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1932

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ALLAHABAD LAW JOURNAL

REPORTS

HIGH COURT

GANPATJI AND ANOTHER (*Plaintiffs*)
versus
HANUMAN SINGH (*Defendant*)*

Civil

1931

July 1

MUKERJI, J.
ALLEN, J.

Tenancy Act of 1926, Sec. 226(3)—Suit for profit against lambardar—Court's power to estimate 'unrealizable arrears'—To be based on evidence—Evidence Act, Sec. 35—Income from chari*—Calculation of—Settlement officer's report—Whether admissible.*

Where in a suit for profits against the lambardar, it was found that the lambardar had not shown in his books the actual realisations and that his books were extremely unreliable and misleading, but the court, without giving any reason, allowed 'a rebate of 10%' on the gross rental as covering the possible arrears in the collections, *held*, that the estimate of unrealisable arrears should be based on some evidence which can be acted upon, and the deduction should not be merely conjectural, and the rebate should not have been allowed.

Where the Assistant Collector hearing the suit, finding that there was a difference between the estimated income from *chari* calculated by a Commissioner appointed by him for the purpose and by a certain settlement officer respectively, allowed a deduction of 50% on the estimate of the latter and fixed the income at Rs.1,500, but the District Judge reduced this figure on the ground that the settlement officer's report was inadmissible and that of the Commissioner vague, *held*, that the settlement officer's report was admissible under Sec. 35 of the Evidence Act as it was a relevant fact though not conclusive; and the Commissioner's estimate was a workable estimate though vague to some extent. The Assistant Collector's estimate should therefore be restored.

SECOND APPEAL from a decree of L. S. WHITE ESQ., District Judge, Cawnpore, modifying a decree of M. S. HYDER ESQ., Assistant Collector, first class, of Banda.

A. P. Dube for the appellants.

S. S. *Shastry* for the respondent.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is an appeal by the plaintiffs in a suit for arrears of profits claimed against the deceased defendant, Hanuman Singh, who is now represented in this appeal by his sons.

The claim was, according to the plaint, a rough estimate of the profits, the plaintiffs being usufructuary mortgagees, who were never before acquainted with the village. The plaintiffs clearly said in the plaint that if the profits were found to be larger than had been claimed in the plaint, they would pay additional court-fee for the sum found really due to the plaintiffs. The defence was that the lambardar had made certain collections, and the plaintiffs should have only their share, which was 0-5-0 in the village. The court of first instance granted a decree for Rs.4,210 with costs and interest.

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*S. A. 348 of 1929

The defendant appealed, and the plaintiffs filed a cross-objection.

The learned District Judge reduced the amount of the decree to the sum of Rs.2,175-12-3.

In this Court the plaintiffs have filed an appeal, and the defendant has filed a cross-objection.

The points that have been raised by the parties are as follows: (1) Whether a 10 per cent deduction on the gross income was properly allowed by the courts below as probable arrears. (2) Whether the amount of the *Chari* income has been rightly estimated by the learned District Judge at Rs.800. (3) Whether the claim for weighment dues should have been allowed by the learned District Judge. (4) Whether the court below was wrong in levying additional court-fees on the ground of cross-objection filed by the plaintiffs. (5) Whether the village expenses have been estimated at too low a figure.

The first point arises in this way. The courts below are agreed that the lambardar has not shown in his books the actual realisations and that his books are extremely unreliable and misleading. The courts below were agreed that the plaintiffs were entitled to a share of the gross rental and other incomes, but have allowed what they call a 'rebate of 10 per cent' as covering the possible arrears in the collections.

It is on foot of the new Tenancy Act that the learned Judges of the courts below have allowed what they have called a 'rebate'. Before the Tenancy Act of 1926 was passed the decree used to be against the lambardar, where his negligence in collections was proved, upon the basis of the gross income of the village without any deduction.

Paragraph No. 3 of Section 226 of the Tenancy Act runs as follows:

> In any such suit (suit for arrears of profits) the burden of proving the amount collected shall be on the lambardar, and where he fails to discharge it, the court may presume that the profits have been collected in full, *or with such deduction on account of unrealizable arrears as it considers reasonable.*

It is on account of the words italicised above that the courts below have allowed a rebate.

There can be no doubt that it is open to a court hearing a suit for settlement of accounts and profits to make an estimate of unrealizable arrears, and to give the lambardar the benefit of that estimate. But we think that the estimate should be based on some evidence which can be acted upon; and the deduction should not be merely conjectural; for, in that case, it will be impossible to say why the deduction should not be, say, 25 per cent instead of 10 per cent.

In this particular case before us the courts below have not given any reason whatsoever for making a 10 per cent deduction as unrealizable income. The learned District Judge, it appears, thought that the court of first instance had shown leniency to the defendant by allowing a rebate.

At page 30, lines 41-43 the learned District Judge expresses himself as follows:—

> Considerable leniency has been shown to the appellant in allowing him 10 per cent rebate on the amount which he is supposed to have collected.

As we have already stated, the court of first instance did not give any reason for estimating the unrealizable assets at 10 per cent. At page 21 the learned Assistant Collector expresses himself as follows:

> I am of opinion that allowing a decree on the full recorded assets besides *sayar* would not be fair, as I think that about 10 per cent of gross rental *remains ordinarily in arrears* for some sudden reasons every year.

It will be seen that the estimate of the learned Assistant Collector is based on pure guess work, and if we accept the principle we shall have to allow a rebate in each case and every case where the lambardar fails to maintain a clear account, or deliberately keeps false accounts.

We come to the conclusion that this rebate should not have been granted in this case, and the appellants are entitled to a proportionate increase in their claim.

The second question relates to *chari*. It appears that there is a large area estimated at between four to six thousand bighas of land which is used for grazing purposes. The income from this large area had to be estimated, because it did yield some substantial income. The plaintiffs in their plaint estimated the amount roughly at Rs.800. The learned Assistant Collector deputed a commissioner for the purpose of enquiry, and he was of opinion that the owners of cattle paid Re.1 per head and the number of cattle that grazed was 2,000. At this estimate the income from *chari* was about Rs.2,000 a year. There was on the record an estimate of income from *chari* made by an Assistant Collector, one Mr. Desai, for the purposes of settlement. It appears that a settlement of land revenue is made every five years in this tract of the country. Mr. Desai's estimate was Rs.3,000 a year. The Assistant Collector hearing the present suit allowed a deduction of 50 per cent on the estimate of Mr. Desai, and held that the income from *chari* must be at least Rs.1,500 a year.

The learned District Judge was of opinion that the estimate made by the Commissioner was vague, and the report of Mr. Desai was not admissible in evidence. On the last point, we are not able to accept the opinion of the learned District Judge. The report of Mr. Desai was admissible under Section 35 of the Indian Evidence Act. His estimate was, at least, a relevant fact, though certainly not conclusive. The estimate made by the Commissioner was bound to be vague to some extent, but it was a workable estimate, seeing that the estimate made by Mr. Desai for the purposes of assessment of land revenue was at a much higher figure. We are of opinion that if the learned District Judge had not discarded the report of Mr. Desai as inadmissible in evidence, he would not have reduced the amount of *Chari* income estimated by the Assistant Collector. In the circumstances, we do not feel that we are bound by the finding of fact arrived at by the learned District Judge, and we are free to interfere with that finding. We do interfere, and setting it aside restore the finding of the learned Assistant Collector.

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On the third point we agree with the learned District Judge that the present appellant, who was the respondent before him, failed to claim the weighment dues which had been disallowed by the court of first instance. In the circumstances, the claim cannot be reiterated in this Court.

As regards the court-fees realised by the District Judge, we think that he was right. The plaintiffs, as we have already stated, estimated the amount of their claim, as they said only roughly and it was open to them to claim a larger amount on the basis of the evidence led in the case. In the grounds of the objection framed, the plaintiffs claimed much larger sums, and indeed the total amount claimed by them came to over Rs.3,000 as the report of the Munsarim of the District Judge's court shows. That being so, the present appellants were bound to pay the deficiency in court-fees realised from them.

The fifth point arises out of the ground No. 4 of the cross-objection filed by Mr. Shastri on behalf of the respondent. The first three grounds have already been covered by the appellants' claim as to *chari*. This fifth point relates to village expenses. The court of first instance held that the lambardar was entitled to appoint a *Karinda* for making collections at Rs.10 a month, and a peon on Rs.3 a month. He accordingly allowed Rs.186 a year in all as village expenses. The learned District Judge thought that this was enough, though he remarked that the lambardar was not entitled to more because he had been very leniently treated as regards the rebate of 10 per cent. It is contended before us that if the learned Judge had not thought that the lambardar had been leniently dealt with in the matter of rebate, he would have increased the amount of village expenses. We cannot say what the learned District Judge would have done if he had not been of this opinion.

It is further argued that on the basis of the wajib-ul-arz a sum of Rs.279 a year should have been allowed as village expenses. But the entire village, with the exception of a pie, belongs to a single joint Hindu family of which the lambardar was the head. The wajib-ul-arz prepared in such circumstances could not carry any weight where a stranger is concerned. We have not been told that the lambardar needed more than one *karinda* and more than one peon. In the circumstances, we do not think that we can interfere in this matter.

The result is that the appeal succeeds in part, and the cross-objection fails in its entirety. We dismiss the cross-objection with costs, and allow the appeal with proportionate costs to the parties (according to their respective success and failure) as follows:—

The total amount of the estimated profits will be realised by disallowing the 10 per cent deduction made by the District Judge, and the calculation of the plaintiffs' share will be made accordingly. The income from *chari* will be taken at Rs.1,700 for the first year instead of Rs.1,000 at Rs.1,500 instead of at Rs.800 estimated by the learned District Judge for the 2nd and third years. The office will proportionately make a fresh account which, when approved by the counsel for the parties and by the court, will form the basis of the decree.

Appeal allowed in part

CRIMINAL

1931

July 13

KING, J.

LACHMI NARAIN
versus
KING-EMPEROR*

Criminal Procedure Code, Sec. 252—Interpretation of—Trial of warrant case—Accused cannot, as a matter of right, cross-examine prosecution witnesses before framing of charge—But as a matter of practice some cross-examination should be permitted.

An accused has no absolute right of cross-examination of prosecution witnesses, in the trial of a warrant-case, before the framing of the charge; but as a matter of practice or discretion the magistrates would be well-advised to permit some cross-examination at least at that stage, otherwise, Sec. 253 would practically become a dead letter. *Ashirbad Muchi* v. *Maju Muchini*, 8 Cal. W. N. 838, *Queen-Empress* v. *Sagal Samba Sajao*, I. L. R. 21 Cal. 642 at 663 and *Ramyad Singh* v. *Empress*, 58 I. C. 686 *referred to.*

When a Magistrate has "to take all such evidence as may be produced in support of the prosecution", he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in Sec. 256 or 208(2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

CRIMINAL REVISION from an order of P. C. PLOWDEN ESQ., Sessions Judge of Bareilly.

Nanak Chand for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment of the Court was delivered by

King, J.

KING, J.—This is an application in revision against an order passed by the Sessions Judge of Bareilly confirming the order of a magistrate of the first class refusing to allow the applicant to cross-examine the prosecution witnesses before the charge had been framed.

The complaint was instituted on January 26, 1931 alleging that the accused had committed offences under Ss. 420 and 467, I. P. C. When the complainant had been examined on April 1, 1931 an oral request was made to the Magistrate to permit his cross-examination at once. The Magistrate rejected this request. When the next witness had been examined the defence put in a written request that the Magistrate should permit the witness to be cross-examined before the framing of the charge. This request was rejected by the Magistrate in a wirtten order. The Magistrate took the view that S. 256 of the Code of Criminal Procedure did not indicate that prosecution witnesses are to be cross-examined twice, and he could not find any justification in the Code or in the Evidence Act for the proposition that the accused has a right to cross-examine prosecution witnesses both before and after the framing of the charge. After the prosecution witnesses had been examined, the Magistrate framed a charge under Section 420, I. P. C.

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*Cr. Rev. 267 of 1931

The accused applied to the Sessions Judge of Bareilly asking that the Magistrate's order, refusing to allow cross-examination of prosecution witnesses before the framing of the charge, be set aside. The learned Sessions Judge discussed the point and recorded his opinion that the Magistrate was probably incorrect in his procedure, and that the accused was entitled to cross-examine a witness immediately after he had been examined and before the framing of the charge. Nevertheless, in view of the facts that all the prosecution witnesses had been examined-in-chief and the charge had been framed, and some of the witnesses had already been cross-examined after the charge had been framed, he rejected the application.

The question for determination is whether an accused person is entitled to cross-examine a prosecution witness, in the trial of a warrant-case, before the charge has been framed.

Section 138 of the Evidence Act merely lays down the order of the examinations of witnesses, namely, that they should be first examined-in-chief, and then (if the adverse party so desires) cross-examined, and then (if the party calling them so desires) re-examined. This does not indicate a right of cross-examination immediately after the examination-in-chief when express provision has been made for exercising the right of cross-examination at a later stage. It is perfectly clear that, under S. 256, Cr. P. C., the accused has the right of cross-examining a prosecution witness after the charge has been framed. So S. 138 of the Evidence Act does not seem to be of much assistance. It merely lays down that cross-examination shall be allowed at some stage after the examination-in-chief, and S. 256 may well be construed as indicating the proper stage for cross-examination in the trial of warrant-cases. Section 138 certainly does not indicate that the adverse party shall be entitled to cross-examine a witness more than once.

Section 252 of the Code is the section under which prosecution witnesses are examined in warrant-cases. This lays down that the Magistrate "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution". It has been argued that the word "evidence" in this phrase must include not merely the examination-in-chief of a witness, but also his cross-examination and re-examination, if any. In support of this contention reference has been made to S. 244. This section lays down the procedure in the trial of summons cases, and enacts that the Magistrate "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution" The phraseology in Ss. 244(1) and 252(1) is identical. It is argued that under S. 244 when the Magistrate proceeds to "take all such evidence as may be produced in support of the prosecution" he must certainly allow the witnesses to be cross-examined as well as examined-in-chief, and that, therefore, the word "evidence" in this phrase must include not only the examination-in-chief, but also the cross-examination and re-examination, if any. Section 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage, and as no express provision is made for exercising this right in the trial of summons-cases, we must hold that the right is exerciseable under Section 244.

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King, J.

It is argued that as the phrase cited gives a right of cross-examination under Section 244, therefore the same phrase must be held to give a right of cross-examination under Section 252. There is some force in this argument, but it is far from conclusive. One cannot lose sight of the fact that no express provision for exercising the right of cross-examination has been made in the trial of summons-cases, whereas in the trial of warrant-cases such express provision is to be found in Section 256.

It must, moreover, be noted that when the same phrase occurs in S. 208 (1) (which lays down the procedure in taking evidence in inquiries into cases triable by the court of session) we find it expressly stated in Sub-section (2) that "the accused shall be at liberty to cross-examine the witnesses for the prosecution". Sub-section (1) enacts that the Magistrate shall "proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution " Once again we find the same phrase. If that phrase is construed as conferring a right of cross-examination, wherever that phrase may occur, then it must be conceded that Sub-section (2) is wholly redundant. But it must be presumed that the legislature does not enact wholly redundant provisions. The inference is that the phrase in question cannot be construed as necessarily conferring or including the right of cross-examination. I conclude that when a Magistrate has "to take all such evidence as may be produced in support of the prosecution, he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), *if* no express provision is made for cross-examination. But when express provision for cross-examination is made, as in Section 256 or 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

The language of Section 256 supports the same conclusion. That Section requires the accused to state "whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken". If the legislature had intended to confer an absolute right of cross-examination before the framing of the charge, then we should expect it to lay down explicitly that the accused should be required to state whether he wishes *further* to cross-examine any of the prosecution witnesses. The omission of the word "further" seems to indicate that the cross-examination is to be deferred, as a matter of right, until after the framing of the charge.

It must also be remembered that under S. 254 the Magistrate can frame a charge as soon as a *prima facie* case is established against the accused. It is not necessary to record the whole of the prosecution evidence before framing a charge. Hence, although there may be 12 prosecution witnesses, it is frequently possible and even desirable to frame a charge after only one or two witnesses have been examined. In such a case it is clear that all the "remaining witnesses" can only be cross-examined once under S. 256. I doubt whether the legislature intended that witnesses examined before the charge should be cross-examined twice, as a matter of right, while those examined after the charge should only be cross-examined once. Section 257 gives a right of second cross-examination if the Magistrate thinks it necessary in the interests of justice. The interests of the accused, therefore, are fully protected even if no cross-examination is permitted as a matter of right before the framing of the charge.

Sections 286(2) and 289(1) have also been referred to as showing that the examination of witnesses must include cross-examination and re-examination. This is no doubt the correct interpretation of the expression "examination of the witnesses" in Section 289(1) and of the expression "examine his witnesses" in Section 286(2), but that is not of much assistance in construing the language of S. 252 which is different. Moreover, there is no express provision for the cross-examination of prosecution witnesses in trials before High Courts and Courts of Session.

The only ruling relied upon by the learned advocate for the applicant is the case of *Ashirbad Muchi* v. *Maju Muchini*[1]. The judgment was very briefly expressed, but the learned Judges observed that the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if they should so desire, even though the charge may not be framed.

This ruling does not purport to lay down the proposition that the accused has an absolute right of cross-examination before the charge is framed in the trial of a warrant-case. I think the ruling goes no further than laying down that a Magistrate would be well advised to permit cross-examination before the framing of the charge, and does not support the contention that he is bound to permit cross-examination at that stage.

Reference may also be made to the case of *Queen-Empress* v. *Sagal Samba Sajao*[2] in which the learned Judges remarked that Section 256 does not prohibit cross-examination before the charge has been framed. I quite agree. In *Ramyad Singh* v. *Empress*[3] a single Judge of the Patna High Court observed:

> The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed, and, secondly, after the charge is framed under Section 256.

This observation certainly supports the applicant's contention, but it is a mere *obiter dictum* and no reasons are given. There is, therefore, no clear judicial authority, so far as I am aware, for holding that the accused is entitled, as a matter of right, to cross-examine prosecution witnesses in the trial of a warrant-case before the framing of a charge, and I am unable to interpret the relevant sections of the Code of Criminal Procedure and the Evidence Act as giving the accused such a right.

As a matter of practice or discretion I think that Magistrates would be well advised to permit some cross-examination before framing a charge, otherwise, as pointed out by the learned Sessions Judge, S. 253 would practically become a dead letter. It is unlikely that a magistrate could discharge an accused person on the strength of the evidence of prosecution witnesses whose credit has not been impeached by cross-examination. Ordinarily the examination-in-chief of prosecution witnesses does make out a *prima facie* case against the accused, and it is only after the witnesses have been shown by cross-examination to be untrustworthy that the court would be justified in discharging the accused.

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[1] 8 Cal. W. N. 838

[2] I. L. R. 21 Cal. 642 at 663

[3] 58 I. C. 686

In my opinion, although the accused has no absolute right of cross-examination before the framing of the charge, I think that Magistrates would generally be exercising a proper discretion if they did permit some cross-examination at least at that stage.

It has been contended that no *prima facie* case has been made out against the accused, but I agree with the learned Sessions Judge that, on the facts alleged, a criminal offence would be established against the accused.

As the Magistrate has not committed any irregualirty, in my opinion, in refusing to permit cross-examination before the charge, and at the most might be held to have failed to exercise a proper discretion, I see no grounds for interference at this stage. On the materials before me I cannot express any opinion whether the Magistrate should, in the exercise of his discretion, have permitted cross-examination in this case before framing the charge.

The application is rejected.

Application rejected

CIVIL
1931
July 17
SEN, J.
ALLEN, J.

LATIF JAHAN BEGAM *alias* SAKKAN BIBI (*Plaintiff*).
versus
MOHAMMAD NABI KHAN *alias* UMRAO DULAH KHAN (*Defendant*)*

Family settlement—Wife not living with husband—Father-in-law executes document—Agrees to pay allowance called Kharch-i-pandan—Allowance unconditional—Agreement amounts to family settlement—Consideration—Promotion of family peace.

Where the father-in-law of a Mohammedan lady, who had left her husband and was living with her parents, executed a document in her favour under which he agreed to pay her a monthly allowance called *kharch-i-pandan* and expressed his desire of bringing his daughter-in-law to his house so that she may live with her husband, but the document did not reserve to the executant any power of revocation either upon the happening of a future contingency or at his own sweet will and pleasure, *held,* (1) that the daughter-in-law was entitled to recover the arrears of the allowance which was not dependent upon the fulfilment of a condition precedent that she should return to her husband; (2) that the transaction partook of the nature of a family settlement the object of which was to promote good will between the daughter-in-law and her husband.

SECOND APPEAL from the decision of the District Judge of Bareilly.

Sir Tej Bahadur Sapru and *P. N. Sapru* for the appellant.

K. N. Katju and *M. A. Aziz* for the respondent.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal from the decree of the District Judge of Bareilly dated January 31, 1929 reversing the decision of the Subordinate Judge dated July 5, 1928 in a suit to recover arrears of a certain

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*S. A. 370 of 1929

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1931
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Sen, J.

allowance called Karch-i-pandan by enforcement of an instrument dated February 28, 1921.

Karch-i-pandan is a recognised institution amongst Mohammedan families of noble descent and its nature and incidents have been defined by judicial pronouncement of final authorities.

In 1919, the plaintiff was married to Akhtar Ali Khan, son of the defendant-respondent and her dower was fixed at 1,25,500 of Mohammad Shahi *ashrfis*. A child was born of this marriage but died shortly afterwards. Sometimes after this event, the plaintiff left her husband's house and began to live with her parents.

On February 28, 1921, the defendant-respondent executed a document in favour of the plaintiff under which he agreed to pay her Rs.30 every month for her Kharch-i-pandan and other expenses, and in order to secure its due payment he hypothecated a three biswa zamindari share in Mouza Tanda. Under this instrument, he stipulated not to transfer the property to any third party and declared that the agreement was binding upon his heirs and legal representatives.

It is possible that the defendant's object in executing this document was to offer inducement to the plaintiff to return to her husband, but this object was not achieved.

On June 13, 1921, the defendant brought a suit in the court of the Subordinate Judge against the plaintiff. According to the plaintiff, the ostensible object of this suit was to seek a construction of the document dated February 28, 1921 but the real object was to procure its avoidance. This suit was withdrawn. On June 20, 1923 the defendant made a waqf of his entire property including the property hypothecated.

Since its execution, the defendant has not paid the allowance to the plaintiff; hence this suit to recover arrears for six years together with interest. The suit was resisted upon the following two grounds:—

(*a*) The agreement was procured from the defendant by undue influence and was not enforceable.

(*b*) The payment of the stipulated allowance was dependent upon the fulfilment of a condition precedent that the plaintiff should return to her husband and continue to live with him, and as this condition was not fulfilled the plaintiff was not entitled to the allowance claimed.

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The court of first instance overruled both of these pleas and gave the plaintiff a decree for the principal amount claimed but not for the interest.

Before the lower appellate court, the defendant did not urge the plea that the document had been obtained by undue influence. We are not surprised that the plea was abandoned. Where the parties are at arm's length and the party against whom undue influence is pleaded is not in a position to dominate the will of the other party, there can be no undue influence. In view of the fact that the plea has been abandoned, the matter need not be pursued any further.

But controversy appears to have centred upon the construction of the document; and the defendant contended that the agreement relating to the payment of the allowance was not unconditional but was dependent upon the plaintiff's return to her husband to fulfil her marital obligations.

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SEN, J

We have not the slightest doubt that in view of the pleadings this was the only point available to the defendant, and argument was addressed on this point. The learned Judge remarks as follows:—

> The only argument urged before me was whether the defendant was bound to pay the monthly allowance to his daughter-in-law, after she returned to her parties a second time, or whether the allowance was dependent on her remaining with her husband.
>
> It was argued on appeal that this was the vital point in the whole case.

The lower appellate court in agreement with the trial court overruled the defendant's contention on this point. It was definitely held that the alleged condition could not be traced in the four corners of the document. The defendant might well have had that object in view when he executed this document but he did not express it. The finding of the learned District Judge may be reproduced:—

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> The lower court on the other hand considers that if this was the intention of the father-in-law he could have said so in clear terms so that there would have been no further discussion, but he has said that with his own free will he makes a monthly allowance of Rs.30 to his daughter-in-law and will put no objections in the way of payment. According to the lower court's argument it is possible that the daughter-in-law would not have returned to her husband at all if the intention of her father-in-law was merely to pay Rs.30 a month, while she lived with her husband but she might have returned and in fact did return for a short time understanding that she was to receive an allowance of Rs.30 a month for the rest of her life irrespective of the fact whether she was able after making the attempt to continue living with her husband. I agree with the lower court that this is the probable interpretation. The father-in-law was very anxious about his son's health and sanity and was willing to make a favourable offer to the plaintiff to return hoping that she would remain with her husband indefinitely, and if she did not he would still have to pay. It would have been very easy for him to enter in the document that the money was to be paid only as long as his daughter-in-law lived with her husband but this omission cannot be explained now on the ground that this was the intention.

The judgment of the trial court incorporates the following translation of the material portion of the disputed document:—

> Now having regard to the changes of time and the march of events I strongly apprehend that a disagreement will arise between the wife and the husband because my aforesaid daughter-in-law has gone to her parents. As my son has no movable and immovable property of any sort in his name with which he may meet his necessary expenses, the said Musammat is in great difficulties. Now it is necessary for and binding upon me to bring my daughter-in-law aforesaid to my house and keep her with her husband aforesaid.

There is nothing in the document to indicate that the agreement to pay the allowance was qualified by a condition precedent. The document does not reserve to the executant any power of revocation either upon the happening of a future contingency or at his own sweet will and pleasure. We are clearly of opinion that the construction put upon the instrument by the courts below was correct.

In view of the findings of the lower appellate court upon the points

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raised in the memorandum of appeal, there was no further point to arrest the attention of that court and the appeal should have been dismissed.

The lower appellate court appears to have gone astray in allowing the defendant to raise a new point which did not arise from the pleadings. The learned Judge observes:—

> Assuming it proved that the father-in-law made this allowance to her without any stipulation, the next point is whether this agreement which is without consideration is not void under Section 25 of the Indian Contract Act.

This plea was not taken in the written statement. No issue was framed on this point. No arguments were addressed to the trial court and the plea was not taken in the memorandum of appeal to the lower appellate court. The defendant ought not to have been allowed to break fresh ground during the progress of the argument in a court of appeal. The question did not involve a mere point of law. It required the determination of a question of fact, viz., whether the agreement was made on account of natural love and affection. The court below was not justified in recording a finding that the plaintiff had not proved that there was any affection between herself and her father-in-law. There was no occasion in this case for the plaintiff to offer any proof on a point which was not raised at the trial. We are of opinion that the learned District Judge has erred in entertaining and giving effect to this plea.

It has been argued before us that the agreement to pay the allowance is a *nudam pactum*, that it is not supported by consideration and that it is unenforceable. If this was the defendant's case, it ought to have been indicated in the pleadings and the defendant should have pressed for a distinct issue on this point. This was not done. To allow this plea to be raised at this stage of the case will be unfair to the plaintiff and to the courts below. For the same reason, we refuse to entertain the plea that the defendant revoked the instrument.

Our attention has been drawn to the decision of the Judicial Committee in *Khwaja Mohammad Khan* v. *Husaini Begam*[1]. In this case an agreement, resembling in certain respects an ante-nuptial settlement was made between the father of Husaini Begam and Khwaja Mohammad Khan, the prospective father-in-law, under which the latter agreed to pay Husaini Begam a certain allowance which was described as *kharch-i-pandan*. The allowance was specifically charged upon certain immovable property. Husaini Begam sued her father-in-law for recovery of the allowance which had fallen into arrears. It was held by the Privy Council that Husaini Begam was beneficially entitled to the allowance and that the common law doctrine propounded in *Tweddle* v. *Atkinson* could not be applied in India and among communities circumstanced as the Mohammedans, etc. (*See* page 413).

The points of divergence between that case and the present are that here the contract is *post nuptial* and that the daughter-in-law is a party to the agreement.

In our opinion, the transaction between the parties partakes of the

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[1] I. L. R. 32 All. 410=7 A. L. J. R. 871

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nature of a family settlement. It was entered into between two members of the family and its object was to promote good will between Latif Jahan Begam, the daughter-in-law and her husband Akhtar Ali Khan.

The existence of a dispute or the assertion of a claim to any property is not essential for the creation of a family settlement. Where an arrangement has been arrived at between certain members of the family that is designed to promote peace and good will amongst certain of its members, this by itself is a good consideration to support the transaction. It is an established rule of law that in cases of family arrangement, courts will not scan too closely the quantum of consideration.

We allow the appeal, set aside the decree of the lower appellate court and restore that of the trial court. Plaintiff is entitled to her costs in this Court and in the lower appellate court.

Appeal allowed

Civil

1931

May 7

Sulaiman, A. C. J.
Smith, J.

ABDUL WAHID (*Judgment-debtor*)
versus
TRIBHAWAN DAS (*Decree-holder*)*

Civil Procedure Code (V of 1908), Or. 21, R. 89—Application for setting aside sale—R. 89 complied with—Poundage fee as required by R. 15, Chapter XVII, General Rules (Civil) not paid—Effect of—A mere irregularity—Court has power to entertain application and grant time—Sec. 122—Rules framed under—Can only regulate procedure of subordinate courts—Jurisdiction cannot be taken away.

The mere fact that a rule made by the High Court under Sec. 122 C. P. C. is imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the subordinate court and make it helpless in the matter. Under Sec. 122 the High Court can only regulate the procedure of the subordinate courts, and cannot take away their jurisdiction.

Where all the conditions required by Or. 21, R. 89 were complied with by the applicant but as he failed to pay the poundage fee by affixing stamps to the application for setting aside the sale as required by R. 15 of Chapter XVII of General Rules (Civil) framed by the High Court under Sec. 122 C. P. C., the lower courts rejected the application on the ground that they had no jurisdiction *held,* that the failure to comply with R. 15 of Chapter XVII was a mere irregularity, and would not prevent the court from entertaining the application under Or. 21, R. 89, and granting time to deposit the poundage fee.

Civil Revision from an order of G. O. Allen Esq., District Judge of Agra.

Iqbal Ahmad, Mukhtar Ahmad and *Mansur Alam* for the applicant.
S. K. Dar and *Gopi Nath Kunzru* for the opposite parties.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

Sulaiman, A. C. J.—This is a judgment-debtor's application in revision from an order of the District Judge affirming the order of the Small

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*Civ. Rev. 316 of 1930

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Cause Court Judge who declined to entertain an application under Order 21, Rule 89. After the sale had taken place the judgment-debtor deposited within the period allowed by law the amount specified in the proclamation of sale as well as a sum equal to 5 per cent of the purchase money as required by Order 21, Rule 89 and applied for the sale to be set aside. He did not at that stage pay the poundage fee. The Munsarim reported that the poundage fee ought to have been paid at the time the application was filed. On the very day that this office report was made the appellant applied asking for time to deposit the poundage fee.

The learned Judge remarked:

> I am sorry it does not lie within my jurisdiction to grant any extension under Order 21, Rule 89. Any deficiency in the deposited amount necessarily involves (?) a rejection of the objection. The application is rejected accordingly.

There is no doubt that the S. C. C. Judge thought that inasmuch as the poundage fee had not been paid along with the application within 30 days, he had no jurisdiction to grant any extension of time, and he had no option but to reject the application. This was a failure to exercise jurisdiction in case he really had jurisdiction to extend the time.

An appeal was preferred to the District Judge, who considered the applicability of Rule 15, Chapter XVII of General Rules (Civil) made by this High Court for regulating the procedure in the subordinate courts. He began with the remarks:

> Admittedly if it is held that it must be paid along with the two other sums mentioned in Order 21, Rule 89 no time can be allowed.

He concluded that the rule was imperative and that the poundage must be paid up in time, and it was contrary to common sense that a judgment-debtor should get an indulgence without first paying the Government dues. He "accordingly agreed with the view of the S. C. C. Judge." We think that the proper interpretation of the judgment of the learned Judge is that he came to the conclusion that the deposit of the poundage fee within the period of 30 days was a condition precedent to the hearing of the application, and that if that condition was not complied with, the first court had no jurisdiction to entertain it. If his view of the law were not correct, it would amount to a failure to exercise jurisdiction by the first court.

Of course, in most cases a failure to exercise jurisdiction is based on an erroneous view of the law that the court has no jurisdiction. The mere fact that the failure proceeds on an error of law would not take the case out of Section 115 (*b*) of the Civil Procedure Code.

Order 21, Rule 89 requires the deposit of only two sums (1) the amount specified in the proclamation of sale and (2) a sum equal to 5 per cent of the purchase money. Rule 89 does not in terms require the payment of any poundage fee. Rule 92, Sub-rule (2) provides that where in the case of an application under Rule 89 the deposit required by that Rule is made within 30 days from the date of the sale, the court shall make an order setting aside the sale. It would therefore appear that Rule 89 and Rule 92 were literally complied with. The High Court had power

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to amend Rule 89 and to add a third item like poundage fee in it. It has, however, not done this so far.

The High Court in the exercise of its powers under Section 122 has made certain rules for the guidance of the procedure in the subordinate civil courts. Rule 15 of Chapter XVII requires that a poundage fee "shall be paid by stamps affixed to the application to set aside the sale." The rule is no doubt imperative, and although it does not say in so many words that the fee cannot be paid after the expiry of 30 days, this is implied by the requirement that the stamps should be affixed to the application itself. But the mere fact that the rule is imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the subordinate court and make it helpless in the matter. Under Section 122 the High Court can only regulate the procedure of the subordinate courts, and cannot take away their jurisdiction. There are many imperative provisions in the Civil Procedure Code, non-compliance with which has been held in numerous cases to amount merely to an irregularity. The failure to affix the stamps to the application for setting aside the sale would also be nothing more than a mere irregularity, and would not prevent the court from entertaining an application under Rule 89, if all the conditions required by that Rule are complied with. Had the courts below refused the application in the exercise of their discretion on the ground that this was not a fit case for showing indulgence, the position would have been different. They have declined to exercise jurisdiction on the supposed ground that none existed. This was clearly a failure to exercise jursidiction.

Accordingly we allow this application, and setting aside the orders of the courts below, send the case back to the first court through the lower appellate court for disposing of the application on the merits according to law. The costs will abide the event.

Application allowed

CRIMINAL

1931

May 18

KENDALL, J.

MUHAMMADI (*Applicant*)
versus
KING-EMPEROR THROUGH MUNICIPAL BOARD, AGRA (*Opposite party*)*

Municipalities Act, Sec. 298, List I, Group H, Cl. (e)—Interpretation—To be one which encroaches less on rights of citizens—Whether Board has power to make bye-law prohibiting prostitutes from residing in the whole of the municipal area with the exception of a specified part.

The interpretation which must be placed on Sec. 298, List I, Group *H*, Cl. (*e*) of the U. P. Municipalities Act is the one which is not only the more reasonable one but also the one that encroaches less on the rights of individual citizens, viz., that a Municipal Board has power to make a bye-law prohibiting prostitutes from residing in a specified street or area, but not to make a bye-law prohibiting them from residing in the whole of the municipal area with the exception of a certain specified part. *Kruse* v.

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*Cr. Rev. 147 of 1931

CRIMINAL
1931
MUHAMMADI
v.
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Johnson, [1898] Q. B. D. 791, *Kamta Nath* v. *The Chairman, Municipal Board, Allahabad*, 2 A. L. J. R. 676 and *Imami* v. *King-Emperor*, 10 A. L. J. R. 426 *followed.*

CRIMINAL REVISION from an order of G. O. ALLEN ESQ., Sessions Judge of Agra.

Shiva Prasad Sinha for the applicant.

N. P. Asthana for the opposite party.

The following judgment was delivered by

Kendall, J.

KENDALL, J.—This is an application for the revision of an order of the learned Sessions Judge of Agra confirming the order of a bench of Magistrates imposing a fine on Mst. Muhammadi, a prostitute, under Section 299 of the U. P. Municipalities Act. The fine was imposed for the alleged infringement of a bye-law made by the Board, and the application for revision is made on the ground that the bye-law itself is *ultra vires*.

Under Section 298, List I, Group *H*, Cl. (e) of the U. P. Municipalities Act a Municipal Board by special resolution is empowered to make bye-laws

> prohibiting, in any specified street or area, the residing of public prostitutes and keeping of a brothel, or the letting or other disposal of a house or building to public prostitutes or for a brothel.

In 1917 the Municipal Board of Agra passed a bye-law under this Section of the Act to the following effect:—

> No public prostitute shall reside in any house or building or ply her trade within the municipal limits, excepting on both sides of the street beginning from shop Nos. 3215 and 3096 in Phulatti Bazar down to Kinari Bazar up to shop Nos. 2007 and 4765 and from there on both sides of the street in Kashmiri Bazar down to Malkabazar cross road shops Nos. 2723|11 and 2175 on each side of the street.

This bye-law on the face of it specified the area within which prostitutes were permitted to reside. It did not specify the area within which they were prohibited from residing, and it is argued that on a true interpretation of the Act, the Board had no right to pass a bye-law of this nature.

It has also been argued that the bye-law is unreasonable, but I have very little information on this point, and all I have been told by counsel is that the area in which they are permitted to reside is a busy market area not far from the centre of a large city—an area which may be very suitable for a few wealthy members of the profession, but difficult of access to numbers of unfortunate prostitutes who are for this reason practically prohibited from residing in the municipality.

The real question is whether the bye-law is *ultra vires* or not. The word "specify" as defined in Webster's dictionary is

> to mention or name as a particular thing, to designate in words so as to distinguish from other things; as to specify the uses of a plant; to specify the articles one wants to purchase.

In the bye-law, it is argued, the only "street or area specified in this way" is "both sides of the street, etc.," as detailed therein, and it is this area which has been distinguished from the rest of the municipality and set aside as a residence for prostitutes, a procedure which is inconsistent with Clause (*e*) of Section 298 *H*. Mr. Asthana, on the other side, has argued that the bye-law also specifies "the municipal limits," with the result that the rest of the municipal area is distinguished from the area which is excepted, and thus notified as a "specified area" which is prohibited to prostitutes.

I think it must be admitted that the plain meaning of the Section is the one which Mr. Sinha would give to it, viz., that the smaller area is the one that is specified. It has been pointed out to me that in the note to some model bye-laws which were published with the Municipal Manual in 1917 the view is expressed that Section 298 *H* (*e*) only permits bye-laws to be made prohibiting in any specified area or street the residence of a public prostitute, etc. ; it does not authorise bye-laws prescribing distinct areas within which public prostitutes ***must*** reside, or prohibiting their residence ***anywhere else*** within municipal limits. It is true that though the Legislature may have intended this to be the interpretation of the law, it will not necessarily follow that the courts will interpret it in this way unless it can properly be so interpreted according to the judicial rules of interpretation. I have however not been given any reason why the more obvious interpretation should not be preferred. Moreover, if it be supposed for the sake of argument that the bye-law could "specify" the whole of the Municipal area in this way, it does not appear that the Act empowered the Board to go further and to specify a second smaller area in which prostitutes *may* reside. Mr. Asthana has referred to the case of *Kruse* v. *Johnson*[1] to show that a court ought to be slow to hold that a bye-law is void for unreasonableness. It is however not the unreasonableness of the bye-law that is attacked so much as the illegality of it. In more than one case which has come before this Court it has been held that in deciding a question between a municipal board and a resident in the municipality a very strict view will be taken of the Board's powers. In the case of *Kamta Nath* v. *the Chairman Municipal Board, Allahabad*[2] it was held that

> a Municipal Act is an Act which encroaches on the rights of the subjects as regards property. The recognised rule of interpretation in such a case is that any words contained in it should be interpreted if possible so as to respect such rights.

A somewhat similar view was taken by a Bench of this Court in the case of *Dassu* v. *King-Emperor*[3]. Again in the case of *Imami* v. *King-Emperor*[4] a Bench of this Court has held that

> the intention of the Legislature by framing Section 128 (*b*) (*i*) of the Municipalities Act does not seem to be to give a power to inspect and properly regulate all places of public resort. In interpreting an Act like the Municipal Act, which encroaches on the rights of the subjects, the Legislature is expected to manifest its intention clearly and beyond reasonable doubt.

On these principles I must hold that the interpretation which must be placed on Clause (*e*) of Section 298 *H* is the one which is not only the

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[1] [1898] Q. B. D. 791

[2] 2 A. L. J. R. 676

[3] 6 A. L. J. R. 544

[4] 10 A. L. J. R. 426

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more reasonable one but also the one that encroaches less on the rights of individual citizens, viz., that the Board has power to make a bye-law prohibiting prostitutes from residing in a specified street or area, but not to make a bye-law prohibiting them from residing in the whole of the municipal area with the exception of a certain specified part. For these reasons I accept the application, set aside the order of the court below, and direct that the applicant be acquitted and that the fine if paid be remitted.

Application allowed

CIVIL
1931
July 22
BOYS, J.
SMITH, J.

LAKSHMI CHAND (*Applicant*)
versus
BEHARI LAL AND OTHERS (*Opposite parties*)*

Civil Procedure Code, Or. 22, R. 9—Application under—Ignorance of death of a respondent—No negligence or omission on the part of appellant—Whether amounts to 'sufficient cause' within Sec. 5 Limitation Act.

Sec. 5, Limitation Act, is expressly made applicable to an application to set aside the abatement of an appeal so far as a deceased respondent is concerned, and the period of limitation prescribed by Art. 171 can be extended, when 'sufficient cause' is shown.

Ignorance of the death of a respondent, in the absence of any negligence or other act or omission for which the appellant can be held responsible, is "sufficient cause" within the meaning of Sec. 5, Limitation Act.

Panna Lal for the applicant.

Baleshwari Prasad for the opposite parties.

The judgment of the Court was delivered by

Smith, J.

SMITH, J.—This is an application by a defendant-appellant asking for the abatement of his appeal, as against one of the respondents, to be set aside; the abatement being due to the fact that Radhe Lal, the respondent in question, having died, no application had been made to bring his legal representatives on the record within the period of 90 days allowed by the Limitation Act. The application is made on the ground that the appellant was unaware, through no fault of his own, of the death of Radhe Lal. We have considered the three affidavits and heard counsel on the question of fact, and we are satisfied that the appellant has in this respect made out his case that he was ignorant of the death of Radhe Lal until the day he names when he heard of it, and that the respondent has been unable to make out a case that that ignorance was due to the negligence or to the deliberate omission of the appellant. It is next contended for the respondent that ignorance is no basis for extending the period of limitation, it being pointed out that not only have the 90 days elapsed for making the application for substitution, but so have the 60 days allowed for the application to set aside the abatement (Art. 171). Sec. 5 of the Limitation Act is expressly made applicable by O. 22, R. 9 itself to applications of this nature. There is some authority in the decisions of the Punjab Court for the broad proposition that ignorance of the date of the death is not sufficient cause within S. 5 of the Limitation Act. There is

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*Application in F. A. 342 of 1929

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no such authority in this Court, and we can find no jurisdiction for holding that ignorance of the death, in the absence of any negligence or other act or omission for which the applicant can be held responsible, should not be held to be sufficient cause within the meaning of the Limitation Act. In this we are in agreement with the view expressed in *Hari Saran Singh* v. *Sayed Md. Eradat Hussain*[1]. The result is that we allow the application, and setting aside the abatement direct that the appeal be restored to its original number for disposal according to law, and that the names of Shyam Lal and Ram Lal, majors, and Moti Lal, minor, under the guardianship of Shyam Lal, be substituted for the deceased Radhe Lal.

Application allowed

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[1] [1925] Pat. 162

CIVIL
1931
June 29
SULAIMAN, A. C. J.
SEN, J.

COLLECTOR OF FARRUKHABAD AND OTHERS (*Defendants*)
versus
KISHORE MOHAN *alias* MUNNA LAL (*Plaintiff*)*

Transfer of Property Act, Secs. 95, 82, and 100—One of several mortgagors redeems mortgage—Charge accrues in favour of mortgagor who redeems—Rule not limited to possessory mortgages—Art. 132 Limitation Act applicable to such a claim.

On redemption of the mortgage property by one of the several mortgagors, even in a case where the mortgage is not a possessory one, a charge accrues in favour of the mortgagor who discharges the mortgage, and he is entitled to enforce the charge against his co-mortgagors, and the right accrues on the date of payment, and Art. 132, Limitation Act is applicable to such a claim. *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begum,* I. L. R. 28 All. 482 *followed.*

SECOND APPEAL from a decree of BABU AGHOR NATH MUKERJI, District Judge of Farrukhabad, confirming a decree of BABU LAKSHMI NARAIN TANDON, Subordinate Judge.

G. S. Pathak for the appellants.

P. L. Banerji for the respondent.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is a defendants' appeal arising out of a suit for contribution which was treated by the first court as a suit for the enforcement of a lien of the vendor for the unpaid purchase money.

In 1911 a mortgage deed was executed by Raghunath Singh hypothecating a half share in a grove and a zamindari property to Chhange Lal. Later in the same year Raghunath Singh along with the guardian of Sita Ram Singh sold the grove to Azizuddin and Imamuddin, leaving money in the hands of the transferees for payment of the entire mortgage money due to Chhange Lal. Subsequently Azizuddin transferred his interest in the grove to Imamuddin and therefore the latter acquired the whole interest in the grove in 1916. There was a stipulation in the deed that Imamuddin would pay the whole of the mortgage money.

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*S. A. 159 of 1928

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Sulaiman, A. C. J.

Sita Ram instituted a suit for the cancellation of the deed executed by his guardian which succeeded. Then Sita Ram transferred to Lachhmi Narain his share in the grove. This share was obviously free from the mortgage of 1911. Later on Imamuddin transferred his interest in the remaining half of the grove to Lachhmi Narain in 1917. In the sale deed taken by Lachhmi Narain the property was professedly sold free from all incumbrances and there was no reference to the mortgage deed of 1911. Thus Lachhmi Narain contracted in express terms not to undertake the liability to discharge the amount due under the mortgage of 1911. The defendants-appellants are the representatives of Lachhmi Narain. The plaintiff Kishore Mohan in 1918 purchased half the zamindari share of Raghunath Singh, that is to say, his equity of redemption in the share subject to the mortgage of 1911.

The mortgagee of 1911 then brought a suit and obtained a decree and put up the entire mortgaged property for sale at auction. The plaintiff Kishore Mohan paid the whole of the decretal amount and saved the property of all the mortgagors from sale. This was on January 20, 1923. He then on January 23, 1924 filed the present suit claiming the whole of the amount which he had paid in discharge of the mortgage decree. The defendants pleaded that the claim was barred by limitation and that the plaintiff was not entitled to any amount whatsoever from the defendants. The courts below have held that the claim is not barred by limitation and that the plaintiff was entitled to the whole amount.

So far as the question of limitation is concerned the learned advocate for the appellants has to concede that the latest case of this Court, *Aziz Ahmad Khan* v. *Chhote Lal*[1] is against him. The payment was made at a time when the old Transfer of Property Act was in force. We are therefore not concerned with the effect of the recent amendment. With regard to Section, 95 of the old Act their Lordships of the Privy Council in the case of *Ahmad Wali Khan* v. *Shamsh-ul-Jehan Begam*[2] remarked that

> the construction of Section 95 of the Transfer of Property Act should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses: the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow on redemption.

It is clear that their Lordships intended to lay down that on redemption of the mortgage property by one of the several mortgagors, even in a case where the mortgage was not a possessory one, a charge accrued in favour of the mortgagor who discharged the mortgage. Reading Sections 82, 95 and 100 of the Transfer of Property Act in the light of the observation made by their Lordships of the Privy Council there can be no doubt that a mortgagor redeeming the whole mortgage was entitled to enforce the charge against his co-mortgagors. The right to enforce it obviously accrued on the date of payment. The Article applicable to such a claim would obviously be Article 132 of the Limitation Act. It was therefore impossible to hold that if 12 years had expired by the time the mortgage decree was passed on the mortgage and one of the mortgagors paid up the whole amount he had no remedy left. We are therefore of opinion that the suit was really one for contribution and was not barred by time.

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[1] 26 A. L. J. R. 298

[2] I. L. R. 28 All. 482

On the other hand it is very difficult to say that the plaintiff should be allowed to recover the whole amount paid by him. He is a representative of Raghunath Singh so far as the zamindari share is concerned. This zamindari share was mortgaged along with the grove and was rateably liable for the mortgage money. Taking the case at its highest in favour of the plaintiff there was a lien on account of the unpaid purchase-money in favour of Raghunath, the vendor of the grove, and later on in favour of Azizuddin who transferred his interest in the grove to Imamuddin. The defendants' predecessor was the subsequent transferee of this grove. The plaintiff cannot claim to have acquired the lien of Raghunath Singh in respect of the unpaid purchase-money of the grove because he has only acquired the zamindari property which was distinct and separate from the grove. Whatever remedies Raghunath himself or for the matter of that Azizuddin might have had, it is difficult to say how the present plaintiff can enforce such a lien against the defendants. The plaintiff ought to contribute *protanto* to the extent of the value of the property purchased by him and can only get a decree for the proportionate amount against the defendants who have acquired the grove. As the rateable liabilities of the two properties have not been gone into by the courts below we think that it would be just and fair to send down an issue on this point. The legal position of the parties was not practically understood by the courts below and that is why no proper issue was framed as regards the rateable liabilities of the various properties.

What were the relative values at the time of the mortgage dated July 3, 1911, of the properties now held by the plaintiff and the defendants-appellants respectively?

As this is a new issue we direct that the parties should be allowed to produce any fresh evidence which they choose to produce.

The lower appellate court will be at liberty either to take the evidence itself or direct the court of first instance to record the evidence, but it will however submit its own finding on the evidence within three months.

Issue remitted

CIVIL
1931
July 2
SULAIMAN, A. C. J.
SEN, J.

SIDDIQ-UN-NISSA BIBI (*Applicant*)
versus
NIZAM UDDIN KHAN AND OTHERS (*Opposite party*)*

Guardians and Wards Act, Sec. 19——Where contingencies mentioned in sub-clauses exist—Court has no power to appoint guardian—Personal law governing minor not touched—Sec. 25—'Custody'—Meaning of—Includes constructive custody.

The language of Sec. 19 Guardians and Wards Act implies that when any of the three contingencies mentioned in the Sub-clauses exists, there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred

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*F. A. F. O. 180 of 1930

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upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19 of the Guardians and Wards Act. The legislature apparently did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor.

Sukhdeo v. *Ram Chandar Rai*, I. L. R. 46 All. 706=22 A. L. J. R. 680, *Annie Besant* v. *Narayaniah*, I. L. R. 38 Mad. 807 at 822 and *Imambandi* v. *Mutsaddi*, 45 I. A. 73 at 83 *relied on.*

There is no reason to restrict the meaning of the word 'custody' in Sec. 25, Guardians and Wards Act, to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody.

Where on the death of a Mohammedan mother, the father placed his minor daughter under the care of the maternal grand-mother who lived at a distance from the residence of the father, and the girl was brought up by the maternal grand-mother upto the age of 7, when the father served a notice upon the maternal grand-mother that the child should be delivered to him and followed it up by an application under Sec. 25, Guardians and Wards Act, *held,* (1) that the custody of the girl with the maternal-grand-mother was in law a constructive custody of the father, and the father, who was the guardian of her minor daughter, could maintain an application for obtaining the custody of the minor under Sec. 25, (2) that the refusal of the grand-mother to hand over the child to the father amounted to a removal from the constructive custody of the father, (3) that in the circumstances the minor was not under the care of the grand-mother by virtue of her right of *hizanat.*

The definition of the word 'guardian' in Sec. 4(2), Guardians and Wards Act does not necessarily mean a guardian duly appointed or declared by the court, and includes any person having the care of the person of a minor.

If a female relation is under the Mohammedan Law entitled to the custody of the minor and is not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having care of the person of the minor.

In cases where Sec. 17, Guardians and Wards Act, applies the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor.

FIRST APPEAL from an order of BABU PIARE LAL, District Judge of Ghazipur.

Iqbal Ahmad and *Munsur Alam* for the appellant.

K. N. Katju and *Ram Anugrah Narain Singh* for the respondents.

The following judgments were delivered:—

Sulaiman,
A. C. J.

SULAIMAN, A. C. J.—This is an appeal by the maternal grand-mother of Mst. Wajida Khatun from an order of the District Judge of Ghazipur directing that she should make over the child who was about seven years old to the respondent, her father. The mother of the girl died a few days after her birth at Sasaram which is the residence of the father. The maternal grand-mother is residing in another district at Zamania. The girl was undoubtedly allowed to be brought by the grand-mother from Sasaram to Zamania and has for these years been maintained and brought up by the appellant. An application was made by the maternal grand-mother that she should be appointed the guardian of her person. Objections were filed by the father, the grand-father as well as the paternal grand-mother to the appointment of the maternal grand-mother as her guardian and there was also a prayer that either of these persons be appointed a gurdian of her person. The learned District Judge came to the conclusion that in view of the provisions of Section 19 of the Guardians and Wards Act he had no power to appoint a guardian at all, but he granted a separate application of the father made under Section 25 of the Act for the return of the girl to him. The grand-mother has accordingly appealed and challenges the propriety of the order passed.

The learned counsel for the parties have placed before us a large number of rulings which show that there has to some extent been a conflict of opinion on the interpretation of some of the sections of the Act.

There can be no doubt that so far as the power to appoint and declare the guardian of a minor under Section 17 of the Act is concerned the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the court, which must look to the welfare of the minor consistently with that law. This is so in cases where Section 17 applies. In such a cases the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. Section 19 then provides that:

> Nothing in the chapter shall authorise the court to appoint or declare a guardian of the person (*a*) of a minor who is a married female and whose husband is not, in the opinion of the court, unfit to be guardian of her person, or (*b*) of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or (*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

The language of the Section, as it stands, obviously implies that when any of the three contingencies mentioned in the sub-clauses exists there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Section 17 to appoint or declare a guardian is ousted where the case is covered by Section 19.

The learned advocate for the respondent has argued before us that the Section must be read as if it was meant that nothing shall authorise the court to appoint or declare a guardian of the person of the minor 'other than the husband or the father as the case may be'. This, in my opinion, would be interpolating new words into the Section which are not there. If an application for appointment of a guardian is made to the court, and it is brought to its notice that the minor has a husband who is alive and is not unfit to be the guardian of the minor, or that he or she has a father who is living and is not unfit to be the guardian of the person of the minor, then there is no authority in the court to appoint or declare a guardian of the person of the minor. The section means not only that in the presence of the husband or the father no one else should be given preference, when either of them is fit to be appointed the guardian, but on its language it even ousts the jurisdiction of the court altogether and prevents it from appointing even the husband or the father as a guardian when both of them are not unfit to be the guardian. The legislature apparently did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor. In the same way no appointment or declaration of a guardian can be made when the property of the minor is under the superintendence of a court of wards which is competent to appoint a guardian of the person of the minor. This, in my opinion, is the plain meaning deduced from the language of the Section as it stands. The learned advocate for the respondent has argued that by enacting Section 19 the legislature intended to declare that the husband is the guardian of the married female minor and after him her father, and therefore the Section does not prohibit their being appointed or declared to be the guardian. In my opinion, the legislature intended that nobody should be appointed or declared the guardian at all when the husband and the father are alive and both of them are not unfit, without attempting to settle the competition between them which may arise under the personal law. There is no justification for interpreting the Section as if it is confined only to the appointment or declaration of a guardian other than the husband or the father.

This conclusion, though possibly not for the same reason, has been arrived at in several cases of which mention may be made of the case of *Sukhdeo* v. *Ram Chandar Rai*[1]. It may also be pointed out that in the case of *Annie Besant* v. *Narayaniah*[2] their Lordships of the Privy Council remarked:

> And further no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the court he was unfit to be their guardian, which was clearly not the case.

It is not necessary to refer to cases which have taken a contrary view. But it can be briefly stated that the same view has been expressed in Oudh and Madras.

The learned advocate for the respondent has argued that the personal law of the minor has been completely abrogated and superseded by the Guardians and Wards Act for all purposes. He has further urged that there is no right of suit for obtaining custody of the minor independently of this Act. He has relied on a passage in the judgment of their Lordships of the Privy Council in the case quoted above. On the other hand, in another case the Bombay High Court has expressed the view that where no application can be made by a father under the Guardians and Wards Act he may maintain a regular suit. It is not necessary to express any opinion on this point.

[1] I. L. R. 46 All. 706=22 A. L. J. R. 680

[2] I. L. R. 38 Mad. 807 at 822

The personal law has been abrogated to the extent laid down in the Act. Where however the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded.

It is urged before us that the husband and the father are the natural guardians of the minor child and are always entitled to apply under Section 25 as against the mother or other relations. Section 25 provides that if a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return. The necessary condition for the exercise of the discretion given by Section 25 is that the ward should have left or have been removed from the custody of the guardian of his person. If the ward has not left or has not been removed from such custody, it is difficult to see how the Section would apply. At the same time it must be conceded that the custody need not be the actual physical custody of the minor and may even be a constructive custody of the guardian. This view was expressed by Lindsay, J. in the case of *Mushaf Husain* v. *Mohammad Jawad*[8] and has been followed by other courts also, except perhaps in Bombay. There is no reason to restrict the meaning of the word 'custody' to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian he or she would be under the guardian's constructive custody. Section 25(3) indicates that the residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship. Accordingly the constructive guardianship will continue.

At the same time I would not be prepared to hold that if under the personal law governing the minor she is for the time being in the custody of the *dejure* guardian, the court has full power to remove the child from that custody and place it in the custody of another person who may also come within the definition of the expression 'guardian of the person' though not duly appointed or declared by the court. In my opinion in such a case the ward cannot be said to have left or have been removed from the custody of a guardian.

Under the Mohammedan Law a minor wife has the option of repudiating the marriage on attaining puberty. Dr. Katju has contended before us that the legislature by enacting Section 19 has laid down that the husband and after him the father is the natural guardian of a female minor and has superseded the personal law. I do not think that this is the result of the Section. If she were living with her female relation who is entitled under the Mohammedan Law to the custody of her person, I would be loath to hold that the District Judge would have power to direct that she should be handed over to her husband.

A question has been raised before us whether the right under the Mohammedan Law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the

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[8] 21 Oudh Cases 194

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guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is not absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father. Mr. Ameer Ali in his treatise on the Mohammedan Law, Vol. II, page 587 (3rd edition) noted that the first and primary natural guardian of a minor is the father. In *Imambandi* v. *Mutasaddi*[4] their Lordships of the Privy Council in reviewing the provisions and principles of the Mohammedan Law remarked:

> It is perfectly clear that under the Mohammedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone or if he be dead, his executor (under the Sunni Law) is the legal guardian.

It would therefore seem to follow that the mere fact that a female relation is entitled to the custody or care of the minor girl up to a certain age would not result in the father not being the guardian of the child.

Under the Guardians and Wards Act however the word 'guardian' has been defined as meaning a person having the care of the person of a minor or of his property, or of both his person and property. Thus the word 'guardian' is used in a very wide sense and does not necessarily mean a guardian duly appointed or declared by the court. Any person who has the care of the person of the minor is a guardian of the person, and any person who has the care of the property of the minor is a guardian of the property within the meaning of this Act. I would accordingly feel inclined to hold that if a female relation is under the Mohammedan Law entitled to the custody of the minor and is not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having care of the person of the minor.

In the present case, as already pointed out, the girl was born at Sasaram which is the residence of the father. She has the father's mother who is living at the place and her father is alive. The learned District Judge has found that the father is not unfit to be her guardian. There was some dispute as to the dower debt of the girl's deceased mother being still due, which was alleged by the appellant to amount to Rs.40,000 in which the minor's share would come to Rs.20,000. This amount was disputed by the husband, but at the direction of the court the father of the girl has executed a registered document settling property of the value of Rs.20,000 on the minor girl. There is no longer any apprehension that she would be deprived of this inheritance if she were placed in the custody of her father. On the other hand, it is pointed out by the court below that the maternal grand-mother has not got her name entered in the revenue papers in respect of her share in the inheritance left by her deceased mother, but that the grand-mother has got her own name entered as against the entire estate and is in possession of it. The girl has attained the age of seven and needs education, and the learned Judge is satisfied that the proper education as desired by the father cannot be had at Zamania which place the grand-mother according to her own admission is unwilling to leave. The mere fact that the father has married again is not necessarily a disqualification when he has got his own mother living with him who can take care of the child. We think that it is impossible to hold that the father is unfit to be the guardian of the person of the girl. On the other hand we are clearly of opinion that, having regard to the necessity of her being educated properly, it is for the benefit of the minor that she should be under the direction and control of her own father.

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[4] 45 I. A. 73 at 83

Any right which the maternal grand-mother may have claimed under the Mohammedan Law disappeared when the girl was brought over from Sasaram which is the place of the residence of the father. From that moment she was under the care of the maternal grand-mother with the permission of the father and not by virtue of any right which the grand-mother could claim under the personal law. The *Hizanat* accordingly terminated and the next person of the minor would be the paternal grand-mother, who has joined in this application with the father and is living with him. It is therefore impossible to hold that the District Judge had no jurisdiction to proceed under Section 25 of the Guardians and Wards Act. The custody of the girl with the grand-mother was in law a constructive custody of the father with whose consent and permission she had so far been living at Zamania. When the father served a notice upon the maternal grand-mother that the child should be delivered to him and followed it up by this application, the permission was revoked as it was obviously revokable. The refusal of the grand-mother to hand over the child amounted to a removal from the constructive custody of the father. In these circumstances Section 25 applies and the order of the court below was not without jurisdiction.

Sen, J.

SEN, J.—I fully agree with the judgment delivered by the Hon'ble the Acting Chief Justice. The facts which have given rise to this appeal have been dealt with very fully by my learned colleague and need not be recapitulated. The weight of authority is in favour of the propositions that under Section 19 of the Guardians and Wards Act the learned District Judge had no jurisdiction to appoint or declare the father of the minor as her guardian and that the maternal grand-mother could not be appointed her guardian where the father of the minor was living and was not unfit to be the guardian. Section 19 of the Guardians and Wards Act overrides the provisions of Section 17. Under the Mohammedan Law, the maternal grand-mother is not the guardian of the person of the minor grand-daughter. She has the right of *hizanat* till the girl attains puberty, but *hizanat* is not the same thing as guardianship of the person. The guardianship of the person rests in the father. Mst. Siddiqunnissa Bibi, the maternal grand-mother is not resident of Sasaram, the place where the parents of the minor lived. Upon the death of the mother, the father

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took the girl to Zamania where the maternal grand-mother lived and put her into the possession and custody of the latter. This did not confer upon her the right of *hizanat.* On the other hand, she became the custodian of the girl by the leave and license of the father. Possession or custody may be either actual or constructive. The possession of the minor by the maternal grand-mother under the circumstances disclosed by this case was clearly constructive. The father therefore was entitled to put an end to this constructive custody and to claim restoration of the girl to him as the legal guardian under the Mohammedan Law. Moreover, the father has, under the Mohammedan Law, the right to put an end to the *hizanat* exercised by a female relative where the latter lived at a distance from the residence of the father with the result that it was not practicable for the father to exercise the rights of supervision and care over the minor. Although the father has not been appointed or declared the guardian under Act VIII of 1890, the definition of the term 'guardian' in Section 4, Sub-clause (2) is sufficiently wide to include a Mohammedan father, who has the right of supervision over his minor daughter for the ends of her welfare. The father was therefore the 'guardian' within the fold of Section 25 of the Act and could thus maintain an application for recovery of the custody of the minor from the maternal grand-mother. I would therefore dismiss the appeal with costs.

By the Court—The appeal is dismissed with costs.

Appeal dismissed

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August 25

Sulaiman, A. C. J.

CHANCHAL (*Applicant*)

versus

KING-EMPEROR THROUGH THE SECRETARY, MUNICIPAL BOARD, ALIGARH (*Opposite party*)*

Municipalities Act (U. P. Act 2 of 1916), Sec. 298, List I, Group H, Cl. (e)—Bye-law under—Prohibiting prostitutes from residing within specified areas and streets—But permitting those who owned and resided in houses in March 1925 to continue to live—Whether bye-law ultra vires.

The object of the Legislature in enacting Sec. 298, List I, Group *H*, Cl. (*e*) of the U. P. Municipalities Act is that the prohibition must be general and of universal application within a specified street or area, and must not hit particular prostitutes, while leaving other prostitutes free to ply their trade.

Where a municipality framed a bye-law prohibiting public prostitutes from residing within specified areas and streets but permitted those who owned and resided in houses in March 1925 to continue to live there as before, *held,* that such a bye-law was not in accordance with the provisions of Sec. 298 because it did not amount to a prohibition of the residence of public prostitutes but merely to a prohibition against a particular class of prostitutes.

Emperor v. *Balkishan,* 22 A. W. N. 117 *relied on.*

Criminal Revision from an order of S. N. Dube Esq., Sessions Judge of Aligarh.

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*Cr. Rev. 428 of 1931

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Shiva Prasad Sinha and *S. B. L. Gaur* for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

SULAIMAN, A. C. J.—This is an application in revision from an order convicting the accused under S. 299 of the U. P. Municipalities Act for having committed a breach of a municipal bye-law.

On July 13, 1925, the Municipal Board of Hathras got a notification published in the Government Gazette under which the following bye-law, among others, was announced:—

> No public prostitute shall reside within the areas or in the streets specified below, provided that public prostitutes who at the end of March, 1925, owned and resided in houses and streets in areas mentioned below may continue to reside in those houses.

Then followed a list of no less than 13 items containing roads, bazars, abadi, lanes, etc. The bye-law was expressly not made applicable to public prostitutes who had owned and resided in houses and streets in the areas mentioned at the end of March, 1925. It was intended to apply to new comers only.

This notification was replaced by another notification of April 27, 1927, which contained the same bye-law.

The applicant, although she denied the fact, has been found by both the courts below to be a public prostitute and to have been carrying on her profession as such. This finding must be accepted in revision. There is no doubt that she has committed a breach of the bye-law mentioned above because the house occupied by her is situated in one of the streets which had been prohibited.

The learned advocate for the applicant impugns the validity of the bye-law and urges that the conviction is illegal because the bye-law itself was invalid.

Under S. 298 (1) a Board is empowered to make bye-laws applicable to the whole or any part of the municipality for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality, and for the furtherance of municipal administration. Group H in List I appended to the section in clause (*e*) for

> prohibiting, in any specified street or area, the residing of public prostitutes and the keeping of a brothel, or the letting or other disposal of a house or building to public prostitutes or for a brothel.

There is no doubt that the prohibition against public prostitutes from residing in a particular street or area given may be for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the mupicipality, and that therefore such a bye-law can be validly made.

But the bye-law must aim at prohibiting in specified streets or areas, the residing of public prostitutes or the keeping of a brothel, etc. It must not be discriminating in its effect. It would be illegal for a Municipal Board to single out any individual prostitute and prohibit her from residing in a particular area. Similarly, it would be illegal to pick out a group of prostitutes and prohibit them from residing in a particular area.

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The bye-law must be general and must prohibit the residing of public prostitutes in that area. The prohibition must be aimed against the residence of public prostitutes in general and not the residence of individual prostitutes or any particular class of prostitutes. It is obvious that when a discrimination is made, the object for which the bye-law was framed would be nullified, and there would be no promotion or maintenance of the health, safety and convenience of the inhabitants. Such a bye-law will merely create an invidious distinction and be beneficial to one class of prostitutes and injurious to the others. I am perfectly satisfied that this is not what is contemplated by the Legislature. The prohibition must be general and of universal application within a specified street or area, and must not hit particular prostitutes, while leaving other prostitutes free to ply their trade.

The language of the bye-law as quoted above not only permits prostitutes who owned and resided in houses in March 1925, to continue to live there as before, but even perhaps permits prostitutes who merely resided in the streets in the areas to carry on their profession undisturbed. Such a bye-law was not in accordance with the provisions of S. 298 because it did not amount to a prohibition of the residence of public prostitutes but merely to a prohibition against a particular class of prostitutes.

In *Emperor* v. *Balkishan*[1], learned Judge of this Court declined to give effect to a bye-law made by the Naini Tal Municipal Board where it appeared that an invidious and unreasonable distinction was drawn between a person who is a servant and a person of a similar degree who is not a servant.

I accordingly accept this revision, and setting aside the conviction of the accused, acquit her of the offence with which she was charged, and direct that the fine, if paid, be refunded.

The Municipal Board of Hathras would be well advised to redraft this bye-law so as to make it of general application.

Application allowed

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[1] 22 A. W. N. 117

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KING, J.

BASDEO NARAIN SINGH AND ANOTHER (*Plaintiffs*)
versus
BIRJU SINGH (*and after his death his sons*) AND OTHERS (*Defendants*)*

Pre-emption Act, Sec. 12(2)—Right of pre-emption—Confined to proprietors in same village—Not extended to shares sold in another village—Even though both villages are in the same mahal.

Sec. 12(2) of the Pre-emption Act contemplates that the right of pre-emption should not be exercised outside the village in which the pre-emptor is a co-sharer, that is to say, there would be no right of pre-emption in favour of a proprietor of one village in respect of a share sold in another village, even though both the villages happen to be within the same mahal. The policy of the legislature appears to be that the right of pre-emption should be confined to proprietors in the same village and not extended to shares sold in other villages. It should make no difference whether one mahal consisted of two or more complete villages or only portions of two or more villages.

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*S. A. 977 of 1928

Civil

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Basdeo Narain Singh
v
Birju Singh

SECOND APPEAL from a decree of AGHOR NATH MUKERJI ESQ., District Judge of Azamgarh, confirming a decree of BABU MATHURA PRASAD, Munsif of Haveli.

Shiva Prasad Sinha for the appellants.

N. C. Vaish for the respondents.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is a plaintiff's appeal arising out of a suit for pre-emption. Mahal Mahwapar consists of portions of five villages. The plaintiffs are co-sharers in the same mahal Mahwapar but their shares are situated in the first village. The vendor was a co-sharer in the same mahal but his share was situated in the second village. The vendee had no share within mahal Mahwapar. At the same time part of the village in which the vendor had a share was situated outside the mahal and in two other mahals. Both the plaintiffs and the vendee were co-sharers in the second village Bharpur Pachhwar but outside mahal Mahwapur.

It is therefore quite obvious that the plaintiffs cannot claim a preferential right by virtue of their being co-sharers in village Bharpur Pachhwar alone because there the plaintiffs and the vendee are both on the same footing as they own shares in that village outside the mahal in dispute.

The plaintiffs certainly have an advantage over the vendee in this respect that they are co-sharers in mahal Mahwapar because they own shares in a village which is included in this mahal. The vendor, however, is a co-sharer in the same mahal but in another village.

If Sub-section 1 of Section 12 had stood by itself it would have given the plaintiffs a preferential right by virtue of their being co-sharers in the same mahal with the vendor, but Sub-section 2 restricts the right conferred upon them by Sub-section 1.

Under Sub-section 1 as against a vendee, who is a perfect stranger, co-sharers in the mahal, whether they are in the same village with the vendor or not, as well as co-sharers in the same village, whether in the same mahal with the vendor or not, have a preferential right. The legislature has not interfered with the right of pre-emption in favour of co-sharers in the same village which is conferred by Sub-section 1. But Sub-section 2 provides that where a mahal includes more villages than one, no person having proprietary rights in any such village shall be entitled by reason thereof to a right of pre-emption in respect of any other such village. It undoubtedly contemplates that the right of pre-emption should not be exercised outside the village in which the pre-emptor is a co-sharer, that is to say, there would be no right of pre-emption in favour of a proprietor of one village in respect of a share sold in another village, even though both the villages happen to be within the same mahal. The proprietor in one village by reason of his proprietary rights is necessarily a co-sharer in the mahal which includes this village along with the village of the vendor, but under Sub-section 2 he is not allowed a right to pre-empt a share in the other

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villages. The policy of the legislature appears to be that the right of pre-emption should be confined to proprietors in the same village and not extended to shares sold in other villages. In our opinion it would make no difference whether one mahal consists of two or more complete villages or only portions of two or more villages.

On the findings returned by the lower appellate court it is quite clear that the plaintiffs have no preference over the defendant-vendee. The appeal is accordingly dismissed with costs.

Appeal dismissed

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SULAIMAN, A. C. J.

PUTTU LAL (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Excise Act (IV of 1910), Sec. 64(c)—License for selling liquor—Condition of—Hours for sale fixed—Shop closed temporarily by licensee—Whether amounts to breach of condition of license.

Where one of the conditions in the license for selling liquor was that "the hours for the opening and closing of the shop have been fixed as follows It is necessary that shops should not be kept open at any other hour", and the licensee was convicted under Sec. 64(*c*) of the Excise Act (IV of 1910) for having broken the condition as the Excise Inspector had found it closed temporarily, *held,* (1) that the condition cannot be interpreted as meaning that at no time between the two limits the shop should be closed even temporarily. The object of the condition is to prevent the sale of liquor outside the fixed hours; (2) that there was no breach of condition and the conviction should be quashed.

CRIMINAL REFERENCE made by BABU TRILOKI NATH, Sessions Judge of Farrukhabad.

The applicant was not represented.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is a reference against an order convicting the accused under Section 64(*c*) of the Excise Act (IV of 1910), for having broken one of the conditions of his licence.

When the Excise Inspector went to inspect his shop, he found it closed. When questioned later, the accused alleged that he had gone to a ware-house to bring four gallons of liquor which were entered in his register.

The learned Magistrate infers that it was not a case of temporary absence, but of the closing of the shop on account of picketing. He accordingly convicted the accused and sentenced him to pay a fine of Rs.50.

The Sessions Judge has recommended that either the conviction be set aside or the fine be reduced to Rs.5.

The fourth general condition in the license applicable to all licenses is in the following terms:—

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*Cr. Ref. 228 of 1931

> The hours for the opening and closing of the shops have been fixed as follows. It is necessary that shops should not be kept open at any other hour.

It is note-worthy that the condition does not say that the shop should not, on any account, be closed during these hours.

It seems to me that the object of this condition is to prevent the sale of liquor outside the fixed hours. This condition cannot be interpreted as meaning that at no time between these two limits the shop should be closed even temporarily. If that be the intention of the authorities, they ought to lay down the condition in more express terms.

In my opinion there was no breach of the condition in the license. I accordingly accept this reference and setting aside the conviction and sentence, acquit the accused and direct that the fine, if paid, be refunded.

Application allowed

Civil
1931
June 23
Sulaiman, A. C. J.
Banerji, J.

BALZOR SINGH (*Defendant*)
versus
RAGHUNANDAN SINGH (*Plaintiff*) AND MAKUND SARUP (*Defendant*)*

Hindu Law—Alienation—Deed of Exchange—Executed by manager—When binding on family—Pre-emption Act, Sec. 20—'Indefeasible'—Deeds of exchange from individual members of joint Hindu family—Transferee does not acquire indefeasible title—Unless deeds are for 'benefit of the estate'.

A deed of exchange executed by a father or manager of a joint Hindu family is an alienation and is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the estate. *Palianappa Chetty Sreenath Devasikamony Pandara Sannadhi*, 40 Mad. 709 and *Raja Bahadur Birj Narain Rai* v. *Mangala Prasad Rai*, 21 A. L. J. R. 934 *applied.*

Where the vendee, who was a stranger at first, obtained, during the pendency of a co-sharer's suit for pre-emption, deeds of exchange from individual members of a joint Hindu family, and the exchanges were not for the benefit of the estate, *held*, that the vendee had not acquired an indefeasible interest in the property taken in exchange and therefore could not defeat the pre-emptor.

First Appeal from a decree of Babu Kedar Nath Mehra, Additional Subordinate Judge of Bulandshahr.

S. B. L. Gaur for the appellant.

K. N. Katju and *Panna Lal* for the respondents.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

Sulaiman, A. C. J.—This is a defendant's appeal arising out of a suit for pre-emption. The defendant was a stranger at the time of the institution of the suit and the plaintiff was a co-sharer. During the pendency of the suit the defendant-vendee first obtained a deed of gift and then two deeds of exchange in order to defeat the claim for pre-emption. These gift and exchanges were obtained from persons who were members of joint

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*F. A. 451 of 1929

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A. C. J.

Hindu families and all the members had not joined in these transactions. The learned Subordinate Judge has accordingly held that these acquisitions do not confer an indefeasible interest in the mahal on the defendant-vendee and so do not entitle him to defeat the plaintiff's claim. He has further found that the gift was obviously voidable at the option of the other members of the donor's family and that the exchanges also were liable to be defeated because they were not for the benefit of the family of those persons from whom they had been obtained by the vendee.

The learned advocate for the defendant-appellant argues before us that there is nothing in the Hindu law which allows a Hindu son or a minor member of a joint Hindu family to challenge an alienation by way of exchange made by the father or the manager. The argument is that the power of disposal vested in the father is absolute and is only restricted by certain texts which curtail his power. It is pointed out that the ancient Hindu texts do not speak of exchanges but only refer to sales and mortgages or gifts by the father. It is to be conceded that there is no express text which confers absolute authority on the father to transfer the joint family property by way of exchange. The learned advocate for the defendant argues that inasmuch as in transactions of sale, gift or mortgage the property is frittered away, which is not the case when an exchange is made, there ought to be a distinction.

It is not for us now to go back to the ancient texts behind the authoritative commentaries. As observed by their Lordships of the Privy Council in *Thakoorain Sahiba* v. *Mohun Lal*[1]:

> To alter the law of succession as established by a uniform course of decisions, or even by the *dicta* of received Treaties, by some noval interpretations of the vague and often conflicting texts of the Hindu commentaries would be most dangerous, inasmuch as it would unsettle existing titles.

There can be no doubt that the principles governing the power of alienation of a father have been applied to transactions besides gifts, sales and mortgages. The same principles have been extended to the case of permanent leases. We may refer to the case decided by their Lordships of the Privy Council in *Palaniappa Chetty* v. *Sreenath Devasikamony Pandara Sannadhi*[2]. It has to be conceded that the old texts do not refer to leases just as they do not expressly refer to exchanges.

In the Benares School of Hindu Law the father is no longer the sole owner of the joint estate but all the members by birth acquire an interest in it. His status is probably that of a manager though as against his sons he has the advantage of their pious obligation to pay his personal debts. It would therefore follow that in the absence of any express authority there would be no power in the father to alienate joint family property in which other members are also interested and who do not consent. In numerous cases decided by their Lordships of the Privy Council, power regarding "alienations" has been referred to. An exchange is equally an alienation. We may refer to the case of *Raja Bahadur Birj Narain Rai* v. *Mangala Prasad Rai*[3], where the result of the authorities was summarised by their Lordships of the Privy Council and the restricted power of the manager in the family property was emphasized. We must therefore hold that a deed of exchange executed by a father or manager is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the estate. The transaction would however be binding on the other members if it was of such a nature as a prudent owner in the ordinary management of a estate would make.

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[1] XI Moore's I. A. C. 386 at 403

[2] 40 Mad. 709

[3] 1923 A. L. J. R. 934

The court below has gone into the facts and come to the conclusion that the exchange by the transferors to the vendee was not for the benefit of the transferors' family. The learned Subordinate Judge has pointed out that obviously there was no necessity for them to make the transfers. As regards benefit, it is quite clear that the property given away by exchange was situated in the residential village of these transferors and was conveniently situated and was an advantageous property. On the other hand, the property taken by these transferors was situated in another village not their ancestral village and was at some distance and less convenient. It is not disputed before us that values of the two properties were about the same. There was, therefore, no reason why the transferors should give away a share in their ancestral village in lieu of a share in another village. The suggestion that they might possibly have intended to become co-sharers in the other villages was not made in the court below and this explanation was not offered by the transferors. As a matter of fact the learned Subordinate Judge was very sceptical about this transaction, and he was inclined to believe the oral evidence produced on behalf of the plaintiff which was to the effect that some cash consideration was secretly received by the transferors. That consideration would go into the pocket of the executants of the deed of exchange and would not necessarily benefit the family or the estate. The vendee was given a chance in the court below to show that the exchanges were of such a nature as would be binding on the other members of the family and that accordingly they were not defeasible. He failed to do this. We agree with the court below that the vendee has not acquired an indefeasible interest in the property taken in exchange and therefore cannot defeat the plaintiff pre-emptor.

The vendee claimed the amount due under a preliminary decree for sale on the basis of a mortgage deed which creates a charge on the property in dispute. The decretal amount was not part of the sale-consideration and therefore the plaintiff was not bound to pay that amount. The learned Subordinate Judge has rightly pointed out that the property will go to the plaintiff subject to the prior encumbrance, if it subsists.

The appeal is accordingly dismissed with costs.

Appeal dismissed

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1931

June 9

MUKERJI, J.
ALLEN, J.

NAND GOPAL DAS AND ANOTHER (*Defendants*)
versus
BATUK PRASAD GUPTA (*Plaintiff*)*

Provincial Insolvency Act, Sec. 28—Liability arising out of a covenant in a sale deed of a house in favour of insolvent—Vendee undertook to remove certain constructions at vendor's pleasure—Whether receiver bound—Specific Relief Act, Sec. 27(b)—Transfer of Property Act, Sec. 11.

Plaintiff-respondent owned two houses with a lane running between them. The house to the south was sold by him to *F*. The sale deed contained a covenant that, if and when, the vendor wanted the vendee to remove the *chhatta*—a two-storeyed building constructed over the lane—which opened into the vendee's house, it would be removed by the vendee at his own cost. Further, it was agreed that each of the parties would be entitled to open sky-lights or clear-storey windows in their respective walls. After the sale, *F* was declared insolvent and the house was purchased by the defendants from the receiver. The plaintiff, therefore, instituted the present suit for compelling the defendants to remove the *chhatta* built over the lane. *Held*, (1) that the house vested in the receiver with the liability arising out of the covenant in the sale deed to remove the *chatta* at the vendor's pleasure. *Pearce* v. *Bastable's Trustee in Bankruptcy*, 2 Ch. Div. 122, and *P. Purshotam Naidu* v. *L. Ponnarangam Naidu*, 21 In. Cas. 576 *relied on.*

(2) that the covenant could be enforced against the receiver under Sec. 27(*b*) of the Specific Relief Act.

(3) that, as the *chatta* rested partly on the plaintiffs wall, it imposed a burden on that wall, and unless the *chatta* was removed the sky-lights, etc., could not be opened, and it was therefore for the beneficial enjoyment of the plaintiff's property that the defendants should be compelled to enjoy their property in a particular manner, viz., that agreed upon, and the case was covered by the proviso to Sec. 11, Transfer of Property Act.

SECOND APPEAL from a decree of BABU HARI HAR PRASAD, Subordinate Judge of Benares, modifying a decree of BABU NIRAJ NATH MUKERJI, City Munsif.

K. N. Katju for the appellants.

P. L. Banerji, B. Mlik, K. C. Mital and *H. P. Sen* for the respondent.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—The facts of the case are briefly these:—

There were two houses, one to the north of the other with a blind lane running between the two. Both the houses belonged to the plaintiff-respondent, Batuk Prasad Gupta. The house to the north is still in possession of the plaintiff, but the house to the south was sold by him to one Fateh Chand, by a sale deed dated January 13, 1920. It was agreed, among other matters, between the vendor and the vendee that, if and when, Batuk Prasad wanted the vendee to remove the *chatta* which had been constructed on the lane between the two houses and which opened into the defendant's house, it would be removed by the defendant at his own cost.

After the sale, Fateh Chand was declared insolvent and his property

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*S. A. 1277 of 1928

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Mukerji, J.

was sold by the Receiver in insolvency and the house of Fateh Chand was purchased by the defendants who are the appellants before us. The plaintiff, thereupon, instituted the suit out of which this appeal has arisen, for compelling the defendants to remove the *chatta* built over the lane.

The chatta is in the shape of a building constructed over the lane all along the length of it and it appears that it consists of two storeys.

The plaintiff asked for the removal of the *chatta* and also for an injunction.

The suit was decreed in its entirety by the court of first instance, but on appeal by the defendants the learned Subordinate Judge upheld the decree so far as he directed the defendants to remove the *chatta* but dismissed the suit so far as the prayer for an injunction went.

The defendants have appealed and the plaintiff has filed a cross-objection in respect of that portion of the claim which was dismissed by the lower appellate court.

We may at once dispose of the cross-objection. It is clear on the facts that there was no occasion for the plaintiff to ask for an injunction. If the *chatta* was removed the plaintiff would get all the relief that the case called for and it was entirely unnecessary for the plaintiff to ask for an injunction "restraining the defendants from making an encroachment hereafter on the space so opened".

As a necessary result of the modification of the decree of the court of first instance the learned appellate court allowed the plaintiff only a part of his costs. The plaintiff's contention is that he should have the whole of the costs although a portion of his claim was dismissed. We do not see how the plaintiff can get the whole of his costs . if a portion of his claim was rightly dismissed. We accordingly dismiss the cross-objection with costs, including counsel's fees on the higher scale.

We now come to the appeal in which several points of law have been raised. The first contention of Dr. Katju is that the defendants do not claim under Fateh Chand and are therefore not bound by the covenant contained in the sale deed. The argument is that the receiver is not bound by the covenant and therefore the defendants, who derive their title through the receiver, are not bound by the covenant.

Reliance has been placed on Section 28 of the Provincial Insolvency Act of 1920, and it has been argued that all that vests in the receiver is the property of the insolvent and not any of his liabilities. This argument is fallacious. If the insolvent is under a liability, whether it arises out of an equity or as a matter of law, the Receiver cannot have any greater right than the insolvent himself. It is said that if this were so, something would have been found within the four corners of the Insolvency Act to justify an inference like that. But the scheme of the Insolvency Act is to vest the property of the insolvent in a person called the receiver in order that that property may be distributed. Under that scheme, there is no reason why the receiver should be given a property of greater value than the insolvent himself possessed. It is clear to us that if the power which vested in the plaintiff to remove the *chatta* be taken away from him, the

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NAND GOPAL DAS *v.* BATUK PRASAD GUPTA

Mukerji, J.

property of the insolvent would go up in value, because, in that case, the *chatta* would be always intact and cannot be removed.

No authority has been quoted by the learned counsel for the appellants in support of his case. On the other hand, the learned counsel for the respondent has quoted two cases before us, and one is *Pearce* v. *Bastable's Trustee in Bankruptcy*[1]. This case has been followed by the Madras High Court in *P. Purshotam Naidu* v. *L. Ponnarangam Naidu*[2]. These cases are entirely in keeping with the view we take of the case, and we follow them.

The next argument of the learned counsel for the appellants is that the covenant is a purely personal one and it cannot be enforced against the heirs or representatives of either party thereto. This argument entirely ignores the provisions of Section 27(*b*) of the Specific Relief Act. That rule of law says that specific performance of a contract may be enforced against either party thereto and against any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract.

The Receiver in this case is certainly a person claiming under the insolvent and by a title which has arisen subsequently to the contract. It is true that the title vests in the receiver not by virtue of any contract between the insolvent and himself, but by virtue of law, but nonetheless the Receiver is a person who gets all the interest which the insolvent had and therefore there is no reason to exclude him from the category of persons claiming under the insolvent.

It has been found that the defendants are persons who had notice of the provision in the sale deed and that is a question of fact. The sale deed being registered the registration would charge the defendants with notice of the covenant. The defendants, therefore, are bound by the agreement contained in the sale deed.

Then it was argued that under the provision of Section 11 of the Transfer of Property Act the agreement is not enforceable. Ordinarily a contract like this would not be enforceable by the vendor. But the vendor in this case is interested in the adjoining house, and it is for the beneficial enjoyment of that house that he is enforcing this contract. Section 11 of the Transfer of Property Act contains a proviso in the following language:—

> Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

The *chatta* was partly on the plaintiff's wall. It imposes a burden on that wall. Further, it was agreed in the sale deed between the parties that each of the parties would be entitled to open sky-lights or clear-storey windows in their respective walls and the other party would not be entitled to object to this. Unless the *chatta* is removed the clear-storey windows or sky-lights cannot be opened. For both reasons, it is for the beneficial enjoyment of the plaintiff's property that it is necessary that the defendants should be compelled to enjoy their property in a particular manner, namely, that agreed upon. Section 11 of the Transfer of Property Act, therefore, is no bar to the maintenance of the suit.

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[1] 2 Ch. Div. 122

[2] 21 I. C. 576.

It was further contended that the grant of the relief is discretionary with a court and as no probable damage has been established, the decree should not be granted. But the discretion that vested in court is not arbitrary. The plaintiff and the predecessor-in-title of the defendants agreed with their eyes open that the *chatta* might be, at any time, removed if Batuk Prasad, the plaintiff, so wished. When Fateh Chand was the purchaser it may have suited Batuk Prasad to allow Fateh Chand to maintain the *chatta*, but when other people, who may be entire strangers to Batuk Prasad, have come into the house it may not suit Batuk Prasad to let the *chatta* stand. This is a matter which should rest entirely on the discretion of Batuk Prasad and the court should not interfere with that discretion. Besides, as we have pointed out, there is the burden on the wall of Batuk Prasad of the weight of the *chatta* and the *chatta*, if allowed to stand, would not enable Batuk Prasad to open the clear-storey windows. In the circumstances we do not see how we can disallow the relief to the plaintiff.

Lastly, it was argued that there should be some limit to the enforcement of the agreement contained in the sale deed. It was argued that it might be that in a far distant time, a descendant of the plaintiff might want a descendant of the defendants to remove the *chatta* and, in that case, to agree to the contention of the then plaintiff would be very hard on the then defendant. This case does not call for an answer to that contention but probably it is provided by the Full Bench case of this Court, in *Aulad Ali* v. *Ali Athar*[8].

The result is that this appeal fails and is hereby dismissed with costs.

Appeal dismissed

[8] I. L. R. 49 All. 527

CRIMINAL
1931
Aug. 31
SULAIMAN, J.

BALKRISHNA SHARMA (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Criminal Procedure Code, Sec. 435—Case under Sec. 124A Penal Code—Magistrate's order—Limiting number of witnesses defence should produce—Whether revision lies to High Court—Sec. 257—Scope of—Magistrate cannot arbitrarily limit number of witnesses.

An appeal, in a case under Sec. 124A Penal Code, lies from the order of the District Magistrate direct to the High Court, and the High Court is not precluded from entertaining an application for revision of the District Magistrate's order limiting the number of witnesses which the defence should produce, simply because the Sessions Judge had not been approached first.

Even a settled practice not to entertain a revision when the applicant could have gone to the Sessions Court, does not oust the jurisdiction of

*Cr. Rev. 535 of 1931

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the High Court. *Mannu* v. *Emperor,* 18 A. L. J. R. 187, *Sharif Ahmad* v. *Qabul Singh,* I. L. R. 43 All. 497, *Nathe Singh* v. *Emperor,* 1927 A. I. R. (All.) 829 *referred to.*

Outside the provisions of Sec. 257 Cr. P. C. it is not open to a magistrate to limit the number of witnesses which the defence or prosecution should be allowed to produce. Where the Magistrate does not consider that the application has been made for the purpose of vexation or delay or for defeating the ends of justice, he has no option but to issue process under Sec. 257(1) Cr. P. C.

CRIMINAL REVISION from an order of CAPTAIN A. W. IBBOTSON, District Magistrate of Cawnpore.

K. N. Katju and *K. D. Malaviya* for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an application in revision from an order of the District Magistrate of Cawnpore directing that the defence should select three witnesses out of Nos. 1 to 10, and 8 other witnesses out of the remaining lists. The case pending before him is one under S. 124-A I. P. C.

A preliminary objection is taken that no revision lies because the applicant has not approached the Sessions Judge in the first instance. No doubt it is the general practice of this Court not to entertain a revision when the applicant could have gone to the superior court of the District Magistrate or the Sessions Judge. But, of course, even a settled practice does not oust the jurisdiction of the High Court. In *Mannu* v. *Emperor*[1] and *Emperor* v. *Mansur Husain*[2] Piggott, J. referred to this practice and yet entertained the revisions. In the case *Sharif Ahmad* v. *Qabul Singh*[3], a Division Bench in clear terms declared that there was this practice. Nevertheless, they entertained that particular revision and set aside the conviction. In the case *Emperor* v. *Bhure Mal*[4], which was after the decision of the Division Bench, another learned Judge again referred to the same practice and yet decided the application on the merits. On the other hand, my attention has been drawn to two other cases decided by single Judges, where the applications were not entertained:—*Nathe Singh* v. *Emperor*[5] and *Jadunandan Misra* v. *Sheophal*[6].

The present case is, however, distinguishable. The offence under S. 124-A is triable by either the District Magistrate or the Sessions Judge. It is not triable exclusively by the latter. Under S. 408(*c*) Cr. P. C. an appeal lies from the order of the District Magistrate direct to the High Court and not to the Sessions Court. The propriety of the orders passed by the District Magistrate would, therefore, have to be considered by the High Court in appeal and not by the Sessions Judge. No case has been brought to my notice in which a revision from an order passed by the District Magistrate where an appeal would have lain direct to the High Court was not entertained simply because the Sessions Judge had not been approached first. I therefore think that I am not precluded from considering the application on the merits.

[1] 18 A. L. J. R. 187

[2] I. L. R. 41 All. 587

[3] I. L. R. 43 All. 497

[4] I. L. R. 45 All. 526

[5] 1927 A. I. R. (All.) 829

[6] 1929 A. I. R. (All.) 272

The learned District Magistrate has remarked that he did not make any suggestion of a deliberate attempt at obstruction by the defence, but that the remaining witnesses, if summoned, would in fact result in achieving the purpose of very great delay and defeating the ends of justice. The accused had summoned no less than 183 witnesses. I would not say that a court is not entitled to infer from the mere fact that an unduly large number of witnesses have been summoned, that the application has been made for the purpose of vexation or delay or for defeating the ends of justice. But where the Magistrate does not consider that the application has been made for such a purpose, he has no option but to issue process under S. 257(1) Cr. P. C. The section is imperative and compels the Magistrate to issue such process, except in the case mentioned above. Where he refuses process he is directed to record his grounds in writing.

The number of witnesses which the prosecution or the defence might reasonably produce in a case depends to a large extent on the scope of the enquiry. Outside the provisions of S. 257 Cr. P. C., it is not open to a Magistrate arbitrarily to limit the number of witnesses which the defence should be allowed to produce, any more than the Magistrate can restrict the number of witnesses which the prosecution should produce.

The High Court has added R. 8 (correction slip No. 37) at the end of Chapter 3 of the General Rules (Criminal). Under this rule

> Every application for the issue of process for the attendance of witnesses shall, if the party presenting the application is represented in the case by a legal practitioner, contain a certificate signed by such legal practitioner that he has satisfied himself that the evidence of each of the witnesses is material in the case.

This Rule provides an ample safeguard against a reckless summoning of witnesses. The Magistrate should insist upon such a signed certificate being filed. That will enable the Magistrate to decide for himself whether any witnesses are being summoned for the purpose of vexation or delay or for defeating the ends of justice. If he cannot come to such a conclusion he has no jurisdiction to refuse to summon the witnesses, even though the number may be inconveniently large.

I accordingly set aside the order limiting the number of witnesses, and send the case back to the court of the District Magistrate with direction to proceed in the light of the above observations. I may add that Dr. Katju on behalf of his client assures me that his client will submit a shorter revised list of witnesses to the District Magistrate.

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Oct 13

NIAMATULLAH, J.

CHITESHWAR DUBE AND OTHERS
versus
KING-EMPEROR THROUGH NARSINGH DUBE*

Criminal Procedure Code, Secs. 15, 16, and 350A—Bench of Magistrates—Whether presence of all magistrates on all hearings indispensable—Part of evidence recorded in absence of one magistrate—Conviction based on such evidence—Whether sustainable.

The presence of all the magistrates constituting the bench, under Secs. 15 and 16 of the Criminal Procedure Code, on all hearings is indispensable for a valid trial of a case pending before it. Individual magistrates constituting a bench have no jurisdiction to hear a case cognizable by the whole bench. If witnesses are examined by one or more magistrates in the absence of one or more of those constituting the bench, a conviction based on such evidence is unsustainable.

CRIMINAL REFERENCE made by BABU PIARE LAL, Sessions Judge of Ghazipur.

Kumuda Prasad for the applicants.

L. M. Roy for the opposite party.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is a reference by the learned Sessions Judge of Ghazipur in a case in which the applicants for revision have been convicted by a bench of honorary magistrates for offences under Sections 323 and 447 I. P. C. and sentenced to small amounts of fine.

The bench of honorary magistrates in question consisted of three honorary magistrates, namely, Pandit Paras Ram, Pandit Lachhmi Narain and Maulvi Abdul Mughni. The case was heard on a number of dates. Maulvi Abdul Mughni did not join the other members of the bench on several occasions when witnesses were examined. The learned Sessions Judge is of opinion that the presence of all the magistrates constituting the bench on all hearings is indispensable for a valid trial of a case pending before it. I think this is a correct view of the law applicable to proceedings taken before a bench of honorary magistrates constituted under Sections 15 and 16 of the Code of Criminal Procedure.

Before the Amending Act of 1923 there was some difference of opinion as regards the legality of a trial by a bench whose constitution had been altered during the pendency of the trial. Sections 350A now added provides that "no order or judgment of a bench of magistrates shall be invalid by reason only of a change having occurred in the constitution of the bench in any case in which the bench by which such order or judgment is passed is duly constituted under Sections 15 and 16, and the magistrates constituting the same have been present on the bench throughout the proceedings." There is no question of the constitution of the bench of magistrates having undergone a change in the case under reference. The same magistrates constituted the bench throughout the pendency of this case. One of the magistrates did not however take part in the proceedings throughout but absented himself on some occasions when certain

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*Cr. Ref. 469 of 1931

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Niamatullah, J.

witnesses were examined. The concluding part of Section 350A quoted above makes it perfectly clear that all the magistrates for the time being constituting the bench must take part in the proceedings though if during the pendency of the case the personnel of the bench undergoes a change, the new member can replace an outgoing member without necessitating a fresh trial.

Apart from the view which is deducible from Section 350A it is plain to my mind that individual magistrates constituting a bench have no jurisdiction to hear a case cognizable by the whole bench. If therefore any member of the bench is not present on any hearing no properly constituted bench can be said to have been in existence. If therefore witnesses are examined by one or more magistrates in the absence of one or more of those constituting the bench they cannot be considered to have been examined by the bench. In this view the order of conviction in this case is based partly on evidence recorded by the bench as such and partly on evidence not deemed to be recorded by the bench. A conviction based on such evidence is clearly unsustainable. Accordingly I accept the reference made by the learned Sessions Judge, set aside the conviction and sentence, and direct a retrial as recommended by the learned Sessions Judge.

Application allowed

CIVIL
1931
Oct. 23
PULLAN, J.
NIAMATULLAH, J

JANKI DAS AND ANOTHER (*Applicants*)
versus
SHEO PRASAD AND ANOTHER (*Opposite parties*)*

Civil Procedure Code, Sec. 151 and Or. 41, R. 5—Appeal from preliminary decree —Final decree passed during pendency of appeal—No appeal from final decree —Whether appellate court empowered to stay execution of final decree.

The High Court has power, under Sec. 151 C. P. C., to order stay of execution of a final decree during the pendency of an appeal from the preliminary decree, if, having regard to the ends of justice, it is expedient.

It is generally expedient that proceedings for the preparation of the final decree should not be stayed pending an appeal from the preliminary decree because the mere passing of a final decree will not, in any way, affect the rights of the parties to the appeal from the preliminary decree.

S. K. Dar, Panna Lal, Gopi Nath Kunzru, Vishwa Mittra and *U. S. Gupta* for the applicants.

M. L. Agarwala, K. N. Katju and *Banke Behari* for the opposite parties.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an application for stay of execution of a final decree passed in a suit based on a mortgage. A preliminary decree had been previously passed. The mortgagor preferred a first appeal to this Court impugning the correctness of the preliminary decree. In the meantime, an application was made by the mortgagee to the court of first instance for the preparation of a final decree. The mortgagor then made an application to this Court praying for stay of the proceedings in the

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*Application in F. A. 284 of 1930

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Niamatullah, J

court of first instance for the preparation of the final decree. It was held by a learned Judge of this Court that proceedings for the preparation of a final decree could be taken pending an appeal from the preliminary decree. A final decree has since been passed by the court of first instance, and the present application is for stay of execution of the final decree.

A preliminary objection has been taken by the learned advocate for the mortgagee (opposite party) that this Court has no power to order the stay of the execution of the final decree which is not itself under appeal. It is contended that in so far as the appeal pending in this Court is from the preliminary decree, which is not itself capable of execution no order for stay of execution can be passed under Order 41 of the Code of Civil Procedure. The contention is so far correct that an order for stay of execution of the final decree cannot be passed under Order 41 of the Civil Procedure Code, but the powers of this Court as regards stay of proceedings pending in the court below are not exhaustively defined by Order 41 of the Civil Procedure Code. If, having regard to the ends of justice, it is expedient that the execution of the final decree should be stayed pending the appeal from the preliminary decree, this Court has got ample power to stay it under Section 151 Civil Procedure Code. It cannot be denied that any interference with the preliminary decree in the appeal therefrom will have the effect of the final decree being vacated and that if execution of the final decree is allowed to proceed rights may come into existence before the disposal of the appeal from the preliminary decree. In order to avoid possible complications we think it is necessary in the ends of justice that the execution of the final decree be stayed pending the appeal from the preliminary decree. It may be and generally is expedient that proceedings for the preparation of the final decree should not be stayed pending an appeal from the preliminary decree because the mere passing of a final decree will not, in any way, affect the rights of the parties to the appeal from the preliminary decree. On the other hand, if the preliminary decree is affirmed on appeal, some further time will be needed for proceedings leading to the final decree.

We are clearly of opinion that this Court has power, under Section 151 of the Civil Procedure Code to order stay of execution of a final decree during the pendency of an appeal from the preliminary decree. We hold that the preliminary objection has no force, and is accordingly overruled.

As regards the merits, it is contended on behalf of the mortgagees (opposite party) that the value of the mortgaged property is very much less than the decretal amount and that any delay in having the property sold is likely to raise the mortgage money without any chance of its recovery in full from the mortgaged property. It is not disputed that the mortgagees' remedy under Order 34, Rule 6 Civil Procedure Code, is barred. It is also admitted that the value of the property is less than the decretal amount. In these circumstances, it is obvious that the mortgagees are not likely to obtain satisfaction of the mortgage money from any property other than the mortgaged property. The applicants (mortgagors) should indemnify the mortgagees against possible loss which may be consequent on the order of stay. We are of opinion that the equitable course

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is to order the stay of execution of the final decree on the applicants (mortgagors) furnishing security to the extent of one year's interest on the decretal amount at the rate of interest laid down in the decree. Such interest comes to Rs.8,000. Accordingly we allow this application on condition of the mortgagor applicants furnishing security for Rs.8,000 to the satisfaction of the lower court within three months. If security is not furnished within the aforesaid period execution of the final decree shall proceed.

Application allowed

Civil

1931

Oct. 28

King, J.

KUNDAN LAL AND ANOTHER (*Defendants*) *versus* DULI CHAND AND OTHERS (*Plaintiffs*)*

Court-Fees Act (VII of 1870), Sch. II, Art. 17(iii) and Sec. 7(iv)(c)—When inapplicable—Suit for sale on mortgage—Appeal—Relief—Declaration that appellants were prior mortgagees—Ad valorem *court-fee payable on value of subject-matter in dispute.*

The appellants were impleaded as defendants in a suit for sale on a mortgage upon the allegation that they were subsequent mortgagees. They claimed to be prior mortgagees but the trial court found against them and decreed the plaintiff's suit. The appellants appealed to the High Court and sought for a declaration that they were prior mortgagees. The appeal was valued at Rs.1,600, but a court-fee of Rs.10 only was paid. *Held,* that Art. 17(*iii*) of Sch. II of the Court-Fees Act had no direct application to this case and that an *ad valorem* court-fee was payable on the value of the subject-matter in dispute in the appeal.

Rup Chand v. *Fateh Chand,* 8 A. L. J. R. 821 *distinguished. Makund Ram* v. *Ruqaiya Khatun,* 1931 A. L. J. R. 150, *Moti Begam* v. *Har Prasad,* 16 A. L. J. R. 81, *Premsukh Das* v. *Shah Gopi Saran,* 4 Pat. L. J. 323 and *Venkappa* v. *Narasimha,* 10 Mad. 187 *referred to.*

H. C. Mukerji for the appellants.

The following judgment was delivered by

King, J.

King, J.—This is a reference under Section 5 of the Court Fees Act, 1870. The question is what is the proper court-fee on a certain memorandum of appeal.

The appellants were impleaded as defendants in a suit for sale on a mortgage upon the allegation that they were subsequent mortgagees. They claimed to be prior mortgagees but the trial court found that they are subsequent mortgagees and decreed the plaintiff's suit against all the defendants.

The appellants appeal to this Court against the decree. The relief sought by the appeal is expressed as follows:—

> That the Hon'ble Court will be pleased to declare that the mortgage deeds held by Bhulla and Kundan are in effect prior to that of the plaintiff and allow the appeal with costs throughout.

The appeal is valued at Rs.1,600 but a court-fee of Rs.10 only has been paid. The Stamp Reporter objects that an *ad valorem* court-fee is payable on the value of the subject-matter in dispute in the appeal, namely, Rs.1,600 and there is therefore a deficiency of Rs.95 in the court-fee paid.

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*Stamp Report in F. A. 10 of 1931

It is contended for the defendant-appellants that they seek a mere declaration that they are prior mortgagees, and do not pray for any consequential relief, and therefore the court-fee of Rs.10 is correct under Article 17 (*iii*) of Schedule II.

I hold that the clause mentioned has no application to the facts of this case. That clause applies to a memorandum of appeal ***in a suit*** to obtain a declaratory decree where no consequential relief is prayed. In the present case we have a memorandum of appeal in a suit of a totally different nature, namely, a suit for sale on a mortgage. If the appellants' contention were accepted, I think it would be always possible for a defendant, against whom a decree has been passed, to appeal against the decree on payment of a fixed court-fee of Rs.10, by the simple device of asking for a mere declaration that the decree is erroneous and not binding upon him. Supposing a money decree for Rs.10,000 is passed against a defendant. He might in his appeal ask for a mere declaration that the decree is erroneous and that he is not liable to pay anything to the decree-holder, and might thus claim to file the appeal on a fixed court-fee of Rs.10 only.

Whatever may be the view of the appellate court regarding the form in which the relief sought by the appeal has been framed, I think it is clear that Article 7 (*iii*) of Schedule II has no direct application and I see no reason for applying the principle of that clause by way of analogy.

The appellants obviously seek to get the decree of the trial court modified in their favour so as to get the property sold subject to their mortgage for which they claim priority. I think the substance of the relief sought, and not merely its form, must be considered. Their interest in the property is valued at Rs.1,600 and this must be the value of the subject-matter in dispute in the appeal.

The appellants rely on *Rup Chand* v. *Fateh Chand*[1] but that ruling is clearly distinguishable upon the facts. They also rely on *Makund Ram* v. *Ruqaiya Khatun*[2] but the decision is against them rather than in their favour. The appellant asked the court to grant a declaration and to modify the trial court's decree accordingly. It was held that the case was governed by Section 7 (IV) (*c*) of the Court Fees Act and the court-fee was payable *ad valorem* on the appellant's valuation of the relief sought. The view that the appellants must pay an *ad valorem* court-fee on the value of the subject-matter in dispute in the appeal finds support in *Moti Begam* v. *Har Prasad*[3], *Premsukh Das* v. *Shah Gopi Saran*[4] and *Vemkappu* v. *Nara Sinha*[5].

I hold that the appellants must pay an *ad valorem* court-fee on Rs.1,600 and make good the deficiency of Rs.95. This sum is exclusive of the court-fee payable in respect of ground No. 3, the liability for which is not contested.

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[1] 8 A. L. J. R. 821

[2] 1931 A. L. J. R. 150

[3] 16 A. L. J. R. 81

[4] 4 Patna L. J. 323

[5] 10 M. 187

CIVIL

1931

Nov. 2

MUKERJI, J.
NIAMAT-ULLAH, J.

KANHAIYA LAL (*Plaintiff*)
versus
MAHDEI AND OTHERS (*Defendants*)*

Guardians and Wards Act, Sec. 35—District Judge assigns bond to minor—Whether order fixing surety's liability essential before assignment—Sec. 34—Scope of—Guardian to pay balance due on accounts submitted by himself.

An order by the District Judge fixing the liability of the surety is not called for, before he can assign the bond to the minor (or any guardian of his appointed by the District Judge) under Sec. 35 of the Guardians and Wards Act.

There is no provision in the Act for the surety being a party to any proceeding in which accounts may be taken, nor can the surety appeal against the District Judge's order fixing his liability.

Under Sec. 34 of the Guardians and Wards Act the court directs the guardian to pay such amount as may be due on the accounts submitted by the guardian himself.

SECOND APPEAL from a decree of HARISH CHANDRA ESQ., District Judge of Benares, modifying a decree of V. MEHTA ESQ., Additional Subordinate Judge.

P. L. Banerji and *H. P. Sen* for the appellant.

K. N. Katju, M. N. Kaul and *M. L. Chaturvedi* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is an appeal by one Kanhaiya Lal, who was a minor till lately, to recover a sum of money from defendants Nos. 2 to 5 as the legal representatives of his late certificated guardian, and from Mst. Mahdei, defendant No. 1 as the surety, and from Ramji Das, defendant No. 6 as the subsequent transferee of part of the property given by Mst. Mahdei as security for carrying out her engagements.

The court of first instance dismissed the suit altogether. The lower appellate court modified the decree of the court below and held that the defendants 2 to 5, the representatives of the deceased guardian, were liable and remanded the suit for determination of the amount of the liability. The order of the court of first instance dismissing the suit as against defendant No. 1 and defendant No. 6 was upheld. In this Court it has been urged that defendant No. 1 and defendant No.6 are also liable.

The courts below have proceeded mainly on two matters. The first is the language of the surety bond given by defendant No. 1, and secondly on the view that the liability of the defendant No. 1 could not be fixed till the District Judge had adjudicated upon that liability and found that a particular sum was due. In this Court Dr. Katju, the learned counsel for the respondent No. 1, has also urged that the order of the District Judge, dated January 24, 1924, is a complete answer to the claim.

We shall take the third point first, because it is very simple. This order of January 24, 1924 is before us and it shows that the amount of the liability determined thereby was the liability which was arrived at, on the face of the account submitted by the guardian. The order begins with the following words:—

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*S. A. 270 of 1930

> Amongst other irregularities which have been committed are the following:

The amount of Rs.1,485 was found due on the guardian's own account and, therefore, in pursuance of the provision of Section 45 of the Guardians and Wards Act the guardian was ordered to make good the sum on penalty of being sent to jail. This argument, therefore, does not hold good.

The second question is whether a previous order of the learned District Judge is necessary in law in order to fix the liability of the surety. We have been referred to Section 34 of the Guardians and Wards Act, and it has been urged that the District Judge must find what is the amount due from the surety before he can assign the bond to the minor or any guardian of his appointed by the District Judge.

We have not been able to find any authority for this proposition. Section 34, Clause (*d*) runs as follows:—

> if so required by the Court, pay into the Court, at such time as the Court directs, the balance due from him on those accounts, or so much thereof as the Court directs.

Here the court directs the guardian to pay such amount as may be due on the accounts submitted by the guardian himself. This view of ours is emphasized by Section 35. By this section the court is authorised to assign the bond to some proper person who is to sue the guardian or the surety to realise the amount that may be due. If the Judge's decision is to be final, or if not final and if it is subject to an appeal to the High Court, a fresh campaign in the shape of a suit would be entirely uncalled for. We are, therefore, of opinion that an order by the District Judge fixing the liability of the surety was not called for. We may mention here that within the four corners of the Guardians and Wards Act there is no provision for the surety being a party to any proceeding in which accounts may be taken, and there is no provision by which the surety can appeal against the District Judge's order fixing his liability.

As regards the construction of the surety bond, we are of opinion that the construction contended for cannot hold good. Stress has been laid on the words *bahukum apne*. Paragraph 2 of the bond which has to be considered by us has been quoted at length by the learned Subordinate Judge in his judgment at page 18 and we need not quote those words again. Suffice it to say that in our opinion no special significance can be attached to the words *bahukum apne*. The District Judge is a party to the bond and the liability of the surety is to the District Judge. We do not think that it was in contemplation of the parties, namely, the District Judge on the one hand and the surety on the other, that the District Judge's decision as to the amount should be final as between the parties. The words were added only as being calculated to add to the dignity of the court and they have no other significance.

In the result we are of opinion that the liability of the defendant No. 1 and the defendant No. 6 does exist, and it is to be adjudicated upon by the

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court of first instance. Before we conclude, we may point out that by the deed of assignment the learned District Judge of Benares clearly signifies his opinion that something was payable by the guardian to the minor and, therefore, he was executing the deed of assignment in favour of the minor.

We modify the decree of the court below and remand the suit to the court of first instance for trial in its entirety. Costs here and hitherto will abide the result.

The cross-objection is dismissed.

Appeal allowed

[ED., A. L. J.—The security bond ran as follows:—"Narain Sahu mazqur se kisi qism ki jaidad nabaligh mazqur men khalal wa fitur waqai ho to us halat men A. G. P. Pullan Saheb Judge Bahadur Zila Benares ya jo koi qayam-mukam saheb judge bahadur mausuf ke hon ba hukum apne min muqirah ki zat wa jaidad mankulah wa ghair-mankula se naqd mubligh panch hazar rupaye jis qadr azruye hisab kitab tahwil wa jaidad na baligh men kami waqai ho to wasul kar lewen."]

LALMAN
versus
BISHAMBHAR NATH*

CRIMINAL
1931
Nov. 5
PULLAN, J.

Criminal Procedure Code, Sec. 133—Licensed lime kiln—Magistrate empowered to take action in interests of public health—But it is expedient that matter should be left to the control of Municipal Boards.

A magistrate is empowered under Section 133 Cr. P. C. to order a licensed burner of lime to regulate his business in a manner that it may not be injurious to the health or physical comfort of the community. *Krishna Mohan Banerji* v. *A. K. Guha,* 57 I. C. 829 and *Raghunandan Prasad* v. *King-Emperor,* 1931 A. L. J. R. 912 *followed.*

Where the applicant had been working a lime kiln for the last 45 years, and had a municipal license, and there was no adequate evidence of any evil effects on the public health from the neighbourhood of the kiln; and on a complaint made, under Sec. 133 Cr. P. C., by a person who had recently deliberately occupied a house in a position where he was liable to be inconvenienced by the smoke and smell of the kiln, the magistrate ordered that the kiln should be stopped, *held,* that the High Court, in such cases, can look to the propriety of the order, which, under the circumstances, was unjustified.

It is generally inexpedient that a magistrate should take action in such cases, for these matters are left by the Legislature to the control of the Municipal Boards.

CRIMINAL REFERENCE made by SYED IFTIKHAR HUSAIN, Sessions Judge of Farrukhabad.

K. O. Carleton and *Kumuda Prasad* for the applicant.

S. N. Mukerji and *M. L. Chaturvedi* for the opposite party.

The following judgment was delivered by

PULLAN, J.—This matter comes before this Court in the form of a reference by the Sessions Judge of Farrukhabad. There is also an appli-

Pullan, J.

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*Cr. Ref. 570 of 1931

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Pullan, J.

cation in revision of that order on behalf of one Lalman. This Lalman, who owns property on both sides of the Fatehgarh-Farrukhabad road, within the limits of the Fatehgarh municipality, has been working a lime kiln on his land on the north-east side of the road for the last 45 years. According to the municipal bye-laws, which were published in the Gazette of September 15, 1928, no person is allowed to burn lime within municipal limits without a license from the municipal board. Lalman has obtained a license from year to year, and as far as the municipal board is concerned he is still authorised to conduct the business of burning lime on this site. One Bishambhar Nath, who occupies a house on the opposite side of the road, made a complaint to a magistrate of the first class under Section 133 Cr. P. C. in which he said that the working of this kiln is

> noxious to the health of the residents of the vicinity, and has been a cause of death of several persons in the vicinity, and is a public nuisance.

The magistrate took proceedings on this complaint and passed an order directing Lalman to remove the lime kilns within 20 days and not to start them again on the present site. The Sessions Judge at first was of opinion that the magistrate's order should be set aside mainly on the ground that it was an application by an individual on account of a private grievance. He subsequently modified that order and came to the conclusion that the magistrate was entitled to order removal of the kiln; but he was of opinion that as the health officer of the municipal board had himself suggested the raising of a wall in front of the kiln, and was of opinion that if the wall were raised no body would be discomforted, this Court should set aside the order of the magistrate, but order Lalman to raise a wall seven feet high on the southern side of the kiln, and further "order the magistrate after that to see whether the kiln is still a nuisance to the public." It is open to this Court on a reference of this nature to consider both the legality and the propriety of the order of the magistrate. I have been asked on behalf of Lalman to consider in the first place that the order was passed without jurisdiction. I was referred to the first section of the Criminal Procedure Code by which it was enacted that the Code of 1898 would not affect any special or local law then in force; and it was argued that this restriction on the scope of the Code should be held to cover the Municipalities Act, although that act was passed after the Code. This view is based on a previous enactment, the N. W. P. Municipalities Act of 1883, but I am of opinion that there is nothing in that Act which could affect that the Criminal Procedure Code in its relation to the present Municipalities Act of the year 1916. But the Municipalities Act itself has given to the municipal boards control of all matters relating to public health within the municipal limits; and this municipal board of Fatehgarh has passed bye-laws dealing with the management of what are known as noxious trades, and which include the burning of lime. Under Section 318 of the Municipalities Act, any person aggrieved by an order of the Board on a question of this nature has a right of appeal to the District Magistrate; and under Section 321 of the Act it is laid down that no order or direction referred to in Section 318 shall be questioned in any other manner, or by any other party, than is provided therein. It was held by a Bench of this Court in an unreported case. First Appeal from Order No. 79 of 1928, by Sir Muhammad Sulaiman and myself that an aggrieved person under Section 318 does not mean only an aggrieved party, but includes any person who is really affected adversely by the order which may have been passed behind his back; and in that view of the law the present applicant would be a person aggrieved, if it can be considered that he is now objecting to an order passed by the municipal board under a bye-law framed under Clause (G) of Section 298. But it does not appear that the present complaint challenges directly any order passed by the municipal board; on the contrary it is a complaint under Section 133 Cr. P. C. and merely sets out that the working of the kiln is noxious to the health of the residents. That is to say, the complaint challenges not the order of the Board allowing Lalman to burn lime on a certain plot, but the manner in which Lalman carries out the permission given to him by the Board. In a parallel case decided by a Bench of the Calcutta High Court in the case of *Krishna Mohan Banerji* v. *A. K. Guha*[1], it was decided that a Magistrate was empowered to pass an order curtailing the rights of a certain person under a license. The licensee had an iron yard, but in the course of his business he made an intolerable noise which amounted to a nuisance to the public in the neighbourhood. The Judges laid down there that though the Magistrate would have acted more wisely in advising the complainant to set in motion the machinery of the local Act applicable to the case, the existence of an alternative remedy "does not deprive the Magistrate of jurisdiction"; and it appears that a similar view has been taken by this Court in the case of *Raghunandan Prasad* v. *King-Emperor*[2]. Although it is not expressly stated in that case that the factory, the noise of which was held to be injurious to the physical comfort of the community, was within municipal limits, it must be concluded that this was the case, as it was situated in a congested part of the town of Bareilly. In my own opinion the Magistrate had jurisdiction to pass an order under Section 133 Cr. P. C. to regulate the manner in which Lalman conducted his business if he found that in so doing Lalman was acting in a manner injurious to the health or physical comfort of the community. It is generally inexpedient that a Magistrate should take action in such cases, for these matters are left by the legislature to the control of the municipal boards who have a health officer to instruct them on matters of hygiene; and in this case I must consider whether the Magistrate's order was a proper order and necessary, even in a modified form, in the interests of the health of the public. As the order stands, it is a direction to remove the kiln in spite of the license given by the municipal board; and this Court would be loath to uphold such an order in toto as it would afford a disastrous precedent by allowing magistrates to interfere in matters which have been made over by the legislature to the municipal boards and the committees of public health appointed under them. But such an objection will not apply to the modification of the order proposed by the Judge and which had already been recommended by the health officer of the

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[1] 57 I. C. 829

[2] 1931 A. L. J. R. 912

Board, if I were able to hold that such a modification was justified in the interests of the public health.

I have stated above that the learned Sessions Judge at first questioned the rights of the complainant coming forward with such a complaint on the ground that it was merely a personal matter and not a *bona fide* complaint in the interests of the public. There is abundant evidence to show that this kiln and a few temples are the only building on the north-east side of the road for a considerable distance, and on the other side of the road there are a few houses. It is clear from the evidence that people who use the road have no objection whatever to the kiln; and it comes to this that the only persons who object are those living in three or four houses, more or less opposite to the kiln. I cannot help noticing that the kiln is to the north-east of these houses, and this is not the prevailing direction of the wind in the United Provinces. A lime kiln as such causes at times a rather unpleasant smell and a very little smoke. I very much question whether the majority of the Indian public have any objection whatever to the near neighbourhood of a lime kiln. At any rate, the public of Fatehgarh appear to have put with this lime kiln for the last 45 years without making any objection, and there is, in my opinion, no adequate evidence that apart from slight discomfort there are any evil effects on the public health from the mere neighbourhood of the lime kiln. I do not dispute the statement of two medical witnesses who say that certain noxious gases are formed in burning lime; but there are also two medical witnesses, who saw the kiln when it was in action, who are of opinion that no gases are formed which could be injurious to anyone. A further objection can be taken to the complaint in this case, in that the complainant himself has only recently chosen to occupy the house opposite the kiln, which was built by the owner of the kiln, and when he did so he was well aware of any discomfort that might be caused by the burning of the lime. The complainant was a free agent, and I cannot see that he had any right to set himself down in front of somebody else's lime kiln and then say that he objects to the conduct by that person of a lawful trade for which he holds a license from the local health authority, and which he has been conducting for the last 45 years. I cannot consider any good purpose will be served by making Lalman build a wall 7ft. high in front of the kiln. In the first place, I do not consider that the kiln at present is in any way dangerous to the health of the public, and in the second, I am not prepared to find that any inconvenience that is being caused by it will be diminished by the erection of a wall such as that proposed by the Sessions Judge.

Thus, though I am of opinion that the Magistrate would not have been acting without jurisdiction in ordering a licensed burner of lime to take precautions so as to prevent his trade from being a nuisance to the community, I am of opinion that in any case such an order by a Magistrate is open to general objection in so far as it must inevitably reflect on the orders of the municipal board, and in this case in particular, that it has no justification because the lime kiln in question is not a danger to the

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Pullan, J.

community, and if it causes discomfort to anyone it is only to the complainant and his immediate neighbours who have deliberately chosen to reside in a position where they are liable to be inconvenienced by the smoke and smell from the kilns.

I accordingly allow the application in revision and accept the reference in the form in which it was originally submitted, and set aside the order of the Magistrate in toto.

Application allowed

CIVIL
1931
June 11
SULAIMAN, A. C. J.
BANERJI, J.

P. K. BANERJI, *Official Liquidator*, CAWNPORE (*Applicant*)

versus

MANGAL PRASAD (*Opposite party*)[*]

Provincial Insolvency Act (V of 1920), Sec. 53—"Valuable consideration"—Meaning of—Inadequate consideration—When sale can be set aside.

A consideration would be valuable if it is not so small as to be negligible when the value of the property is to be taken into account. An inadequate consideration may be evidence of want of good faith which may itself be sufficient for the setting aside of a transfer.

SECOND APPEAL from an order of J. J. W. ALLSOP ESQ., District Judge of Cawnpore.

K. N. Katju and *M. L. Chaturvedi* for the appellant.

P. L. Banerji and *B. Mukerji* for the respondent.

The judgment of the Court was delivered by

Sulaiman A. C. J.

SULAIMAN, A. C. J.—This is an appeal by the official receiver from an order of the Insolvency Court refusing to set aside a sale dated October 4, 1926. It has now been finally settled by the pronouncement of their Lordships of the Privy Council in the case of *the Official Receiver* v. *P. L. K. M. R. M. Chettyar Firm*[1] that the burden of proof is upon the receiver to show that the transfer sought to be impugned had not been made in good faith and for full consideration. In the present case the sale deed was ostensibly for Rs.1,500 out of which Rs.500 were set forth against an amount due on a usufructuary mortgage in favour of the vendee's son, Rs.500 were to be paid to one Shahzade Lal said to be due on a promissory note dated September 5, 1926, Rs.450 were to be paid to Kishore Lal on a promissory note dated May 2, 1926 and Rs.50 were paid in cash before the sub-registrar. The vendee led evidence to prove the due execution of the mortgage deed and the promissory notes, and the attesting witnesses showed the passing of consideration. As pointed out by the learned Judge there was no evidence whatsoever on the side of the receiver to contradict the statements of the witnesses. The learned Judge declined to presume that merely because the vendor became insolvent afterwards the promissory notes were fictitious and not genuine. There may be one or two points which might arouse one's suspicion but the burden being on the receiver to prove that no consideration had passed on these promissory notes he had to lead affirmative and substantive evidence to substantiate such a plea. The court of first instance had recorded a categorical finding that these promissory notes had been executed for good consideration. The learned Judge has not differed from that finding. He has further come to the conclusion that the consideration was for value inasmuch as it could not be disputed that Rs.500 due to the usufructuary mortgagee had been paid up.

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[*] S. A. F. O. 5 of 1930

[1] 1931 A. L. J. R. 444

The learned advocate for the appellant contends that the expression valuable consideration must mean consideration which is fully adequate. 'Valuable consideration' in Section 53 of the Provincial Insolvency Act has been explained in Strouds' Judicial Dictionary as meaning money or money's worth and 'valuable' as meaning real as distinguished from a consideration that is merely illusory or nominal; but not necessarily meaning equivalent. The consideration would be valuable if it is not so small as to be negligible when the value of the property is to be taken into account. Of course, an inadequate consideration may be evidence of want of good faith which may itself be sufficient for the setting aside of the transfer.

In this particular case the learned Judge has found that there was no want of good faith. The property in question was the ultimate right of the insolvent or his successor to succeed to the estate after the death of certain ladies who had under a decree of court obtained possession for life in lieu of their maintenance.

In this case no objection was taken that no second appeal lay to the High Court. This question therefore has neither been considered nor decided.

We think that the order of the court below was right. The appeal is dismissed with costs.

Appeal dismissed

Civil
1931
June 30
Sen, J.
Bajpai, J.

MOTI CHAND AND ANOTHER (*Defendants*)
versus
THE BRITISH INDIA CORPORATION LTD., CAWNPORE (*Plaintiff*)*

*Transfer of Property Act, Sec. 52—Explanation added by Act XX of 1929—Does not introduce a new rule of law—Mortgage suit—*Lis *continued even after final decree and subsisted during pendency of execution proceedings—Sec. 70—Accession to mortgaged property—After final decree—Whether mortgagee entitled to such accession.*

The explanation appended to Sec. 52, Transfer of Property Act, by the Amending Act XX of 1929, has not introduced a new rule of law, but has put the impress of legislature upon certain judicial pronouncements in which it has been held that in a mortgage suit the *lis* continued even after the final decree and subsisted during the pendency of proceedings in execution. See *Sarjiram Marwari* v. *Barhamdeo Persad,* 2 C. L. J. 288 and *Bhawani Koer* v. *Mathura Prashad,* 7 C. L. J. 1.

The present defendant brought a suit for sale of a house and its compound on the basis of a mortgage (dated May 15, 1909) in the year *1915,* and a final mortgage decree was passed by the High Court on *December 23, 1918*. The defendant purchased the property in execution of the decree, and the sale was confirmed on *December 24, 1925*. The defendant was obstructed in obtaining possession by the present plaintiff, and the Subordinate Judge passed an order directing delivery of possession to the defendant. Thereupon the present plaintiff instituted a suit for a declaration of his proprietary right. The defendant's mortgagor had sold the property to one *M* on *June 20, 1917*, and *M* sold the property to a Transport Co., on February 7, 1919, which subsequently went into liquidation, and the present plaintiff eventually purchased the property on July 26, 1921 from the Official Liquidators. (On March 1, 1920 the Transport Co. obtained a lease from the Secretary of State for India for a piece of land which included the land covered by the mortgage in favour of the defendant. There was no evidence on the record that the defendant's mortgagor had not full proprietary rights in the land but only limited rights terminable at the option of a superior proprietor.) The Transport Co. had built new structures in the compound after 1919, i.e., after the final decree in the mortgage suit. *Held*, (1) that the present plaintiff was bound by the auction sale dated December 24, 1925. (Sec. 25 Transfer of Property Act), (2) that the defendant was not entitled to obtain possession over the new structures built by the Transport Co. after the final decree in the mortgage suit. (Sec. 70 Transfer of Property Act), (3) that the lease taken by the Transport Co. from the Secretary of State did not enlarge the title acquired under the purchase dated Feb. 7, 1919 or confer upon them an independent title.

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*F. A. 561 of 1927

FIRST APPEAL from a decree of W. E. J. DOBBS ESQ., Subordinate Judge of Naini Tal.

B. E. O'Conor, P. L. Banerji and *Govind Das* for the appellants.

K. N. Katju for the respondents.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This appeal arises out of a suit brought by the British India Corporation Ltd., Cawnpore, against Raja Moti Chand and Lala Gokul Chand, defendants first party, and Lala Lalta Prasad, Jhabu Lal and Shri Kishen Chand, defendants second party. The defendants first party will for convenience's sake in this judgment be called as Raja Moti Chand and the defendants second party as Lalta Prasad. The plaintiffs prayed that (1) a decree be passed against the defendants declaring the proprietary right of the plaintiffs in the plaint properties and declaring that the said properties are not affected by a mortgage executed by Lalta Prasad in favour of Moti Chand on May 15, 1909 and are not saleable in execution of the decree obtained by Raja Moti Chand against Lalta Prasad; (2) it be declared that the sale in favour of Raja Moti Chand in November 1925 is null and void and ineffectual as against the plaintiffs; (3) an order of December 24, 1926 passed by the court of the Subordinate Judge and Deputy Commissioner of Naini Tal be set aside. The court below has passed a decree in favour of the plaintiffs against the defendants for the property claimed on payment of Rs.8,000. Raja Moti Chand has filed the present appeal against the said decree.

It appears that on May 15, 1909 Lalta Prasad executed a simple mortgage in favour of Raja Moti Chand, hypothecating among other properties

> one bungalow with *pacca* houses and *sisam* trees, etc., within the enclosure mortgaged, boundaries given, situate in Mohalla Kathgodam, district Naini Tal, purchased under the sale-deed executed and got registered on October 22, 1885.

The exact area of this land is not given in the mortgage-deed, but from other documents it appears that the area is 6¼ bighas, and it has not been contended before us by any party that the area was anything else. Raja Moti Chand brought a suit in the court of the Subordinate Judge of Aligarh upon the basis of this mortgage and obtained a simple money decree on April 15, 1915. On July 19, 1915, First Appeal No. 225 of 1915 was filed in the High Court by Raja Moti Chand in which he claimed that he should have been given a mortgage decree. On December 14, 1917, the High Court accepted the appeal of Raja Moti Chand and gave him a preliminary mortgage decree, and the decree was made final on December 23, 1918. This decree was transferred to Naini Tal for execution, and on November 24, 1925, the property mentioned above was purchased by Raja Moti Chand. The sale was confirmed on December 24, 1925 and the sale certificate was obtained on May 29, 1926. Raja Moti Chand was evidently obstructed in obtaining delivery of possession by the British India Corporation but on December 24, 1926, the Subordinate Judge of Naini Tal passed an order directing delivery of possession to Raja Moti Chand against the British India Corporation, and this last order has given the plaintiffs the cause of action to maintain the present suit. It may be mentioned here that in the mortgage litigation the British India Corporation was not a party and the entire proceedings connected with that litigation were conducted against Lalta Prasad (defendants second party alone) till we come to the time when the British India Corporation offered obstruction to Raja Moti Chand in his attempt to obtain possession.

We now propose to trace the title to this property, and the earliest that we can go is the year 1885. On October 22, 1885, one Mrs. Purcell sold this property which was described as

> the house situated on the South of the railway station at Kathgodam, Kumaun district, consisting of four large rooms, four small rooms, two verandahs and its compound

to the Right Reverend Bishop and Vicar Apostolic of Patna for a sum of Rs.6,000. On March 30, 1892, one Frederic Edward George Mathews, acting as the general attorney of the Bishop, sold the same to Lala Lalta Prasad. On June 20, 1917, Lalta Prasad and his two sons Jhabu Lal and Shri Kishan Chand sold the same to one Moti Singh, and in this sale-deed the property is described as having an area of 6¼ bighas. It might be mentioned that before this the mortgage in favour of Raja Moti Chand had been effected and Moti Singh obviously purchased this property with the burden of the mortgage in favour of Raja Moti Chand. Moti Singh sold the property on February 7, 1919 to Mr. J. E. da Fonseca, managing proprietor of the Naini Tal Motor Transport Company Limited, and in this document also the property is described as having an area of 6¼ bighas. On March 1, 1920, the Naini Tal Motor Transport Company obtained a lease from the Secretary of State for India for land measuring 8 bighas and odd for 30 years on an annual rental of Rs.202. It has been found by the court below that these 8 bighas and odd include an area of 6¼ bighas which is the subject of dispute in the present litigation. We have considered the evidence and are satisfied that this finding is correct. The Naini Tal Motor Transport Company subsequently went into liquidation, and the Official Liquidator of the Naini Tal Motor Transport Company sold this property to the British India Corporation on July 26, 1921. On August 17, 1921, the High Court at Fort William Calcutta ordered that the sale to the British India Corporation of the movable and immovable properties as also of the good-will of the business of the Naini Tal Motor Transport Company completed on the 26th day of July 1921 be confirmed. The British India Corporation have now enclosed the entire 8 bighas 11 biswas of land covered by the lease of March 1, 1920 and have made certain additions to the old buildings. The above statement of facts which are practically admitted will indicate the nature of the title advanced by the two contending parties, and we have got to adjudicate upon their rights. The court below has passed a declaratory decree in favour of the plaintiffs against the defendants with reference to the property claimed subject to a payment of Rs.8,000 to Raja Moti Chand. The plaintiffs are satisfied with this decree; but Raja Moti Chand in this appeal impugns this decree and contends that he has an indefeasible title to the property under his purchase. In the court below, it was argued on behalf of the Raja that he was entitled to the entire area of 8 bighas odd and to all the buildings that had been subsequently added as accretions to the original security, but in this Court Mr. Pearey Lal Banerji on behalf of the appellants has definitely abandoned this position and his prayer is that he should be given possession over land measuring 6¼ bighas and the buildings that stood thereon at the time of the mortgage and the sale and, if some portions of the old constructions have been demolished and new constructions erected instead, then he should get possession over such new constructions, or some other suitable orders passed which might adjust the equities between the parties. We shall decide the present appeal upon the basis of the position that has been taken before us by the learned advocate for the appellants.

The third issue before the court below was: "What are the existing boundaries and area of the land mortgaged in 1909"? and the finding upon this issue is in the following words:

> During the hearing of the suit I made an inspection of the locality; and the result of my inspection is embodied in a note, dated July 8, 1927 (page 13 of our record). A plan was prepared by an Amin, who proved it in court. I find that the area which I have shaded blue in the Amin's map (Exhibit B) is that which was mortgaged in 1909. The area is 6 bighas 3 biswas and the boundaries are as shown in the said map.

This finding has not been attacked by either party and we must take it that the present area of the mortgaged land is 6 bighas 3 biswas and the

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same has been demarcated by the court below in the Amin's map referred to above.

The fourth issue in the court below was:

> which or which portions of the existing buildings stand outside the boundaries referred to in issue 3?

and the finding thereon was as follows:—

> The map (Exhibit B) also shows the existing buildings which stand outside the limits referred to in the last issue. The big new Workshop; the Engineering Office, and the Store are entirely outside the mortgaged area.

This finding is based upon evidence and upon the Judge's inspection note and is not seriously challenged by either party. The fifth issue was: "Are any portions of the existing buildings unaffected by the mortgage?" and the decision thereon was:

> The buildings referred to under issue 4 are in any case unaffected by the mortgage. The extra land which was obtained on lease cannot be regarded as 'accruing' to the mortgaged area.

In view of the position taken by Mr. Banerji, it is not necessary for us to examine the legality or propriety of this finding and we must accept it correct. From the evidence of Mr. Vaughan it appears that there were formerly 4 main rooms and 4 bathrooms in the main building, a verandah in front and a small verandah behind. In 1915 the front verandah was closed and a room made and about the same time another room was made closing the back verandah. These alterations were made during the subsistence of the mortgage before it was put in suit, and it is contended that the mortgagee is entitled to these either as accessions or as substituted security unless his right to them is barred by some rule of law. From Moti Singh's evidence it appears that Mr. Fonseca built a room adjoining the bungalow and a long office and a kitchen. This room adjoining the bungalow, the long office and the kitchen were built after 1919, i.e., after the final decree obtained by Raja Moti Chand, and we shall have to consider whether the Raja can lay claim to these constructions.

The first contention that has been advanced on behalf of the appellants is that the plaintiffs being purchasers *pendente lite* could not set up their title by purchase as against the claim of the appellant mortgagee under the decree. It is quite clear that apart from certain complications, which we shall notice later on, Moti Singh who is in a certain sense the predecessor of the present plaintiffs purchased the property on June 20, 1917 during the pendency of the mortgage suit initiated by the appellants. It may be noted here that the court below is in error when it says:

> After he (Moti Singh) purchased the property, an appeal was preferred to the High Court and the decree was given against the property.

It is conceded that the appeal in the mortgage suit was filed on July 19, 1915, and Moti Singh's purchase was made on June 20, 1917 during the pendency of the appeal in the High Court which was decided on December 14, 1917. The provision of law which has been relied upon by the appellants is contained in Section 52 of the Transfer of Property Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit. *See* the case of *Gobind Chunder*

Roy v. *Guru Churn Kurmokar*[1]. Further in a mortgage suit the *lis* does not terminate with the preliminary decree but must be deemed to continue at least till the passing of the final decree, vide *Parsotam Narain* v. *Chheda Lal*[2] and *Shib Chandra* v. *Lachmi Narain*[3]. It is obvious, therefore, that at least up till November 23, 1918 when the final decree in the mortgage suit was passed the property could not be transferred or otherwise dealt with by any party to the suit or his representative so as to affect the rights of any other party thereto under any decree or order which might be made therein. The sale by Lalta Prasad to Moti Singh on June 20, 1917 could not in any way affect the rights which Raja Moti Chand obtained under his decree.

The question that immediately arises is: what are the rights which Raja Moti Chand obtained under the decree and the auction sale, and to what extent are the plaintiffs affected by them? On November 24, 1925, Raja Moti Chand purchased one bungalow with *pukhta* houses and *sisam* trees, etc., within the enclosure mortgaged (boundaries given) situate in Kathgodam, district Naini Tal, acquired under sale-deed, dated and registered on October 22, 1885. It may be mentioned that neither the British India Corporation, nor the Secretary of State for India, nor the Naini Tal Motor Transport Company, nor Moti Singh were parties either to the mortgage suit of Raja Moti Chand or to the execution proceedings connected with the mortgage suit. We shall for the time being exclude out of our consideration the Secretary of State for India, but from what we have said above it is clear that every one of these persons is bound by the final decree obtained by Raja Moti Chand on November 23, 1918, so far as they are the successors-in-interest of Lalta Prasad. This follows from the text of Section 52 of the Transfer of Property Act of 1882 before its amendment. The amending Act of 1929 has not introduced a new rule of law in the following explanation appended to Section 52:

> For the purposes of this Section the pendency of a suit or proceeding shall be deemed . . . to continue until . . . the suit or proceedings has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained

but has put the impress of Legislature upon certain judicial pronouncements in which it has been held that in a mortgage suit the *lis* continued even after the final decree and subsisted during the pendency of proceedings in execution—*see* the case of *Sarjiram Marwari* v. *Barhamdeo Pershad*[4]. In the case of *Bhawani Koer* v. *Mathura Prasad*[5] Mukerjee, J. observes as follows:—

> It is quite clear, in the first place, that the mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations. This view is supported by the decisions of Lord Ellenborough in *Drake* v. *Mitchel*, [1803] 3 East 251, namely, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party. This

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[1] I. L. R. 15 Cal. 94

[2] I. L. R. 29 All. 76 at 80

[3] 33 C. W. N. 1091 (P.C.)

[4] 2 C. L. J. 288

[5] 7 C. L. J. 1 at 30

> principle has been recognized in the cases of the highest authority which will be found reviewed in the judgment of this Court in *Sarjiram Marwari* v. *Barhamdeo Pershad*, 2 C. L. J. 202 at 214. It follows, consequently, that the fact that the defendant obtained a decree on his mortgage did not extinguish his security.

Under Section 89 of the Transfer of Property Act (IV of 1882) when an order absolute under that section for sale of the mortgaged property was obtained the security was extinguished, and therefore, there are cases including decisions of the Privy Council which lay down that after an order absolute if the property should not be redeemed, "that matter passes from the domain of contract to that of judgment"—*Sunder Koer* v. *Rai Sham Krishen*[6], *Het Ram* v. *Shadi Ram*[7] and *Matru Lal* v. *Durga Kunwar*[8]. These cases are no longer law in view of the repeal of Section 89 of the Transfer of Property Act and the enactment of Order XXXIV of the Civil Procedure Code of 1908. This matter has been clearly brought out in the decision of *Sukhai* v. *Ghulam Sattar Khan*[9], and, therefore, we think that the principle of law enunciated by Mr. Justice Mookerjee in *Bhawani Koer's* case is sound. The result is that the British India Corporation so far as they are the representatives of Lalta Prasad, are bound by the auction sale of November 24, 1925. Two consequences follow from this: (*a*) The British India Corporation have lost their right to redeem Moti Chand's mortgage and (*b*) Raja Moti Chand has acquired an indefeasible title as against them. Indeed the British India Corporation have never offered to redeem and we are inclined to hold that they are aware that they have no right to redeem. The auction sale is clearly binding upon the British India Corporation in so far as they are the successors-in-interest of Lalta Prasad.

Raja Moti Chand's purchase included the building and such rights in the land as Lalta Prasad possessed. We have now to see what rights Lalta Prasad possessed in the land which has now been found to have an area of 6 bighas and 3 biswas as marked in the Amin's map by the court below. Mrs. Purcell sold to the Bishop of Patna and the Bishop of Patna sold to Lalta Prasad and Lalta Prasad mortgaged to Moti Chand. There is no suggestion that the right in the land which was dealt with by these transactions was anything but proprietary right. It is true that Moti Singh says that he used to pay Rs.3 yearly rent to the Tahsil, but we have no other material on the record from which we could come to the conclusion that Mrs. Purcell, the Bishop of Patna or Lalta Prasad, had not permanent rights in the land but only limited rights terminable at the option of a superior proprietor. It has been argued by Dr. Katju who appeared on behalf of the respondent that on March 1, 1920 the Naini Tal Motor Transport Company obtained a 30 years' lease (renewable again after the lapse of 30 years) from the Secretary of State for India, and these rights could in no event be sold, for he says that, as these lessee rights were acquired after the final decree, there is no equity in favour either of the mortgagee or of the purchaser at the court auction to have such acquisitions taken away from the person who paid for them and attached to the property covered by the decree, and he relies upon the case of *Hardhan Chakarvarty* v. *Hargobind Dutta*[10] and *Mysore Kopniah Sivananjiah* v. *K. Sithey Goudar*[11]. Even if we were to agree that there can be no accession to the mortgage security after the passing of the final decree, we are of the opinion that the action of the Naini Tal Motor Transport Company in obtaining a lease from the Secretary of State for India does not enlarge their proprietary interest, acquired by them under the sale-deed dated February 7, 1919. As we said before, there is no material on the record from which we can gather that Lalta Prasad had limited rights in the land and, if therefore the Naini Tal Motor Transport Company in a spirit of caution or under the stress of certain unexplained circumstances took certain proceedings to ensure the continuance of their possession, this did not enlarge their title acquired under the purchase dated February 7, 1919 or confer upon them an independent title. It may be mentioned here that the Naini Tal Motor Transport Company paid no premium to the Secretary of State for India but only agreed to pay a yearly rent of Rs.202 and executed a building lease upon certain terms. The buildings which they have constructed outside the mortgaged area, will, as has been conceded by the learned advocate for the appellants, belong to the British India Corporation. There is thus no hardship cast upon them.

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[6] I. L. R. 34 Cal. 150 at 161 (P.C.)

[7] I. L. R. 40 All. 407

[8] I. L. R. 42 All. 364

[9] I. L. R. 43 All. 469

The Secretary of State for India was no party either to the mortgage suit or to the execution proceedings and is not the successor-in-interest of Lalta Prasad and is of course not bound in any way by the decision of the suit.

Our conclusion, therefore, is that Raja Moti Chand is entitled, unless barred in some other way, to the land marked in the Amin's map by the court below. We have now to see what rights he has in the buildings. By parity of reasoning and in view of our findings it follows that Raja Moti Chand is entitled to obtain possession over the residential bungalow exclusive of the room adjoining the bungalow and long office and a kitchen, unless some other principle of law stands in his way.

It was finally argued before us on behalf of the respondents that we should not interfere with the decree of the court below by reason of the fact that Section 51 of the Transfer of Property Act is applicable to the facts of the case, and that provision of law gives an option to the British India Corporation, and the court below has given effect to that option correctly. On the other hand, it was argued on behalf of the appellants that Section 51 cannot be taken advantage of by a person to whom Section 52 applies. This contention is founded upon the principle enunciated by a Division Bench of this Court in *re*: *Mohammad Shafiq Ullah Khan* v. *Muhammad Sami Ullah Khan*[12] by which we are bound. But we are of the opinion that the plaintiff-respondent is not entitled to the benefit of Section 51, and in our view Section 51 works out in a way different from the way in which the court below has worked it out. It runs as follows:

> When the transfer of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and

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[10] 6 Pat. L. J. 347

[11] 41 Mad. L. J. 490

[12] 1930 A. L. J. R. 57 at 60

> he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the imporvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

It is obvious that the British India Corporation are the transferees of immovable property and the persons subsequently evicted therefrom and Raja Moti Chand is the person having a better title within the meaning of the section. The consequence, therefore is that the British India Corporation have a right to require Raja Moti Chand either to have the value of the improvement estimated and paid to them or to ask Raja Moti Chand to sell his interest in the property to the British India Corporation at the then market value thereof irrespective of the value of such improvement. Upon this reading of the law it is clear that the British India Corporation can put Raja Moti Chand upon election, and it is for Raja Moti Chand to decide whether he will pay up the British India Corporation or whether he will sell his own interest to the British India Corporation. The court below, however, without putting Raja Moti Chand upon an election has compelled him to sell his interest to the British India Corporation, and therein we think it has fallen into an error, but we think that there is no occasion for Section 51 to come into play at all. So far as the 'improvements' are concerned there has been no improvement in the land according to our view and so far as the buildings are concerned, we have already held that Raja Moti Chand will not be entitled to the new room adjoining the bungalow, the long office and the kitchen built by Mr. Fonseca after 1919. Moreover, it is not made out by the evidence on the record that the British India Corporation believed in good faith that they were absolutely entitled to the immovable property in question. No body on their behalf has entered into the witness-box to state that they made any enquiries and that the result of those enquiries was that the Corporation was lulled into a sense of security. Neither the recitals contained in the sale-deed of July 26, 1921 nor the bald statement of Moti Singh Bhat that he had no information of any incumbrance can be of any avail to the plaintiff respondent. Moreover we are not impressed by the statement of Moti Singh. Section 51 of the Transfer of Property Act is, therefore, inapplicable. Our conclusion finally is that there is nothing in law which would stand in the way of Raja Moti Chand's claiming possession over the land marked in the Amin's map and over the residential bungalow. Here his right ceases. He has no right to the lands outside this area and to the room adjoining the main building, the long office and the kitchen built after 1919.

The result is that we allow this appeal, set aside the decree of the court below and substitute therefor a decree declaring the proprietary right of the plaintiffs over (1) the property mentioned in Schedule A, (excluding therefrom the land marked blue in the Amin's map and the residential bungalow) and (2) the end-room adjoining the main building, the long office and the kitchen which were built after 1919. It is also declared that the properties that have been secured to the plaintiffs by our decree are not affected by the mortgage and sale in favour of Raja Moti Chand. The

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order of December 24, 1926 passed by the court of the Subordinate Judge and Deputy Commissioner of Naini Tal so far as it affects the properties decreed to the plaintiffs, is set aside.

The plaintiffs have succeeded to some extent but have lost to a greater extent, and we think that the proper order to make on the question of costs is that the plaintiffs will get one-third of the taxable costs from the defendants first party and the defendants first party will get two-thirds of their taxable costs from the plaintiffs in both courts. Defendants second party will bear their own costs which they have incurred.

Appeal allowed

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1931
July 6
MUKERJI, J.
ALLEN, J.

MUNNI BIBI *alias* AMBIKA DEI AND ANOTHER (*Plaintiffs*)
versus
TIRLOKI NATH AND OTHERS (*Defendants*)*

Contract Act, Sec. 69—'Person interested in payment'—Meaning of—Whether charge created by payment.

A creditor instituted a suit for a declaration of his right to attach and sell a house, which he alleged belonged to the judgment-debtor, in execution of his decree. He joined as defendants the present appellant to whom the house passed if the title was with the judgment-debtor, and one *K*, who claimed to be the owner of the house—the present first three respondents being the descendants of *K*. *K* died shortly afterwards. Thereupon *K's* son paid off the decree and retained possession of the house. The present appellant instituted a suit for possession within limitation. The High Court dismissed the suit, and held that the previous judgment did not operate as *res judicata*. On appeal the Privy Council took a contrary view on the question of *res judicata* and decreed the suit. The respondents however contended that they were entitled to get the money paid by *K's* son as a condition precedent to the plaintiff getting possession. The Privy Council remanded the case to the High Court for decision on this point. *Held*, that the question whether the previous decision operated as *res judicata* was a difficult question of law, and *K's* son had occasion to believe and did believe that the judgment in the creditor's suit was not conclusive as between the defendants, and that an earlier judgment in which *K's* title to the house was upheld yet stood in his favour, and therefore *K's* son acted as a person interested in payment within the meaning of Section 69 of the Contract Act. *Dakhina Mohan Roy* v. *Saroda Mohan Roy*, I. L. R. 21 Cal. 142 *approved*. *Tulsha Kunwar* v. *Jageshwar Prasad*, I. L. R. 28 All. 563, *Radha Madhub* v. *Sasti Ram*, I. L. R. 26 Cal. 825, *Janki Prasad* v. *Baldeo Prasad*, I. L. R. 30 All. 167 and *Chedi Lal* v. *Bhagwan Das*, I. L. R. 11 All. 234 *referred to*. (2) that Sec. 69 gave only a personal remedy to *K's* son and there was no charge in favour of *K's* son on the particular property now in suit. Accordingly the present plaintiffs were entitled to a decree for possession without any condition sought to be attached by the defendants. *Seth Chitor Mal* v. *Shib Lal*, I. L. R. 14 All. 273 *followed*.

APPEAL against the decree of the Additional Subordinate Judge of Agra.

Kailas Nath Katju, B. Malik and *G. Agarwala* for the appellants.

Sir T. B. Sapru, N. P. Asthana and *S. N. Seth* for the respondents.

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*P. C. A. 12 of 1925

The judgment of the Court was delivered by

MUKERJI, J.—The present proceedings arise out of F. A. No. 79 of 1922 of this Court, from the decree in which an appeal was filed before their Lordships of the Privy Council as Privy Council Appeal No. 12 of 1925. Their Lordships of the Privy Council decided the appeal, reversed the judgment of this court but left one point to be determined by this Court and that point is, whether in the circumstances of the case, the plaintiffs cannot recover possession of the property decreed to them except on payment of a sum of Rs.7,200 and interest thereon or any other sum?

The judgment has been reported in the local law journal (1931 A. L. J. 453) and is of course also on the record. The facts are given there and we shall not state them in detail again.

Two questions have been argued before us. The first is whether the claim on behalf of the descendants of Gokul Nath comes within the purview of Section 69 of the Indian Contract Act? And secondly, if it does, whether the defendants can insist on being paid as a condition precedent to the plaintiffs getting possession?

On the first point we do not feel any difficulty in holding in favour of the defendants. Section 69 of the Indian Contract Act runs as follows:—

> A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other.

In the litigation that took place at the instance of Narain Singh and which ended with the decree in his favour in this court on January 18, 1912 (page 292) there can be no doubt that the title of Gokul Nath's mother Kashi Dei was entirely negatived. There were two judgments and each party relied on one of them. For the defendants it was argued that the judgment of April 18, 1895 (page 221) operated as *res judicata* against the plaintiffs and on behalf of the plaintiffs it was contended that the judgment of January 18, 1912 (p. 292) operated as *res judicata*. The court of first instance held that the later judgment operated as *res judicata*. This Court held that the earlier judgment operated as *res judicata* and their Lordships of the Privy Council held that the first court was right.

There can be no doubt that it was a difficult proposition of law to decide, viz., whether in spite of the decree given to Narain Singh, the question of title was or not open as between the defendants? This Court thought that the judgment in Narain Singh's favour, although it allowed Narain Singh to sell the property in suit as the property of Amar Nath, left the question of title open as between the heir of Amar Nath and the heirs of Kashi Dei and her son Gokul Nath. In their judgment which was reversed by their Lordships of the Privy Council, the learned Judges held that the payment of Gokul Nath was a payment made in good faith and in the belief that his title to the house was a good one (*see* page 97 of the printed record). It is impossible to believe that Gokul Nath would go and raise money on the security of his own property, besides the property in suit, and pay the large sum of Rs.7,200 to Narain Singh, if he had not believed that the judgment obtained by Narain Singh did not settle the question of title as between himself and Amar Nath's heirs.

That being the case, the question is whether Gokul Nath acted as a person interested in payment within the meaning of Section 69 of the Indian Contract Act?

There are numerous cases including a decision of their Lordships of the Privy Council in which it has been held, in effect, that the words "a person who is interested" do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. The decisions point to the conclusion that all that is necessary for a person making a payment to recover it is that he should really believe and honestly believe that he must make the payment in his own interest. If we accept this interpretation we should have no hesitation in holding that Gokul Nath came within the rule of law.

In the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[1] the plaintiff paid the money when he had a decree in his favour, which decree was subsequently reversed in appeal. At page 148 of the report their Lordships of the Privy Council are reported to have said:

> Now, it seems to their Lordships to be common justice that, when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own, to reimburse himself out of the rents.

It has been argued that this case does not apply because Gokul Nath had the judgment of this court dated January 18, 1912 before him and as a sane person should have seen that that judgment took away any vestige of title that might have otherwise remained in him. We have however already met this point and have shown that in spite of this judgment Gokul Nath had occasion to believe and did believe that the judgment was not conclusive as between the defendants and that the earlier judgment yet stood in his favour.

Several other cases, viz., *Tulsha Kunwar* v. *Jageshar Prasad*[2], *Kushal Singh* v. *Khawani Lal*[3], *Bindubashini Dassi* v. *Harendra Lal Roy*[4] and *Radha Madhub* v. *Sasti Ram*[5] have been cited on behalf of the defendants.

As against these cases, the learned counsel for the plaintiffs has cited three cases decided by this Court, viz., *Janki Prasad* v. *Baldeo Prasad*[6], *Khuddo* v. *Durga Prasad*[7] and *Chedi Lal* v. *Bhagwan Das*[8].

We have examined all the cases cited by either side. These cases may be divided into two lots. In one set of cases, it was found that the person who made the payment was actually interested in making the payment and did make the payments in good faith. In the other set of cases it was found, and in this set come the cases cited on behalf of the plaintiffs, that where the plaintiff knew perfectly well and had no occasion to believe otherwise, that he had no vestige of title under which he could make a payment, he could not recover.

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[1] I. L. R. 21 Cal. 142
[2] I. L. R. 28 All. 563
[3] 1906 A. W. N. 282
[4] I. L. R. 25 Cal. 305
[5] I. L. R. 26 Cal. 825
[6] I. L. R. 30 All. 167
[7] 3 A. L. J. R. 729
[8] I. L. R. 11 All. 234

There is no difficulty really in the law itself, but the difficulty arises in the application of it to the particular facts of a case. We are of opinion that Section 69, as interpreted by their Lordships of the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[9] does apply and Gokul Nath was interested in making the payment and if he had brought a suit within the period of limitation, the plaintiffs could not possibly have resisted it on the ground that they were not bound to reimburse him.

The second point raised is of some difficulty and no case has been cited on behalf of either side in support of the arguments advanced.

The argument on behalf of the defendants is that Section 69 is based on equitable principles and that no question of limitation arises when the claim is made by the defendants. On the other hand, the argument for the plaintiffs is this. Supposing that Section 69 applied, it gave only a personal remedy to Gokul Nath against the heirs of Amar Nath and there was no charge in favour of Gokul Nath on the particular property now in suit. It is further argued that there being no charge, it was open to Gokul Nath, if he had brought a suit to recover his money, to realise it by sale of any property belonging to the heirs of Amar Nath and, therefore, it cannot be said that the payment is particularly connected with the property now in suit and with no other property.

There is a difference of opinion among the High Courts of India as to whether a person, who makes a payment on account of another, in respect of an immovable property, acquires or not a lien or charge on the property so saved, by way of a salvage lien. In this High Court the principal case is that of *Seth Chitor Mal* v. *Shib Lal*[10] and the same view is taken in Calcutta in *Kinu Ram* v. *Mozaffer Husain*[11]. In Madras a contrary view was taken and a charge was granted and Bombay followed Madras. In Bombay, however, a contrary view was taken later on and in accordance with the view of the Allahabad High Court. In England no charge is allowed (*see* Coote's Law of Mortgage 1927, page 1381). As members of the Allahabad High Court, we are bound to follow the Full Bench decision of this Court and must hold that no charge is created by the payment. That being so, it appears to us that it is not open to the defendants to say that this particular property now in suit must make good the money which Gokul Nath was entitled to recover at the hands of the heirs of Amar Nath.

We decide accordingly, and hold that the plaintiffs are entitled to a decree for possession as was granted to them by their Lordships of the Privy Council without any condition sought to be attached by the defendants. We see no reason to alter the order as to costs as made by the Subordinate Judge whose judgment was ultimately upheld by their Lordships of the Privy Council. As to further costs incurred since the case was remitted to this court, it should follow the event and, therefore, we direct that the defendants shall pay the costs of the plaintiffs of the present hearing.

[9] I. L. R. 21 Cal. 142 [10] I. L. R. 14 All. 273 [11] I. L. R. 14 Cal. 800

CRIMINAL

1931

Sep. 3

SULAIMAN, J.
NIAMAT-ULLAH, J.

KING-EMPEROR
versus
PATRAKHAN*

Criminal Procedure Code, Secs. 438 and 435—Sec. 435 applies exclusively to proceedings before inferior courts—Case decided by Sessions Judge—District Magistrate makes reference to High Court—Reference improper—Duty of District Magistrate.

Where the District Magistrate examined the record of a case decided by the Sessions Judge, and made a reference to the High Court recommending that the sentence of transportation for life should be altered to one of death, *held*, that Sec. 435 Cr. P. C. applies exclusively to the proceedings before an inferior court, and the District Magistrate acted with impropriety.

A District Magistrate is inferior as a court to the Sessions Judge. It is no business of a District Magistrate, on the judicial side, to criticize the propriety of the view taken by the superior court. It is his imperative duty to abide by the conclusion of the sessions court loyally and faithfully. If however he considers that there is room for reconsideration, he may on the administrative side approach the local Government or the Government Advocate with the request, that the High Court should be moved by means of a revision to consider the propriety of the sentence. He cannot sit in judgment over the Sessions Judge and bring his own views to the notice of the High Court.

CRIMINAL REFERENCE made by BABU LAKSHMI NARAIN TANDON, Sessions Judge of Shahjahanpur.

M. Waliullah (Assistant Government Advocate) for the Crown.

S. C. Mittra for the opposite party.

The judgment of the Court was delivered by

SULAIMAN, J.—It is difficult to characterise this matter although it has been treated as a criminal reference by the District Magistrate. The Sessions Judge in a sessions trial convicted the accused under S. 302 I. P. C. but for reasons given in the concluding portion of the judgment he inflicted the lesser sentence of transportation for life. *Sulaiman, J.*

The local Government pleader appears to have addressed a letter to the local District Magistrate giving reasons why the sentence of death should have been passed. On this, the District Magistrate sent a letter to the Registrar of the High Court enclosing the Government pleader's letter and recommending that a death penalty instead of transportation for life should be imposed on the accused. The Registrar very properly returned this letter and the record to the District Magistrate and declined to entertain it when it was sent direct. He however suggested that the record may be resubmitted through the Sessions Judge as laid down in Chapter X, R. 6 of the General Rules (Criminal). We may add that this rule refers to cases which can be properly referred by District Magistrates. The District Magistrate then submitted the two letters to the Sessions Judge for being forwarded to the High Court and the Sessions Judge has forwarded them with his own remarks. He has taken serious objection to two expressions used by the District Magistrate in his original letter addressed

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*Cr. Ref. 249 of 1931

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Sulaiman, J.

to the Registrar, as well as to its general tone.

A learned Judge of this Court ordered notice to issue to the accused to show cause why the sentence should not be enhanced and remarked that the complaint of the Sessions Judge would be considered at the hearing.

No doubt, as the record has come to the High Court, though in a most irregular manner, we have jurisdiction to intervene in revision and consider the propriety of the sentence, but we are not bound to do so.

It has been pointed out by this Court times out of number that a District Magistrate is inferior as a court to the Sessions Judge. It is no business of a District Magistrate, on the judicial side, to criticise the propriety of the view taken by the superior court, namely, the sessions court. It is his imperative duty to abide by the conclusion of that court loyally and faithfully. If however he considers that there is room for reconsideration, he may on the administrative side approach the local Government or the Government advocate with the request that the High Court should be moved by means of a revision to consider the propriety of the sentence. The District Magistrate cannot be allowed to sit in judgment over the Sessions Judge, and criticise the views of the Sessions Judge and bring his own views to the notice of the High Court.

This case is still worse because even the criticisms of the Government pleader on the judgment of the Sessions Judge have been attempted to be placed before the High Court.

The only section under which a court is competent to call for or examine the records of a criminal case is S. 435 Cr. P. C. But that section applies exclusively to the proceedings before an inferior criminal court and not those before a superior court. The District Magistrate has therefore acted with impropriety in examining the record of the case decided by the superior court, and making a reference to the High Court.

As remarked above, we have jurisdiction to consider the matter on its merits as the record has come before us somehow. But it would be encouraging district magistrates to adopt a course authorised by law if after condemning the action we were to entertain the reference. We think that the best way of marking our disapproval of the way in which the matter has been forwarded to the High Court is to decline to consider the matter on its merits.

We must also point out that the Sessions Judge has very properly taken objection to at least two expressions in the letter of the District Magistrate. He remarked:

> The Sessions Judge in his judgment talks about extenuating circumstances.

The word "talks" is a colloquial word most unbecoming for a district magistrate to use in reference to a judgment passed by a court of law superior to him. We are astonished that he should have used such a word. Similarly, the reasons which were given by the Sessions Judge might be good, bad or indifferent, but we think that it was improper on the part of the District Magistrate to call them "quite inscrutable". It is the duty of the subordinate courts to show respect and be courteous to superior courts. We trust that our remarks will be borne in mind by the District Magistrate in future. Let the record be returned.

Civil

1931

Nov. 3

Mukerji, J.
Niamat-ullah, J.

NANHI (*Defendant*)
versus
KETKI (*Plaintiff*)*

Transfer of Property Act, Sec. 55 (2)—Sale deed—Covenant—Entitling vendee to recover consideration by sale of property sold—On being dispossessed from whole or part of property—Whether implied covenant of title in terms of Sec. 55 (2) excluded.

Where there was an express covenant in the sale deed entitling the vendee, on being dispossessed from the whole or part of the property sold, to recover the whole of the consideration by sale of the property transferred or from other property; *held*, that there was nothing in the sale deed which excluded an implied warranty of title, contemplated by Sec. 55 (2) T. P. Act, nor was there anything in the sale deed which limited the vendee's remedy to the rescission of the contract; and the covenant was an enabling clause, intended for the benefit of the vendee, and conferred a right, which he would not otherwise possess, and which he could exercise in addition to any right which the law gave him.

SECOND APPEAL from a decree of BABU RATAN LAL, Additional Subordinate Judge of Farrukhabad, reversing a decree of BABU MOTI LAL, Munsif.

P. N. Sapru for the appellant.

U. S. Bajpai and *G. S. Pathak* for the respondent.

The judgment of the Court was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This is an appeal by the defendant and arises out of a suit brought by the plaintiff-respondent for damages for breach of a covenant, alleged to be express and, in the alternative, said to be in a sale-deed dated March 22, 1912, executed by the defendant-appellant in favour of the plaintiff-respondent for a sum of Rs.2,000, conveying certain house property. The court of first instance dismissed the suit. The lower appellate court has decreed the plaintiff's claim for a smaller amount than that claimed by the plaintiff.

The deed recites that the vendor has placed the vendee in possession of the entire vended property and that part of the property was the subject of a deed of gift in favour of one Jwala Prasad but that the vendor subsequently cancelled it by executing a deed of annulment. The implication of these recitals is that the vendor is the absolute owner of the property in spite of the infructuous deed of gift referred to.

One of the clauses of the sale-deed provided that:

> If, God forbid, the whole of the property transferred, or any portion thereof, goes out of the possession of the vendee on account of any transfer or incumbrance, etc., by her, or by her ancestors, or by any person who claims to be the owner of the property, on the basis of any law, custom or Shastra, the vendee shall have a right to recover his consideration money along with damages and costs from the property transferred or from other movable or immovable property of hers.

The vendee was resisted in taking possession of the property to which the deed of gift and the deed of annulment, already referred to, related. The

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*S. A. 347 of 1929

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Niamat-ullah, J.

vendee and the vendor both instituted proceedings for recovery of the property covered by them; but they were unsuccessful. Thereupon, the plaintiff-respondent brought the present suit for recovery of a proportionate amount of the consideration paid under the sale-deed.

The defence was that no warranty of title was given by the vendor to the vendee and that the plaintiff was not entitled to recover a proportionate part of the consideration paid under the sale-deed. There were other defences also, which it is not necessary to mention for the purposes of this appeal.

The court of first instance dismissed the plaintiff's claim, as already stated, holding that the covenant, contained in the sale-deed, did not entitle the plaintiff to a proportionate amount of the consideration. The lower appellate court has taken a contrary view on that question and has held, in addition, that there is an implied warranty of title under Section 55 (2) of the Transfer of Property Act.

The learned counsel for the defendant-appellant argues, (1) that the implied covenant of title in terms of S. 55 (2) of the Transfer of Property Act is excluded by the express covenant, contained in the deed and relied on by the plaintiff, and (2) that the plaintiff-respondent is bound to have the sale transaction rescinded, as provided in the covenant. According to this contention, the only remedy which the plaintiff-respondent has under the covenant referred to is to restore to the vendor so much of the vended property as came into his possession under the sale-deed and then claim refund of the consideration of the sale-deed. The express covenant undoubtedly entitles the vendee, on being dispossessed from part of the property sold, to recover the whole of the consideration, and the fact that he can do so by sale of the vended property clearly indicates that the vendee should treat such property as belonging to the vendor. Such a procedure clearly implies annulment of the sale. It is contended that the warranty of title and the vendee's remedy in case of a breach thereof being thus provided for, he cannot avail of the implied warranty under S. 55 (2) Transfer of Property Act, or claim damages on its breach. We are of opinion that the covenant in question is an enabling clause, intended for the benefit of the vendee, and confers a right, which he would not otherwise possess, and which he can exercise in addition to any right which the law gives him. There is nothing in the sale-deed which excludes an implied warranty of title, contemplated by S. 55 (2), T. P. A., nor is there anything in the sale-deed which limits the plaintiff's remedy to the rescission of the contract referred to in the covenant in question. In this view, the plaintiff-respondent is entitled to damages for breach of the implied warranty of title. As a measure of such damages, the lower appellate court has decreed to him a proportionate part of the price, having regard to the value of the property which the plaintiff could not recover and the value of the property in his possession. No question has been raised as regards the amount of damages awarded by the lower appellate court being excessive.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed

Civil

1931

Nov. 5

Sen, J.
Niamat-ullah, J.

BASDEO SINGH (*Defendant*)

versus

RAM RAJ SINGH AND OTHERS (*Plaintiffs*)*

Civil Procedure Code, Or. 23, R. 3—Parties agreeing to abide by statement of a certain individual—Effect of agreement—When agreement may be resiled from—Civil Procedure Code, Sec. 115—Munsif dismissing case behind back of parties on date not fixed for hearing—Whether revision lies.

The agreement to abide by the statement of a certain individual nominated by the parties to a pending action, amounts to an agreement to accept an adjustment of the case which might ensue as the result of the statement made by the nominee, the said statement furnishing the agreed data whereon the adjustment is to be founded; and one party or the other has the right to resile from the agreement any time during the pendency of the suit and so long as no *proper* statement is made by the referee in terms of the agreement. *Himanchal Singh* v. *Jatwar Singh*, I. L. R. 46 All. 710, *Deoraj Misra* v. *Abbai Raj Singh*, 25 A. L. J. R. 729, *Ram Ratan* v. *Ram Lal Singh*, 1929 A. L. J. R. 1095 and *Bishambhar* v. *Radha Kishunji*, 1931 A. L. J. R. 393 *followed.*

Where the munsif took up a case on a date which was not fixed for hearing and dismissed the suit behind the back of the parties by accepting the sworn testimony of the referee, *held,* that the munsif's order was irregular and without jurisdiction, and was open to revision under S. 115 C. P. C. *Chandu Lal* v. *Koka Mal*, I. L. R. 43 All. 334 *distinguished.*

SECOND APPEAL from the decision of BABU MATHURA PRASAD, Second Additional Subordinate Judge of Benares, confirming a decree of MR. D. P. MEHROTRA, Additional Munsif.

K. Verma for the appellant.

B. S. Shastry for the respondents.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This second appeal and the connected civil revision are interdependent and proceed upon common grounds.

On November 29, 1928, Ram Raj Singh, Ram Deo Singh and Mt. Parkali instituted a suit against Basdeo Singh for a declaration of title to certain property situate in village Rajwari and for the cancellation of an award, dated September 17, 1928, made by Raghunandan Singh and others consequent upon an agreement of reference to arbitration, dated June 2, 1928. The plaintiffs alleged that the agreement of reference was vitiated by fraud and that the award was not binding upon them. This suit was registered as No. 688 of 1928 in the court of the Havali Munsif of Benares City. Basdeo Singh filed a written statement on January 22, 1929. which amounted to a traverse of all the material facts whereon the claim was founded.

On January 25, 1929, Basdeo Singh presented an application in the same court under para 20, Sch. II, C. P. C., and prayed that the award, dated September 17, 1928, be filed and that a decree be passed in accordance therewith. This application which was subsequently registered as suit

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*S. A. 680 of 1930 (connected with Civ. Rev. 307 of 1930)

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Sen, J.

No. 46 of 1929, was directed against Ram Raj Singh and Ram Deo Singh. Mt. Parkali was no party to it. She appears to have been omitted from the array of defendants presumably on the ground that she had no interest in the subject-matter in dispute. Ram Raj Singh and Ram Deo Singh filed a written statement on February 15, 1929. The grounds of attack in suit No. 688 of 1928 constituted, in substance, the grounds of defence in this proceeding.

Both the cases were fixed for hearing on August 31, 1929. On that date, the parties made a statement in court whereby they agreed to abide by the statement of one Thakur Baldeo Singh about the subject-matter in dispute. This statement was recorded in the order sheet. The word used in the order sheet is not 'bayan' but 'faisla' (decision); but reading the order-sheet as a whole, there can be doubt that the intention of the parties was to abide by the statement of Thakur Baldeo Singh. Mt. Parkali does not appear to have joined in the said statement before the court. The court ordered that a 'parwana' be issued to the referee and that the latter be directed to file his 'faisla' in two days.

A similar statement was recorded in the order-sheet of suit No. 46 of 1929. The court directed that a 'parwana' be issued to the referee directing him to file his 'faisla' till September 4, 1929 and that the case be put up for disposal on September 4, 1929.

On September 3, 1929, Mt. Parkali appears to have signified her assent to a reference to Thakur Baldeo Singh. A 'parwana' was directed to be issued to Thakur Baldeo Singh. The record shows that this 'parwana' never reached the hands of the Thakur.

On September 3, 1929, Thakur Baldeo Singh came to the court of the learned Munsif of Havali. Oath was administered to him, and he made a certain statement. This statement was recorded in suit No. 46 of 1929. The learned Munsif gave effect to that statement and dismissed the suit of Basdeo Singh for filing an award.

Suit No. 688 of 1928 was taken up by the Munsif on the following day. Thakur Baldeo Singh does not appear to have made any verbal statement before the court; but he filed a statement in writing, which is to be found at page 15 of the paper book. He stated that he had already given his decision in court on September 3, 1929, and his decision in the present case was just the same and that, as the result of his decision the plaintiffs' claim should be decreed with costs. The learned Munsif accepted the 'decision' of the referee and decreed the suit No. 688 of 1928 with costs.

Two appeals were preferred to the learned District Judge from the orders of the learned Munsif in the two cases referred to above. These appeals were transferred for hearing to the court of the 2nd Additional Subordinate Judge of Benares. He took up the appeal from the order in suit No. 46 of 1929 first, and came to the conclusion that there was no reference to arbitration within the purview of Sch. 2 of the Code of Civil Procedure, that the agreement of reference amounted to an agreement to abide by a 'statement' on oath and that the said statement having been given by the referee on oath, the court was bound to pass a decree in accordance

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therewith. He accordingly affirmed the order of the trial court and dismissed the appeal. He next took up the appeal in the connected suit and decided that case upon the ground that the order in the connected suit operated as *res judicata.*

The orders of the 2nd Additional Subordinate Judge of Benares have given rise to the second appeal and the application for civil revision that we are now dealing with.

We have considered the agreement of reference as embodied in the two order-sheets in the two cases and are of opinion that there was no agreement of reference to arbitration and that the transaction did not amount to an agreement to abide by the sworn testimony of the referee. The agreement amounted to an undertaking on the part of the disputants that they would be bound by the statement of Baldeo Singh, the nominee. The agreement to abide by the statement of a certain individual nominated by the parties to a pending action, amounts to an agreement to accept an adjustment of the case which might ensue as the result of the statement made by the nominee, the said statement furnishing the agreed data whereon the adjustment was to be founded. This appears to be the view which has been taken by this Court in a number of cases, notably in *Himanchal Singh* v. *Jatwar Singh*[1], *Deoraj Misra* v. *Abhai Raj Singh*[2] and *Ram Ratan* v. *Ram Lal Singh*[3]. It follows that we do not accept the construction put upon the agreement by the lower appellate court, that the statement referred to was to be a statement on oath.

Where the agreement of the parties is not to refer their dispute to arbitration within the purview of Sch. 2 C. P. C. nor is an agreement to abide by the sworn testimony of a particular referee within the meaning of Ss. 9 and 11 of the Oaths Act, the agreement in question may be withdrawn or resiled from by one party or the other before the statement has been made in court and action taken thereon. (*Vide* in *Bishambhar* v. *Radha Kishunji*[4].

It is abundantly clear from the facts we have stated above that the procedure adopted by the trial court in disposing of suit No. 46 of 1929, was irregular and not in accordance with law. September 3, 1929 was not the date fixed for the hearing of the case. On that date, the parties did not appear in court either in person or through their pleaders. The learned Munsif, however, for some reasons which do not appear from the record, took up the case on that date, and behind the back of the parties dismissed the suit by accepting the sworn testimony of the referee.

A preliminary objection has been taken by Mr. Shastri that the order of the lower appellate court is not open to revision under S. 115, C. P. C. and reliance has been placed upon a decision of this Court in *Chandu Lal* v. *Koka Mal*[5]. The facts of this case were that a certain plaint was returned by the trial court for presentation to the proper court. An appeal was preferred to the learned District Judge, who differed from the trial

[1] I. L. R. 46 All. 710

[2] 25 A. L. J. R. 729

[3] 1929 A. L. J. R. 1095

[4] 1931 A. L. J. R. 393

[5] I. L. R. 43 All. 334

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court and, setting aside the order of that court, remanded the suit for trial on the merits. An application for revision having been filed under S. 115, C. P. C., this Court held that the appellate court had jurisdiction to entertain the appeal and to pass such orders as it considered fit, and that even if the order were erroneous, it was passed by a court having jurisdiction and consequently was not obnoxious to the provisions of S. 115. We are of opinion that the facts of this case are entirely different from the case now in hand. The learned Munsif had no jurisdiction to take up the case on a date which was not fixed for hearing and to pass orders on the case behind the back of the parties. On this short ground, we would accept the application for revision, set aside the orders of the courts below and send back the case to the trial court for disposal of the application according to law.

It was open to one or the other parties to the reference to resile from the agreement on September 3, 1929. A telegram was sent to the Additional Munsif of Havali, which was worded thus:—

> *Basdeo Singh* v. *Ramraj Singh*, etc., case No. 46 of 1929. Baboo Baldeo Singh Panch decision not required being uncle of Baboo Jagannath Singh pleader who is pleader of against party hence no judgment hoped kindly try case yourself he is under pressure—Basdeo Singh.

It was received in court before September 4, 1929, which was the date fixed for the hearing of the suit. As a matter of fact, it was received on September 3; but the learned Munsif paid no attention to it upon a two-fold ground:—Firstly that no representation made through a telegram was entitled to attention and, secondly, that the suit had already been disposed of. There can be no manner of doubt that the suit was decided by the learned Munsif with indecent haste. Basdeo Singh had the right to resile from the original agreement any time during the pendency of the suit and so long no proper statement had been made by the referee in terms of the agreement. We have examined the statement of Baldeo Singh in detail and are of opinion that his so-called 'decision' is extremely vague; and we find it extremely difficult to hold that he had made any pronouncement upon any of the questions which were really in dispute between the parties. It has got to be remembered that the plaintiffs claimed to sweep aside the award dated September 17, 1928, upon the ground that the initial agreement of reference, dated June 2, 1928, had been procured by fraud, that the award itself was the outcome of fraud and collusion and that the property in dispute was the exclusive property of the plaintiffs because of a partition which had taken place nearly half a century before the action. Th. Baldeo Singh does not appear to have applied his mind to this part of the case at all and he sweeps aside the award with the observation that the agreement to refer to arbitration is wrong. It is true that he states that the parties have been separate for a fairly long time and that there was no necessity to enter into an agreement of reference to arbitration about the division of the property but he makes no attempt to definitely tackle the cardinal issues in the case.

The order of the Munsif in suit No. 46 of 1929 having been set aside, the said order does not operate as *res judicata* in the connected suit. The

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statement in writing filed by the referee in the said suit is open to the same criticism which his sworn testimony was exposed to. The learned Munsif was not justified in accepting that statement as one in due accordance with the agreement arrived at between the parties on August 31, 1928 or as one deciding the points in controversy.

The result is that we set aside the decree of the courts below in suit No. 688 of 1928, and remand the suit to the trial court under O. 41, R. 23, C. P. C., for disposal according to law. The agreement, dated August 31, 1928, having been already resiled from, the suit has to be tried by the learned Munsif himself. Basdeo Singh is entitled to his costs in both the suits throughout. The suit No. 46 of 1929 must also be tried on the merits by the learned Munsif.

Decree set aside
Suit remanded

CRIMINAL
1931
June 17
BAJPAI, J.

DASAI AND ANOTHER (*Applicants*)
versus
KING-EMPEROR (*Opposite party*)*

Penal Code, Sec. 499, Exception 9—Complainant excommunicated by panchayat—Punches informed members of brotherhood—Good faith to be presumed—No direct evidence of malice—Communication privileged.

A communication by the *punches* to the members of the community, incorporating the resolution of the *panchayat* excommunicating the complainant (who absented himself when summoned to answer a charge), must be presumed to have been made in good faith, and in the absence of direct evidence of malice, the communication must be deemed to be privileged, even though the resolution was not worded in an absolutely regular and formal manner. *Emperor* v. *Umed Singh*, I. L. R. 46 All. 64=21 A. L. J. R. 765, *Ayyaswami Iyer* v. *Annan Thirumala Iyer*, 47 Mad. L. J. 8, *Emperor* v. *Virji Bhagwan*, 11 Bom. L. J. 638 and *Emperor* v. *Padman Babul Mhatre*, 14 Bom. L. R. 585 *relied on*.

CRIMINAL REVISION from an order of R. K. AGHA ESQ., Sessions Judge of Meerut.

M. A. Aziz for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Bajpai, J.

BAJPAI, J.—The two applicants before me were convicted by a Magistrate of the first class under Section 499 of the Indian Penal Code and sentenced to pay a fine of Rs.100 each. Their convictions were upheld by the Additional Sessions Judge of Meerut but in view of the fact that the complaint was perhaps actuated by some malice, the learned Judge thought fit to reduce the fine to Rs.25 each.

The case for the prosecution was that the complainant was a member of the community of Ghagarpars to which the accused belonged, but the accused in the course of certain letters addressed to other members of the community stated that the complainant had mixed with Jaswara Chamars and had thus lapsed from his religion and exhorted the members of the community not to associate with the complainant. These facts, the complainant alleges, brought about his excommunication and lowered him and his prestige in the eyes of the members of the community. This accusation, the complainant further alleges, was made without good faith and out of malice. It might be mentioned that the Ghagarpars are Kabir Panthi Julahas and the Binoudhas and Jaswaras are the other sub-divisions of the Julahas, yet the Ghagarpars perhaps claim for themselves superiority as amongst the various sub-divisions of the community. There can be no doubt that the allegations made in the circulatory letters were defamatory, but it is contended before me that it was made for the public good inasmuch as it was made in the interest of the community to which the parties belonged. The facts are that certain allegations were made against the complainant in which he was charged with having killed a buffalo and a pony, and the complainant was asked to attend various Punchayats for the purpose of declaring his character. The complainant paid no heed to the various summonses issued by the Punchayat, nor did he conform to the penance imposed by the Punchayat. The obvious result was that on a particular meeting he was excommunicated, and in the Punchayat, as would appear from the evidence of Ram Autar one of the *punches*, there was an allegation to the effect that Gur Din was mixing with the Jaswaras which was a sub-caste with which the Ghagarpars could neither intermarry nor interdine. The *punches* communicated the result of the Punchayat to the various members of the community residing in different parts and stated that they had excommunicated Gur Din the complainant, because he had lapsed from his religion and had become like the Jaswara Chamars. The position of law taken on behalf of the accused is that this communication must be deemed to have been made in good faith without malice incorporating the decisions of the Punchayat for the purpose of protecting their own interests. In the case of *Emperor* v. *Umed Singh*[1] Mr. Justice Walsh observes that

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*Cr. Rev. 193 of 1931

> if a person really was out-casted, a statement to the members of the brotherhood that he was out-casted was the kind of statement contemplated by the expression 'for the public good'. So long as caste prevails and it must be remembered that it is sanctified by religious and racial traditions going back for centuries and forming one of the fundamental characteristics of social life in India, any attempt to minimize, ignore or brush on one side existing regulations, existing sanctions, or respect for existing decisions, must be regarded from the Indian point of view as contrary to the public good.

It must further be remembered that the accused are not men of education and culture, but more or less illiterate men, and they cannot be expected to incorporate the resolutions of the Punchayat in an absolutely regular and formal manner. The fact, however, remains that certain charges were made against the complainant. Those charges were investigated. The complainant was given full opportunity to meet those charges and not

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[1] I. L. R. 46 All. 64

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having availed himself of that opportunity he is himself to blame if as a matter of fact the resolution was not worded in a highly regular fashion. It has been proved, that the Punchayat did excommunicate the complainant, and under those circumstances, I am of opinion that good faith must be presumed, and in the absence of direct evidence of malice the communication must be deemed to be privileged. I am supported in my view by the cases of *Ayyaswami Iyer* v. *Annan Thirumala Iyer*[2], *Emperor* v. *Virji Bhagwan*[3], *Emperor* v. *Padman Babul Mhatre*[4] and *Umed Singh* v. *King-Emperor*[5].

The result is that I allow this application, set aside the conviction and sentence and direct that the fine or any portion of it, if paid, must be refunded.

Application allowed

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[2] 47 Mad. L. J. 8

[3] 11 Bom. L. R. 638

[4] 14 Bom L. R. 585

[5] 22 A. L. J. R. 79

ABDUL RAFIQ (*Plaintiff*)
versus
BHAJAN (*Defendant*)*

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May 12
Sulaiman, A. C. J.
Niamatullah, J.

Accounts—Examination of—Unconditional acknowledgment of indebtedness—Whether constitutes a new cause of action—Inclusion of time-barred debts in acknowledgment—Burden of proof—Contract Act, Sec. 25—Limitation Act, Sec. 19—Stamp Act, Art. 1.

Per Niamatullah, J.—Where two persons examine their mutual dealings and one of them formally acknowledges his indebtedness to the other to a certain extent in a document which complies with all the formalities of the law, for example, Stamp Act, the natural inference is that he promised to pay the amount. *The promise is a new contract, the consideration for which is the old debt, and such promise constitutes a new cause of action.* In short, an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. If in making the acknowledgment he has included time-barred debts which he might have well repudiated, it may still be open to him to plead failure of consideration to that extent. The creditor places himself in a disadvantageous position in this respect by omitting to take a bond containing an express promise to pay, which alone can successfully meet the plea of want of consideration. This is the effect of Sec. 25 Contract Act. *Maniram Seth* v. *Seth Rupchand,* I. L. R. 33 Cal. 1047 *relied on.*

Per Sulaiman, A. C. J.—A mere acknowledgment of liability is not always evidence of a new contract which can be the basis of a suit. There may be recitals in the written acknowledgment or there may be other direct or circumstantial evidence, which may show that the transaction in which the acknowledgment was made amounted in reality to a novation of the contract for a valid consideration. *Ganga Prashad* v. *Ram Dayal,* I. L. R. 23 All. 502 *relied on.*

The question whether a mere acknowledgment or a simple receipt can be made the basis of a suit is one more of procedure than of substantive law. If the transaction has amounted to a new contract it can undoubtedly be made the basis of a suit. But if it is nothing more than a mere acknowledgment then, if made beyond the period of limitation, it cannot be the basis of a fresh suit which can succeed. If the acknowledgment had been made within limitation, then the cause of action is kept alive and all that would be at most necessary would be an amendment of the plaint, if the original debt is not referred to therein.

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*Civ. Rev. 242 of 1930

There is no justification for holding that a simple acknowledgment of a liability to pay a debt throws the burden of proof that the debt was barred on the person who has acknowledged it. When Sec. 19 Limitation Act requires proof that the period had not expired, it would be contrary to the provisions of Secs. 101 to 104 of the Evidence Act to require that the burden lies on the defendant who acknowledged the liability.

CIVIL REVISION from an order of MAULVI ZAMIRUL ISLAM KHAN, Judge, Small Cause Court, Pilibhit.

Mushtaq Ahmad for the applicant.

G. S. *Pathak* for the opposite party.

The following judgments were delivered:—

Niamatullah, J.

NIAMATULLAH, J.—This is an application for revision directed against the decree passed by the Judge of the Court of Small Causes at Pilibhit dismissing the plaintiff-applicant's suit for recovery of Rs.250 principal and Rs.30 interest on what purports to be an acknowledgment of liability but has been wrongly described by the court below as a promissory note. As considerable importance has come to be attached to its contents in course of the argument before us, it is desirable to quote it in extenso. It runs as follows:—

> A sum of Rs.250, half of which is Rs.125 has been found due by me to Shaikh Abdur Rafiq on settlement of account (fahmid hesab kitab) in respect of dealings between me and him (Abdur Rafiq) up to date. These presents are, therefore, executed to be of service in case of need.

The plaintiff's case as set out in the plaint is that dealings between the parties were taken account of on May 3, 1929 when the sum of Rs.250 was found due to the plaintiff from the defendant who executed the acknowledgment already referred to and promised to execute a hypothecation bond later but did not do so. The defence was a total denial of every thing alleged by the plaintiff and no positive case of any kind was set up. In particular it should be noticed that neither limitation nor want of consideration for the acknowledgment was pleaded in the alternative if the acknowledgment were found to have been made. The only issue set down for hearing was "whether the defendant owed Rs.250 to plaintiff as alleged in the plaint." The finding of the Judge is so brief that it may be quoted in its entirety:

> I am not satisfied that the plaintiff has succeeded in proving that the defendant owed him Rs.250 for which the acknowledgment was executed. The plaintiff ought to have submitted a statement of account. His (?) mere words cannot be accepted as true. The issue is decided against the plaintiff though I hold that the receipt relied on by the plaintiff was executed by the defendant.

I fail to understand what the learned Judge meant in stating that "his mere

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words cannot be accepted." If "his" refers to the plaintiff, as I think it does, there must have been some misapprehension in the mind of the learned Judge. The plaintiff does not rely upon his own words but those of the defendant who acknowledged his liability by executing the document, handed over to the plaintiff, and which established that the defendant was on its date indebted to the plaintiff to the extent of Rs.250. What a party himself admits to be true should be accepted to be so until the contrary is proved, a proposition so well established that no authority need be quoted in support of it. The narrow issue which arose in the case could only have been answered in the affirmative, and the indebtedness of the defendant having been thus found and no other defence having been raised, a decree in favour of the plaintiff should have followed.

The learned advocate for the respondent has argued before us that the acknowledgment in question not being "account stated" to which Art. 64 of the Indian Limitation Act refers or the statement of a "balance due on a mutual, open and current account" to which Art. 85 of the aforesaid act refers cannot be the foundation of a suit and that the only use which can be made of an acknowledgment like the one in question is to save limitation under S. 19, Limitation Act provided it can be shown that all the items which had been brought into account were within limitation on the date of the acknowledgment. To my mind every one of these arguments assumes some fact or other and puts the plaintiff to proof of the contrary at a stage when it is impossible for him to do so and when it is highly unjust to require him to substantiate it. I see no reason why we should assume that the transactions between the parties were not of a character that the balance acknowledged cannot be said to be account stated or that it was not the balance of a mutual, open and current account. Such a plea should have been taken at the earliest stage to give the plaintiff notice of the ground on which his right of suit is challenged. If the plea had been taken he might have produced his accounts to show that it was a case of the kind which, according to defendant's argument, entitles the plaintiff to sue on a mere acknowledgment. I am of opinion that the defendant is not entitled to take the plea involved in the argument addressed to us. Nor is it open to the plaintiff or to the defendant to ask us to treat the acknowledgment as one merely saving limitation in respect of advances made prior to the acknowledgment, as the plaintiff's suit is not based on the original debt which became merged in the acknowledgment. The only question is whether the plaintiff is entitled to sue basing his claim on the acknowledgment itself. Granting it is open to the defendant at this stage to ask us to assume that the acknowledgment has no reference to such transactions as would make it an account stated or that the balance therein acknowledged is not the balance of a mutual, open and current account, I am, nevertheless, of opinion that it could be the foundation of a suit. It is clearly an acknowledgment of the description given in Art. 1, Sch. 1 of the Stamp Act which provides a duty of one anna for Rs.20 or more acknowledged therein. The language of the article is important and may be usefully quoted:-

> Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession: provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.

The acknowledgment in question fulfils all the requirements of the article. It contains no express promise to pay or any stipulation as to interest. There can be no doubt that it was intended by the parties to supply evidence of the debt and was not executed merely to satisfy the curiosity of one of the parties nor was it brought into existence for information only of the debtor or the creditor. It is a formal document handed over by the debtor to the creditor and bears the requisite stamp duty. I entertain no doubt that it was intended by the parties to embody an agreement that the amount therein entered should be taken to be due as the result of settlement of account which took place immediately before its execution. It was clearly intended by the parties that their mutual rights and obligations arising out of past dealings should stand on the new footing then agreed on. The *bahi khata* account was taken as closed.

We have the high authority of their Lordships of the Privy Council that an unconditional acknowledgment always implies a promise to pay. Apart from any authority, the only rational inference, to be drawn from the conduct of the parties to an unconditional and formal acknowledgment, is that the debtor agreed to pay, otherwise he would not have gone the length of signing a duly stamped paper and handing it over to his creditor. No other explanation is conceivable, and none has been suggested before us for the acknowledgment in suit. In no less than two cases their Lordships of the Privy Council have laid down the aforesaid rule: see *Kalka Singh* v. *Paras Ram*[1] and *Maniram Seth* v. *Seth Rupchand*[2] from which relevant passages were quoted by me in *Govind Singh* v. *Bijay Bahadur Singh*[3] in which the same question arose before this Bench which, as I read the judgment of my learned brother, held that an acknowledgment clear and unconditional can be the foundation of a suit, there being an implied promise to pay. It was said in course of the arguments before us that the observations of their Lordships were in the nature of *obiter dicta* and should not therefore be treated as any authority for the proposition that an unconditional acknowledgment implies a promise to pay. It is not a mere casual or passing remark, but is part of a rule enunciated for the purposes of the case. It has never been the practice to treat dicta of the Judicial Committee going beyond the requirements of the case in which they were pronounced as no authority, otherwise most of what has been laid down by their Lordships in the cases of *Sahu Ram Chander* and *Brij Narain* in defining the rights of a Hindu father and other members of a joint Hindu family shall have to be disregarded. Their Lordships have quoted in the judgment in question English cases in which it was clearly laid down that an unconditional acknowledgment implies a promise to pay and such cases,

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[1] I. L. R. 22 Cal. 434 at 444

[2] I. L. R. 33 Cal. 1047

[3] 1929 A. L. J. R. 1279 at 1282

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at any rate, are quite good authority for the proposition. I would take the same view unaided by any case-law. I may, however, refer to *Chuni Lal* v. *Laxman Govind*[4] in which it was said that:

> If, then, the acknowledgment, which in this case was made before the limitation period expired, implies a promise to pay, I can see no reason why it should not form the basis of a suit.

The Privy Council case already referred to was accepted as an authority for holding that an unconditional acknowledgment implies a promise to pay. That the debt acknowledged should not be a time-barred debt is made necessary not because it is treated as an acknowledgment under Section 19 of the Limitation Act which certainly saves the bar duly if the acknowledgment was made before the debt had become barred, but because of Section 25 of the Indian Contract Act, which provides, *inter alia*, that

> an agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suit.

It follows that time-barred debt is not a valid consideration unless there is an express promise made in writing and signed by the debtor. If, therefore, the promise is only inferable, and not expressly made, as in case of an acknowledgment, it is open to the debtor to plead absence of consideration and to show that the debt had become barred by time on the date of the acknowledgment or to put the creditor to proof of the fact that the debt had not become barred by time, according as the onus is on one or the other (I leave alone the question of onus for the present). Acknowledgment being a new contract a simple plea of limitation will have a reference to the period commencing on its date. A suit brought within three years of its date to enforce the implied promise therein contained is not barred. That the original debt had become barred by time is not a plea of limitation in reference to the acknowledgment on which the suit is founded but is the background of the plea of want of consideration for the acknowledgment and should be taken in that form.

It may be said that an acknowledgment of this kind has no real value, as the necessity of proving that the original debt had not become barred by time exists in either case, the only difference being that where there is such acknowledgment it goes to prove consideration and in the other case it bears directly on the question of limitation. This objection is easily answered. Without acknowledgment the creditor has to prove his case item by item while if he has taken an acknowledgment after adjustment of past dealings the amount due is established by proof of it.

In the case before us, as already pointed out, the defendant did not take the plea of want of consideration or of limitation. He cannot at this stage call upon the plaintiff to establish that there was valid consideration by showing that the original debt had not become barred by time.

> Where a contract is alleged in a pleading, a bare denial of the same by the

[4] I. L. R. 46 Bom. 24

> opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

(Or. 6, R. 8, C. P. C.). Reference was made in this connection to *Anup Singh* v. *Fateh Singh*[5] which was a case of redemption of an ancient mortgage of which the date was not known and to prove his subsisting title, the plaintiff relied on an acknowledgment, made within 60 years of the suit, in which the factum of mortgage had been admitted. The argument was that in admitting the mortgage the mortgagor should be deemed to have also admitted that on the date of the admission the mortgage subsisted, that is, it had been made less than 60 years before the admission. On the construction of the wajibularz in which the admission was recorded the majority of the full bench held that the admission did not prove that the mortgage had been made less than 60 years before the date of the admission. Banerji, J. held that it did. In the first place, the acknowledgment in question in that case was one under S. 19, Limitation Act, which makes it essential that the party relying on an acknowledgment should prove, to start with, that at the date of the acknowledgment the claim acknowledged had not become barred by time. It was not a case where acknowledgment is a new contract in which limitation runs from its date. In the second place, there is nothing in that case to suggest that in no circumstances, howmuchsoever clear the language may be, an acknowledgment can serve the dual purpose of saving limitation and of establishing that the original liability had been incurred at a time which was within the prescribed period counted backwards from the date of the acknowledgment. In each case, it is a question of construction of the acknowledgment. I must, however, say that the acknowledgment in question before us does not expressly state that the original debt had not become barred by limitation before its date, but it is a legitimate inference that the defendant, who like all others is presumed to know the law of limitation applicable to his transactions, would not have deliberately accepted his liability, unless it existed and had not become barred by time. This could not be said in the reported case above referred to, as the occasion on which the acknowledgment was made was the inquiry into the origin of the defendants' possession which was admitted to be a mortgage transaction. The mortgagee did not say, and there was no occasion for him to declare, that his position at the date of the acknowledgment continued to be that of a mortgagee liable to be redeemed. In this case the debtor admits that a certain sum was due by him on the date of acknowledgment. As already said, it is a matter of inference of one fact from another, and no hard and fast rule can be laid down. As Piggott, J. put it:

> we are dealing with a question of circumstantial evidence, inferring one fact from another, applying the principles laid down in Section 114 of the Indian Evidence Act.

The case of *Gobind Das* v. *Sarju Das*[6] is authority only for the proposition that the promise in writing to pay a time-barred debt, as contemplated by S. 25 of the Indian Contract Act, should be an express promise

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[5] 18 A. L. J. R. 789

[6] I. L. R. 30 All. 268

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and that a promise implied in an acknowledgment of time-barred debt is not enough. The result is that a time-barred debt is a valid consideration for a bond or a promissory note in which there is an express promise to pay but is no good consideration for an acknowledgment of the kind to which Art. 1, Sch. 1, Stamp Act, relates, which cannot contain an express promise to pay, otherwise the stamp of one anna, provided for by the aforesaid article, will not be enough. The case referred to above is no authority for the proposition that an unconditional acknowledgment does not imply a promise to pay or that it cannot be the basis of a suit even though the parties intended that it should be evidence of the amount due on its date from one to the other. This case might have been applicable to the present case if it could be said that the acknowledgment, now in question, was made in respect of a time-barred debt and was therefore without valid consideration; but, as already said, such a plea has not been raised in this case, and if it be entertained at this stage, sufficient opportunity should be afforded to the plaintiff to establish by evidence (which would include the recitals contained in the acknowledgment) that the debt was not barred by limitation and could form a valid consideration of the acknowledgment.

The only case which requires examination and which appears to be in conflict with the view I am disposed to take is *Ganga Prasad* v. *Ram Dayal*[7]. In that case "the defendant having examined his account acknowledged a balance of Rs.549-11-0 to be due by him, and affixed his signature to the plaintiff's account book. Allowing for sums since received and adding interest to the balance, the plaintiff claimed Rs.508-11-0, stating that the cause of action accrued on July 21, 1897." No words were used, and the acknowledgment was to be inferred merely from the act of signing the balance in the creditor's book. No stamp appears to have been affixed. It was held that the transaction did not amount to 'account stated'. It was further held, on the authority of certain cases that "a mere acknowledgment did not create a new obligation." In the cases referred to only the question of limitation arise and they dealt with oral acknowledgments or those to be inferred from the act of the debtor in signing the creditor's book. Such cases are, therefore, authority for the proposition that an oral acknowledgment of that species did not save limitation. Incidentally it was said that such acknowledgment did not imply a fresh contract. The learned Judges who decided the case of *Ganga Prasad* v. *Ram Dayal* proceed to observe:

> no doubt, as pointed out in the Bombay case (*Shanker* v. *Mukta*, I. L. R. 22 Bom. 513) in England an acknowledgment, if unconditional, is held to be sufficient evidence of a new contract which can be sued upon, but there no difficulty arises with reference to the law of limitation because an unconditional acknowledgment takes a case out of the statute of limitation whether it is made before or after the period of limitation expires. In India it is otherwise. An acknowledgment in writing signed by a debtor provides a fresh period of limitation only if it is made before the period of limitations expires. After the period expires nothing short of a fresh contract will revive the debt and provide a fresh period of limitation. If it

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[7] I. L. R. 23 All. 502

> were held that an acknowledgment of debt is evidence of a new contract which may be sued upon, then Sec. 19 of that Act would be a dead letter.

I say with the utmost respect, that the last sentence is based on a misapprehension of the scope of Section 19 of the Limitation Act which contemplates a large variety of admissions which cannot amount to new contracts.

An acknowledgment under S. 19 of the Limitation Act may not be unconditional, need not be stamped, may be accompanied with a refusal to pay, and may be addressed to any person. An acknowledgment of debt in the above circumstances will be useful as saving limitation, but cannot be evidence of a new contract. It is difficult to see how S. 19 will be a dead letter if an unconditional acknowledgment of liability be taken to amount to a new contract. Moreover, S. 19 is not confined to acknowledgments in respect of debts, but applies to cases in which a plea of limitation is raised to bar a claim to movable or immovable property. It also applies to acknowledgments saving the bar of limitation in cases of applications for execution of decrees.

In *Maniram Seth* v. *Seth Rupchand*[8] the rule of English law according to which an unconditional acknowledgment of liability implies a promise to pay, was referred to, and their Lordships saw

> no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word, which is not a word of art but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the statute law either of England or India.

The rule of English law on the subject is thus stated in Halsbury's Law of England, Vol. 19, pp. 58-59:

> A debt may be taken out of the operation of the Limitation Act, 1623, by an express unconditional promise to pay, or by an unconditional acknowledgment of the debt from which a promise to pay is implied, or by a promise to pay on the fulfilling of a condition, or on the expiration of a specified time or the happening of a certain event, if the condition is fulfilled, or the specified time has elapsed or the specified event has happened. Time begins to run afresh from the making of such an unconditional promise or acknowledgment, or, in the case of a conditional or contingent promise, from the fulfilment of the condition, or the lapse of the specified time, or the happening of the specified event. *The promise, express or implied, is a new contract, the consideration for which is the old debt, and such a promise constitutes a new cause of action.*

This rule is based on a principle of universal application and common sense, and is not peculiar to any particular system of law. Where two persons examine their mutual dealings and one of them formally acknowledges his indebtedness to the other to a certain extent in a document which complies with all the formalities of the law, for example, Stamp Act, no other explanation than that he promised to pay the amount is conceivable. If in making the acknowledgment he has included time-barred debts which he might have well repudiated, it may still be open to him to plead failure of consideration to that extent. The creditor places himself in a

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[8] I. L. R. 33 Cal. 1047

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disadvantageous position in this respect by omitting to take a bond containing an express promise to pay, which alone can successfully meet the plea of want of consideration. I take this to be the effect of S. 25 of the Indian Contract Act as interpreted by this Court in *Gobind Das* v. *Sarju Das*[9].

The case of *Shanker* v. *Mukta*[10] relied on by the learned Judges who decided *Ganga Prasad* v. *Ram Dayal*[11] has since been dissented, from in a later case of the same Court, *Chuni Lal* v. *Laxman Govind*[12], following the Privy Council case of *Muniram Seth* v. *Seth Rupchand*[13].

The trend of later decisions in this Court has also been to the contrary. *Muhammad Abid Husain Khan* v. *Bhagwan Das*[14] was a case in which a suit had been based on a 'sarkhat' which acknowledged receipt of a sum of money, including a time-barred debt. It was held by a Division Bench that the transaction amounted to a new contract, and not merely to an acknowledgment of a statute-barred debt. The 'sarkhat' contained no express promise to pay.

Kallu v. *Bhagirath Lal*[15] is another case in which the same view was taken and which is irreconcilable with *Ganga Prasad* v. *Ram Dayal*[16]. The nature of the acknowledgment is not stated in detail in the judgment, but the report of the facts clearly shows that it was not a case of "account stated" in the technical sense.

The only case which supports the opposite view is that of *Dharamsala Lala Reoti Ram* v. *Lachhman Prasad*[17] in which a learned single Judge of this Court applied *Ganga Prasad* v. *Ram Dayal*[16] to a case in which a "sarkhat" containing an acknowledgment had been sued upon. The Privy Council case *Maniram Seth* v. *Seth Rupchand*[18], which had since been reported, and the cases of this Court, to which reference has already been made, were not brought to the notice of the learned Judge. As against it, reference may be made to *Gobind Singh* v. *Bijay Bahadur Singh*[19] decided by this very Bench.

For the reasons explained above, I am of opinion on principle and authority, that an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. Where the acknowledgment is not unconditional and is qualified by some recital or otherwise, different considerations may arise. In the absence of a plea by the defendant of want of consideration and of an alternative case by the plaintiff seeking a decree on the original debt I would have disposed of the case as it stands but I understand that my learned brother would like to remit certain issues which imply that the aforesaid pleas are now entertained. I do not object to this course being adopted and concur in the order he proposes to pass.

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—The facts of this case have been set forth in the

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[9] I. L. R. 30 All. 268

[10] I. L. R. 32 Bom. 513

[11] I. L. R. 23 All. 502

[12] I. L. R. 46 Bom. 24

[13] I. L. R. 33 Cal. 1047

[14] 5 I. C. 418.

[15] 46 I. C. 58

[16] I. L. R. 23 All. 502

[16] I. L. R. 23 All. 502

[17] 23 A. L. J. R. 900

[18] I. L. R. 33 Cal. 268

[19] 1929 A. L. J. R. 1279

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judgment of my learned brother which I have had the advantage of perusing. As much turns on the remarks made by their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand*[20], which, even if *obiter dicta*, command our highest respect, I would begin with a consideration of that case.

Before the expiry of the period of limitation for the recovery of the debt, the representatives of the debtor in a written statement referring to the creditor acknowledged that ' for the last 5 years he had open and current accounts with the deceased.' Their Lordships accepted this as a clear admission that there were open and current accounts between the parties at the death of the debtor with the legal consequence of a right as against the other to an account, which necessarily involved an acknowledgment of liability to pay the debt, if the balance should be ascertained to be against him. As observed by their Lordships at the foot of page 1057 the only question was whether this was sufficient by the Indian law to take the case out of the statute. Their lordships at the bottom of that page emphasised 'it has been already pointed out that the acknowledgment was made before the statutory period had run out'. Their Lordships remarked that that requisite of Section 19 was complied with and so was the necessity of signature. As it was not necessary that the acknowledgment should be addressed to the person entitled, the bare question that remained was 'Whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient'. It was with reference to this question that their Lordships immediately after stating the question remarked, "their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian Law." Their Lordships then proceeded to state the English law as laid down by Lord Justice Mellish in *re. Rivers Steamp Company, Mitchell's claim*[21] that

> an acknowledgment to take the case out of the Statute of Limitation, must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be conditional promise to pay the specific debt, and evidence that the condition has been performed.

This statement of the law was immediately followed by the remark

> an unconditional acknowledgment has always been held to imply a promise to pay, because that is a natural inference, if nothing is said to the contrary.

There is no doubt that the conditions laid down by Lord Justice Mellish under which an acknowledgment would take the case out of the statute of limitation were conditions necessary in England and not conditions as are required by the Indian Limitation Act, under which an acknowledgment has to be made within the period of limitation. The remark of their Lordships that 'an unconditional acknowledgment has always been held to imply a promise to pay' was obviously made with reference to the case-law in England as the whole paragraph refers to the English Law. This is further clear from the passage at the bottom of page 1059 'an acknowledgment unconditional in the first instance, from which, in English law, a promise

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[20] 21 I. L. R. 33 Cal. 1047

[21] L. R. 6 Ch. App. 822, 828

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to pay has always been inferred.' Their Lordships further observed:

> The Indian Limitation Act, Section 19, however, says nothing about a promise to pay and requires only a definite admission of liability,

and then concluded that

> there was no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing.

As their Lordships had previously pointed out that in the case before them the acknowledgment had been made before the period had run out, and that requisite of Section 19 was complied with, the rule applied to a case where no question of limitation arises.

It is therefore clear to me that this case cannot be extended so as to be an authority for the proposition that in India every unconditional acknowledgment implies a promise to pay to such an extent, as to override the provisions of the Indian Limitation Act, the Indian Contract Act, the Indian Stamp Act, or the Indian Evidence Act.

That, if the context indicates the contrary, an unqualified admission of a debt does not necessarily imply an unconditional promise to pay, is shown by the decision of their Lordships of the Privy Council in *Kalka Singh* v. *Paras Ram*[22].

It seems to me that it would not be correct to say that every acknowledgment of liability amounts to a new contract. There may be recitals in the written acknowledgment or there may be other direct or circumstantial evidence, which may show that the transaction in which the acknowledgment was made amounted in reality to a novation of the contract for a valid consideration. A new contract may well be entered into under which there is a fresh adjustment of rights and liabilities which would amount to a fresh agreement. In the case of *Gobind Singh* v. *Bijai Bahadur Singh*[23], I pointed out that the contents of a receipt or other circumstances may point to the conclusion that there was a fresh promise to pay which, if for consideration, would be a new agreement. I held in that case that the previous debt had either been acknowledged afresh or had been substituted by a new contract including a fresh promise to pay. Similarly in *Muhammad Abid Husain Khan* v. *Bhagwan Das*[24], the circumstances showed that the transaction by which a sarkhat was executed amounted to a new contract and was not merely an acknowledgment of the barred debt. But in order to become a new contract it is necessary that the circumstances should show consideration other than a mere implied promise to pay a time barred-debt.

As their Lordships of the Privy Council remarked in *Maniram Seth's* case, it is the natural inference from an unconditional acknowledgment that the person who acknowledges, promises to pay the debt, that is what every honest man would mean to do. An acknowledgment would ordinarily imply a promise to pay. The whole object of acknowledging a debt would be an implied promise to pay or, at any rate to give a fresh start for purposes of limitation.

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[22] I. L. R. 22 Cal. 434 at 444

[23] 1929 A. L. J. R. 1279 at 1284-85

[24] 5 I. C. 418

But limitation only bars the remedy and does not extinguish the debt. A promise to pay a debt does not therefore necessarily imply an admission that the debt on the date of the acknowledgment had not become barred by time. Many a person would consider a plea of limitation to be a dishonest plea, and may unhesitatingly promise to pay a debt knowing that it is time-barred and is not recoverable through a court of law. In *Fatimatul-nissa Begam* v. *Sundar Das*[25] their Lordships of the Privy Council pointed out that people may admit liability even though a statute has actually barred it, but such an admission is ineffectual in law by the express terms of the statute. As a person may promise to pay a debt which has become barred by time and also a debt which is not time-barred, there can be no presumption that the promise to pay it necessarily implies an admission that the debt was not time-barred at the time.

The Indian Legislature in order to protect debtors has considered it necessary to make acknowledgments ineffective, unless they have been made before the expiry of the period of limitation. Section 19 of the Indian Limitation Act undoubtedly shows that the Legislature contemplated that there may be an acknowledgment of a time-barred debt, and enacted that such an acknowledgment would be of no avail. In order to enforce the law of limitation strictly, it has thought fit to throw on the creditor the burden of proving that the acknowledgment was made within time. Mere acknowledgment is not enough under Section 19 unless it is shown that it had been made before the expiration of the prescribed period. No doubt Section 19 is of a much wider application and covers cases other than those of mere acknowledgments of debts, but it cannot be denied that the acknowledgments of money debts are equally governed by the provisions of that Section. It follows that it is not sufficient for the plaintiff to merely prove the acknowledgment of liability to pay a money debt and throw the burden of showing that the acknowledgment was made beyond time on the debtor by invoking the aid of a general principle of common law that an acknowledgment necessarily implies a promise to pay it. The aid of any such principle cannot be sought to override the express provisions of the statute of limitation and be made the excuse for casting the onus of proof on the defendant. If such an indirect evasion of the law were permitted, it would have the effect of nullifying the express provisions of Section 19 so far at any rate as acknowledgments of money debts are concerned.

A second difficulty in the way of assuming that the Common Law principle is of universal application in India arises under the provisions of the Indian Contract Act. Even if an acknowledgment of a liability implies a promise to pay, such a promise has no binding effect unless it is for a fresh consideration so as to amount to a novation of the contract or is embodied in a duly signed written document. Under Section 25(3) an agreement to pay a time-barred debt, unless it is made in writing and signed by the person to be charged therewith or by his duly authorised agent, is one made without consideration and is void. Every one seems to be agreed that the implied promise to pay involved in a mere acknowledgment would not be sufficient under Section 25 of the Indian Contract

[25] I. L. R. 27 Cal. 1004 at 1012

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Act. To avoid such a result, recourse must be had to reading Section 25 as if the word 'express' were interpolated before the word 'promise' so as to exclude implied promise. The distinction between Section 25 of the Contract Act and Section 19 of the Limitation Act is obviously this that in the case of the former a duly written and signed promise to pay a debt is good, whether the promise was made before or after the expiry of the period of limitation. In the case covered by the latter section the acknowledgment is utterly useless unless it was made before the expiration of the prescribed period.

Once it is conceded that the supposed implied promise would not fulfil the requirements of Section 25 of the Indian Contract Act, then apart from any question of burden of proof which I shall consider later, the assumption that there is such an implication is really of no avail. Let us leave aside the cases where a new contract has been made. An acknowledgment of liability may have been made either before the period of limitation or after its expiry. In the first case, it is fully sufficient because a written acknowledgment of that kind gives a fresh start for limitation, and it is wholly unnecessary to treat it as a fresh promise to pay which can be independently enforced. In the second case, it is useless as an acknowledgment and it is equally ineffective as an implied promise to pay a time-barred debt. An implied promise to pay a time-barred debt admittedly does not amount to a valid agreement or to a fresh binding contract, unless of course there be some other consideration for it.

In the interest of debtors the legislature has thrown the burden of proof on the creditor that the acknowledgment was made within the period of limitation. Apart from anything that there may be in the language of the acknowledgment itself, I see absolutely no justification for holding that a simple acknowledgment of a liability to pay a debt throws the burden of proof that the debt was barred on the person who has acknowledged it. Such a conclusion would, in my opinion, be directly opposed to the express intention of the legislature as shown by Section 19. There is no rule which allows of any Common Law principle to circumvent a statute law. The burden of proof cannot be made to shift by supposing not only that there was an implied promise to pay, but further supposing that there was an admission that the debt had really not become barred by time and was still capable of being enforced in a court of law. When Section 19 of the Limitation Act requires proof that the period had not expired, it would be contrary to the provisions of Sections 101 to 104 of the Indian Evidence Act to require that the burden lies on the defendant who acknowledged the liability.

It seems to me that the opinion expressed by the majority of the Full Bench in *Anup Singh* v. *Fateh Chand*[26] is directly in support of this view, and so long as that decision is not overruled by a higher authority, I must loyally follow it. With regard to the acknowledgment of the mortgage which came up for consideration before the Full Bench, it was strenuously argued on behalf of the appellant that it was an acknowledgment of an existing liability, which raised the presumption that it was made within time, and therefore it was for the defendant to prove by positive evidence

[26] 18 A. L. J. R. 789

that the acknowledgment was beyond time. The majority repelled this contention. From the acknowledgment of the mortgage, Piggott, J. declined to infer an admission that the mortgage was redeemable in law. He remarked:—

> In one sense it is possibly correct to say that a man does not ordinarily acknowledge a liability which he knows to have become statute-barred; but the possibility of such an acknowledgment was clearly contemplated by the Legislature when drawing up the relevant clause of the Indian Limitation Act. It required to be laid down that in order to save limitation an acknowledgment must be made before the period of limitation in respect of the liability so acknowledged had expired; and in so doing the Legislature clearly contemplated the possibility of acknowledgments being made of statute-barred debts. If the courts are in a general way to act upon the sort of principle involved in the words which I have quoted from the judgment of Mr. Justice Pearson, the result will be that an acknowledgment made within sixty years of the limitation period prescribed for the institution of any suit will have to be treated as ordinarily sufficient to save limitation, unless and until the party bound by that acknowledgment is able to prove affirmatively that it was made beyond limitation. I do not think this is a sound principle, or was intended by the Legislature.

Similarly Walsh, J. observed:

> I agree with my brother Piggott, that the express language of Section 19 of the Limitation Act contemplates the possibility of an acknowledgment of liability given after the expiration of the statutory period and shows by its terms that a plaintiff before he can succeed upon an acknowledgment at all must establish that it was made before the expiration of the statutory period. In this case it is not suggested that he has established that fact by any direct evidence. In my opinion no inference can be drawn from the acknowledgment, however fully it may have admitted liability, so far as the actual date of the original mortgage is concerned.

The question whether a mere acknowledgment or a simple receipt can be made the basis of a suit is one more of procedure than of substantive law. If the transaction has amounted to a new contract it can undoubtedly be made the basis of a suit. But if it is nothing more than a mere acknowledgment then, if made beyond the period of limitation, it cannot be the basis of a fresh suit which can succeed. If, however, the acknowledgment had been made within limitation, then the cause of action is kept alive and all that would be at most necessary would be an amendment of the plaint, if the original debt is not referred to therein. The learned Judges of the Bombay High Court in *Chunni Lal* v. *Lakshman*[27], although they expressed the opinion that the acknowledgment having been made before the limitation period had expired, implied an unconditional promise to pay and could be made the basis of the suit, also remarked at page 28 that 'in any event the only penalty which could fall on the plaintiff would be to have to amend his plaint so as to implead the previous transaction.' It is thus obvious that the question whether an acknowledgment can be made the basis of a suit is not of considerable importance provided it was made when the limitation had not expired. There is a preponderance of authority of this Court that a mere acknowledgment is not always evidence of a new contract which can be the basis of a suit. *Ganga Prasad* v. *Ram Dayal*[28]. As a single Judge I felt myself bound to follow this Division Bench ruling

[27] I. L. R. 46 Bom. 24

[28] I. L. R. 23 All. 502

in *Dharamshala of Lala Reoti Ram* v. *Lachchman Prasad*[29]. I may also refer to the case of *Gobind Das* v. *Sarju Das*[30]. In an earlier case *Shanker* v. *Mukta*[31] the Bombay High Court considered that the suit could not be brought by treating an acknowledgment as a fresh contract.

As indicated above, I consider this question as one of minor importance for the ultimate success or failure of the suit will depend on whether the acknowledgment had been made within or without or beyond the prescribed period of limitation.

Yet another difficulty would be created by the provisions of the Stamp Act, if the contrary view were to be upheld. Article 49 of the Indian Stamp Act prescribes a duty payable up to four annas for promissory notes payable on demand, while only one anna is required for an acknowledgment under Article 1 or a receipt under Article 53. If a mere acknowledgment or a receipt implies such a promise to pay as can be made the basis of a fresh suit, a creditor can evade the Stamp law and either not take a promissory note at all and evade payment of the necessary duty or even withhold an insufficiently stamped promissory note, and simply bring a suit on the basis of an acknowledgment or a receipt as the case may be. Can he be allowed to set at naught the requirement of the payment of the necessary duty under Article 49 and escape by paying only one anna? It may also be pointed out that the definition of acknowledgment of a debt in Article 1 contains a proviso that such an acknowledgment does not contain any promise to pay the debt. To get over the difficulty created by this definition one would have to say that an acknowledgment contains an implied promise to pay but the Article requires an *express promise*.

The case of *Kallu* v. *Bhagirath Lal*[32] did not lay down any new principle, but merely followed the case of *Bhola Nath* v. *Net Ram*[33]. The latter case was in no way inconsistent with *Ganga Prasad* v. *Ram Dayal*[34] which had been professedly distinguished. The learned Judge pointed out that in *Ganga Prasad's* case no evidence had been given regarding the acknowledgment of the balance due which was entered and signed in the plaintiff's account book. On the other hand in *Bhola Nath's* case the suit was for monies lent and advanced. In addition to the written acknowledgment of the account books of the plaintiffs, there was oral evidence to prove the plaintiff's claim. That evidence established that the amount claimed was due. It was accordingly held that the acknowledgment was an acknowledgment of the accuracy of the details of the accounts as appearing in the plaintiff's books and that *Ganga Prasad's* case had no application and the suit could not fail.

In view of all the points stated above I am not able to depart from the course of decisions of this Court and hold that by invoking the Common Law principle that an acknowledgment implies a promise to pay, we can either treat every acknowledgment of liability as a fresh binding contract for consideration or bring about the shifting of the onus of proof on the opposite party by its means.

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[29] 23 A. L. J. R. 900

[30] I. L. R. 30 All. 268

[31] I. L. R. 22 Bom. 513

[32] 40 I. C. 58

[33] 3 A. L. J. R. 801

[34] I. L. R. 23 All. 502

I agree with my learned brother that the judgment of the Judge of Small Cause Court is very unsatisfactory. Although he remarked that he was not satisfied that the plaintiff had succeeded in proving that the defendant owed him the debt for which the acknowledgment was executed, he also held that the receipt had been duly executed by the defendant. He has not at all considered the question whether the transaction in the course of which the receipt was executed amounted to a new contract between the parties. Nor has he applied his mind to the question whether the receipt executed by the defendant had been executed before the period of limitation for the original debt had expired.

I would accept the translation of the receipt as made by my learned brother with this exception that the original words "Bad Fahmid Hisab Kitab" literally mean 'after understanding the accounts; and not necessarily a settlement or adjustment of account. The verb "Fahmidan' means 'to understand'. I am not prepared to assume, in the absence of a clear finding, that there was necessarily a novation of the original contract.

I would accordingly require findings on the two following issues:—

1. Did the transaction, in the course of which the receipt signed by the defendant was executed, amount to a fresh contract between the parties for valid consideration, or whether the receipt was a mere acknowledgment of the amount due as shown by the account?

2. If the receipt was nothing more than a mere acknowledgment of liability was it executed before the expiration of the period of limitation during which the debt could be recovered?

BY THE COURT—The following issues are remitted to the lower court for findings to be returned within two months. On receipt of the findings ten days shall be allowed for objections.

ISSUES

1. Did the transaction, in the course of which the receipt signed by the defendant was executed, amount to a fresh contract between the parties for valid consideration, or whether the receipt was a mere acknowledgment of the amount due as shown by the account?

2. If the receipt was nothing more than a mere acknowledgment of liability, was it executed before the expiration of the period of limitation during which the debt could be recovered?

Parties shall be at liberty to produce fresh evidence if so advised.

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MOHAMMAD ABDUL JALIL KHAN (*Defendant*)
versus
MOHAMMAD ABDUS SALAM KHAN (*Plaintiff*)*

Tenancy Act (III of 1926), Sec. 226(2)—Suit for profits against lambardar—When decree to be passed on basis of gross rental—Collections exceed 75% of gross rental—Presumption of no negligence—Sec. 225 (2)—Co-sharer entitled to simple interest at 1% p. m. on net profits—From date when profits became divisible till actual realisation—Sec. 225 (1)—Profits divisible on a prescribed date—Profits accrue from day to day and vesting not postponed—Principle of Sec. 36 Transfer of Property Act applicable.

In a suit for profits by a co-sharer against the lambardar, if the lambardar succeeds in showing the actual collections, then unless those collections are so low that the court may presume negligence on the part of the lambardar, the decree has to be made on the basis of the actual collections and not on the gross rentals. On the other hand, if the discrepancy between the gross rental and the actual collection is very large, then, in the absence of any satisfactory explanation on the part of the lambardar why he was not able to collect a larger amount, the presumption would be that he was negligent and the decree should be on the basis of gross rental. In the absence of any definite evidence either way, those cases in which collections exceed 75% of the gross rental should be taken as cases in which no negligence can be presumed, and in cases in which collections are less than 75% there is *prima facie* a presumption of such negligence.

There is no reason why the principle underlying Sec. 225 should not be applied to future interest after the decree up to the date of realisation. Accordingly in a suit for profits against the lambardar, the plaintiff co-sharer is entitled to simple interest at the rate of 1% per mensem on his share of net profits from the date when they became divisible *till actual realisation.*

Applying the principle of Sec. 36, Transfer of Property Act, the profits accrue from day to day and become vested in the co-sharers, and although the time for payment is postponed for the sake of convenience till the following August, it does not imply that the right to a share in the income does not vest till the arrival of that date.

Litigation is not a part of the ordinary expenditure in the management of a mahal; but where it is *unavoidable,* it is a necessary part of the expenditure incurred by a lambardar and it is undoubtedly incurred for the benefit of the entire coparcenary body, and there is no reason why the lambardar should not be credited with the taxable costs of the litigation.

First Appeal from a decree of Mr. Abdul Wahid Khan, Assistant Collector first class of Bulandshahr.

T. A. K. Sherwani for the appellant.

A. M. Khwaja for the respondent.

The judgment of the Court was delivered by

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Sulaiman, A. C. J.—Three out of the 34 appeals which were connected with one another were dismissed by us yesterday, as no appeal lay to the High Court. These appeals arise out of suits for profits brought by one brother as co-sharer against the eldest brother as the lambardar.

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*F. A. 402 of 1927

They relate to different mohals, but the points which arise in most of them are more or less common.

In some cases the defendant was not allowed to file his written statements as applications for adjournment of the cases on his behalf were rejected. In two cases he filed his written statements which gave us an idea of the pleas raised on his behalf.

It is convenient to dispose of the points which are common in all these appeals.

The plaintiff claimed his shares of profits on the basis of gross rentals. The court below has given him decree on the basis of the gross rentals in all the cases. It is quite clear that if the defendant succeeds in showing the actual collections, then unless those collections are so low that the court may presume negligence on the part of the lambardar, the decrees have to be made on the basis of the actual collections and not on the gross rentals. On the other hand, if the discrepancy between the gross rental and the actual collection is very large, then, in the absence of any satisfactory explanation on the part of the lambardar why he was not able to collect a larger amount, the presumption would be that he was negligent and the decree should be on the basis of gross rental. In the absence of any definite evidence either way, we would roughly take those cases in which collections exceed 75% as cases in which no negligence can be presumed. In cases in which collections are less than 75% of the rent there is *prima facie* a presumption of such negligence.

The defendant further claimed that under a deed of relinquishment executed by the mother and other lady relations of the parties there was a liability to pay certain annual allowances out of the income of the entire estate and that the defendant had paid these allowances. He claimed a set-off on account of these allowances in the suit for profits. The assistant collector has rightly disallowed this set-off. It is quite obvious that no set-off can be allowed in the revenue court for any amount that is not due under a decree, unless the amount can be treated as part of the ordinary expenses of collection. In this particular case it is impossible to treat the payment of these allowances as an expenditure incurred in the collection of profits because the amount has to be paid in a lump sum out of the entire income of the estate and it is not easy to apportion it separately for each village. Strictly speaking it is a discharge of liability under a registered deed of hypothecation and not a part of the ordinary expenses of collection. It is not necessary for us to express any final opinion whether the defendant will have a separate remedy to recover these allowances in case he has paid them. It may be that inasmuch as there was a joint liability under a registered deed of hypothecation creating a charge on part of the estate, the defendant as one of the co-debtors having paid off the amount has his remedy by a suit for contribution by enforcement of that charge, for which the period of limitation may be 12 years. As mentioned above we would leave this point open. We have however no doubt in our minds that the allowances cannot be set off in these suits.

The next point in dispute is the amount of the expenditure which the lambardar can claim from his co-sharers. Oral evidence was led on his behalf to show the number of employees like siyaha navis, karinda, peon,

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etc., who were employed in the estate for the purpose of collecting rents. It is clear from the evidence that the same staff is employed for a number of villages and it is very difficult to apportion expenditure incurred in the payment of their salaries for each village. In some cases the total income of the village is very small, in other cases it is very large. On the other hand, it is quite clear that some staff must be employed by the lambardar defendant so that he may successfully make collections in so many villages which are scattered all over the district. We think that it would be highly impracticable to go into each case separately and apportion the expenditure separately. The most just and equitable way would be to fix upon a rough flat rate which would cover the expenses and give satisfactory result. Having considered the matter we are of opinion that in addition to the lambardari dues of 5% which the lambardar is entitled to get under the Land Revenue Act he should get 5% on the actual collections made by him towards the expenses of collection.

Another point in dispute between the parties is the costs of litigation. It is quite clear that litigation is not a part of the ordinary expenditure in the management of a mohal. In some years litigation may be very expensive and heavy and in others it may be practically nil. Where it is unavoidable, it is a necessary part of the expenditure incurred by a lambardar and it is undoubtedly incurred for the benefit of the entire coparcenary body. There is no reason why the defendant should not be credited with the taxable costs of the litigation incurred. As regards the costs incurred out of court there would be considerable uncertainty, part of which ought to be included in the salaries of the staff. We therefore think that the defendant should be allowed credit for any taxable costs of litigation which have remained unrealised from the tenants of the various villages in suits by or against them, provided the same are shown by documentary evidence.

Another point in dispute between the parties is as to whether the plaintiff is entitled to interest on the arrears of profit. The court below has allowed him interest at the rate of 6¼ per cent. It has not given any reasons why the rate of 1 per cent per mensem, which is specified in Section 225 of the Agra Tenancy Act of 1926, was not adhered to. There is now a statutory provision which entitles a co-sharer to claim interest on arrears of profit as 1 per cent per mensem. After accounts have been taken, and an amount has been found due to the plaintiff, there is no reason why he should be debarred from claiming the rate which is allowed by the Tenancy Act. We, therefore, think that there can be no doubt that the plaintiff should be given interest at the rate of 1 per cent per mensem on the principal amount of the net arrears of profit found due to him from the date when they became divisible till at least the date of the decree of this Court.

If we were to consolidate the principal sum and interest up to the date of decree, we might under Section 34 C. P. C. have allowed future interest at the rate of 6 per cent on the consolidated amount. The learned Advocate for the plaintiff, however, urges that the plaintiff does not claim interest on the consolidated amount, but should be given 1 per cent per mensem simple interest on the principal amount of arrears up to the date

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of realisation. We see no reason why the principle underlying Section 225 should not be applied to future interest after the decree up to the date of realisation. We would accordingly allow the plaintiff simple interest at the rate of 1 per cent on his share of net profits from the date when they became divisible until actual realisation.

The learned advocate for the defendant contends that the plaintiff had previously brought a suit for accounts against the defendant treating him as his trustee and agent for the period of the alleged agency, which was dismissed because the court was satisfied that the plaintiff had himself removed the necessary papers, and that accordingly he is not entitled to sue for profits in the revenue court for the same period over again for which his civil suit had been instituted. On the other hand, the learned advocate for the plaintiff replies that the defendant held a dual capacity of the plaintiff's agent and the lambardar and he was not bound to pay the profits as lambardar to the plaintiff co-sharer, whose agent he may be supposed to have been, before the date on which the profits became divisible. Admittedly the profits became divisible as between the lambardar and the co-sharers on August 1, following the year for which they are claimed. In the previous suit the plaintiff had alleged that the agency of the defendant terminated either on November 22, 1924 or December 19, 1924, on account of certain letters sent by the plaintiff revoking the agency. This fact was denied by the defendant. The learned Subordinate Judge in his findings on issues Nos. 3 and 15 came to the conclusion

> that the defendant continued to manage the estate as an agent on behalf of the plaintiff after the expiry of the period of the minority up to November or December 1924, when the plaintiff expressly revoked the powers given to him by means of written letters.

In the earlier portion of his judgment he pointed out that the plaintiff alleged that he had sent a letter on (?) November 22, 1924 and one on December 19, 1924, and that in this last mentioned letter he had clearly expressed his intention of putting an end to the relationship of agent which up to that time existed between the parties. There is no doubt that the learned Subordinate Judge was inclined to take the view that the agency terminated on December 19, 1924; but his actual finding was in the alternative, namely, that it terminated either in November or December 1924.

The previous civil suit was for recovery of the amount found due on the taking of the accounts between the parties, and it was up to the end of the period of the agency. The defendant no doubt held two capacities. If the plaintiff had sued him in the revenue court merely as a lambardar, his suit for recovery of profits as a co-sharer would have been premature if it were brought before August 1, following. But the suit was not brought by a co-sharer against the lambardar under the Tenancy Act, but it was by a principal as against an agent or trustee in the civil court. If the suit had been decreed, the civil court would without doubt have passed a preliminary decree for an account to be taken up to the end of the period of agency which would have been either November or December 1924. The decree of the first court came to be passed long after the expiry of August 1, 1925 when the profits against the lambardar had also become divisible.

It seems to us that the date fixed for the division of profits is nothing more than a date fixed for the payment of those profits. That date does not imply that the right to a share in the income does not vest till the arrival of that date. The profits accrue from day to day and become vested in the co-sharers, although the time for payment is postponed for the sake of convenience till the following August.

Section 36 of the Transfer of Property Act in terms can not apply to this case, because that deals with the case of a transfer of immovable property. But the principle underlying that section is of a wider scope and certainly lays down the rule regulating the rights of proprietors to the receipt of income from their properties. As between two rival owners, in the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income accrue due from day to day, and are apportionable accordingly, but they are payable on the days appointed for the payment thereof. Under that principle, although the day for the payment of the share or income may not have arrived the income does accrue from day to day and is apportionable accordingly, although the actual apportionment would not in fact be given effect to till that date has arrived.

It seems to us that if it were established that the defendant, who was, according to the view taken in the civil suit, acting as the agent and trustee of the plaintiff, and in fact as the managing member of the family had in reality realised the income of the estate during the period of his agency, then, even though the actual date for the division of the profits as between co-sharers and lambardar arrived after the expiry of the period of the agency, he would have been liable to render accounts for the plaintiff's share in the net profits. The civil court in its decree for accounts would undoubtedly have made the defendant liable to pay to the plaintiff his due share in the net profits of all the income that was realised by him during the period of his agency. The previous suit, therefore, did involve a claim of the plaintiff for recovery of his share in the net income actually realised by the defendant before his agency terminated. Unfortunately for the plaintiff the civil suit was dismissed and no relief was granted to him. The result, therefore, is that the plaintiff's claim for recovery of his share in the income received by the defendant during the period of his agency was made in the civil court, and was dismissed. It seems to us that the plaintiff cannot now be allowed to come to the revenue court and ask for profits for a period which would overlap, that is to say, he cannot be given a decree for his share of the profits with regard to the period which was included in the former civil suit.

In the present suits the plaintiff is claiming profits for the whole of 1332 and 1333 Faslis. Kharif of 1332 Fasli terminated on December 31, 1924, and would therefore include a part of the period which was under consideration in the civil suit. We think that the plaintiff cannot be allowed to claim profits for that part. On the other hand, if the defendant did not actually realise any part of the profits before the termination of his agency, and those profits were realised subsequently, it cannot be assumed that that amount had been claimed in the previous suit. The plaintiff, therefore, would not be disentitled from claiming his share of such profits.

By the expression 'net income' or ' net profits' which we have used, we mean the plaintiff's share in the net profits of the village after deducting the proportionate amounts of the Government revenue, the lambardar's dues, the expenses of collection and the costs of the litigation that may be allowed. The next point in dispute in the remaining cases is as to whether the defendant had been rightly prevented from filing his written statements in some of these suits. The suits were filed on December 23, 1926, and the Christmas holidays followed. On January 5, 1927 an application was made on behalf of the defendant to the revenue court in which it was admitted that he had knowledge of the institution of these 34 suits. Subsequently on January 15, 1927 the suits were transferred to the court of another assistant collector on an application of the plaintiff for which apparently notice was not issued to the defendant. The new court issued summonses to the defendant fixing February 10. These summonses were sent to him at his village Dharampur and not at his house in Aligarh. On January 21, 1927 the process server reported that the defendant was not at Dharampur but had gone to Aligarh and he accordingly brought back the summonses. The reports did not say that he had shown these summonses to any of the servants of the defendant or to any of the inmates of the house at Dharampur or that he had affixed copies of them at the door of the defendant's house. In the application before the court the plaintiff also admitted that the defendant was residing at Aligarh. On an application by the plaintiff the cases were again transferred to another court on February 8, 1927. Again there was no notice of this transfer given to the defendant formally. Curiously enough the court did not make any order that summonses should be issued to the defendant according to his address at Aligarh, but ordered that there should be substituted service. It directed that the summonses should be published in an Aligarh paper. The order was passed on February 10, 1927, the publication appeared in the paper bearing the date February 13, 1927 fixing February 15, 1927 for the hearing. On February 14 an application was filed on behalf of the defendant stating that he had no knowledge of the suits from before and that time should be given to him for filing written statements. The court did not consider that there was a satisfactory explanation and rejected the application not on that date but either on February 15 or 16. In these circumstances the defendant was not allowed to file his written statements. After considering the circumstances we have come to the conclusion that it would be unfair to the defendant to debar him from taking any special pleas that may be open to him in addition to those which he had already taken in the suits which were contested.

Having dealt with the general aspects of the case and the points which were common to most of the appeals, we would now take up these appeals separately. We have already noted that three appeals, namely, Nos. 380, 390 and 396 of 1927 have already been dismissed.

First appeals Nos. 402 and 403 of 1927 arise out of suit in which the defendant had an opportunity of filing his written statements and of leading evidence. No case is made out for allowing him to produce any fresh evidence. The collections in these cases were much more than 75 per cent of the gross rentals and there is no justification for decreeing the claim on the basis of gross rentals. The defendant will however get 5 per cent on

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MOHAMMAD ABDUL JALIL KHAN
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Sulaiman, A. C. J.

the actual collections as his expenses in addition to the 5 per cent of the Government revenue as the lambardar's dues. But in these appeals the plaintiff has filed no cross-objections as regards any further interest. He is not therefore entitled to any interest in excess of that awarded by the decree. But the plaintiff is entitled to support the decree of the court below even on a ground which was decided against him. We are therefore inclined to think that he should be given interest at the rate quoted above provided that the principal amount plus interest up to the date of the first court's decree does not exceed the amount of that decree in each case. Further interest in excess of that allowed by the judgment in each case will not be allowed. If on the account being taken afresh it is found that the amount due to the plaintiff up to the date of the first court's decree is less than that awarded by that court, the plaintiff would be entitled to an addition on account of the extra rate of interest up to 12 per cent per annum calculated on the principal amount of profits from August 1 following the year for which they were due till the first court's decree. In case the result is an excess amount, the plaintiff will not be entitled to the excess, but the decree of the court below will be maintained. The costs in both the courts will be in proportion to success and failure.

In the remaining appeals we have already held that the defendant is entitled to file written statements and produce evidence. The question of the rate of interest is left open in these cases which are to be sent back and in which the defendant is allowed to file written statements. As the cases have been disposed of without this opportunity having been accorded to him, we must allow these appeals and setting aside the decrees of the court below sent the cases back to that court for disposal according to law. The costs in these cases will abide the result.

RAGHUNATH BARAIE (*and after his death*) RAM RAJI
AND ANOTHER (*Defendants*)
versus
JAINARAIN BARAIE (*Plaintiff*)*

CIVIL

1931

June 25

MUKERJI, J.
ALLEN, J.

Hindu Law—Widow—Gift by—Suit for declaration by reversioner—That gift void after widow's life-time—Whether court should grant declaration—Specific Relief Act, Sec. 42—Declaration to be refused at a preliminary stage—And not by court of appeal.

A deed of gift by a Hindu widow could not possibly be held to be evidence of alienation for value for purposes of necessity, and taken by itself the document could not stand as a deed of title; and if the next reversioner files a suit for a declaration that the deed of gift was void after the lifetime of the widow, the court should refuse the declaration. *Rangasami Gounden* v. *Nachiappa Gounden,* 17 A. L. J. R. 536 at 549 *relied on.*

Where a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a court of appeal after the issues on fact and law have been decided. *Isri Dat Koer* v. *Hansbutti Koerain,* 10 I. A. 150= 10 Cal. 324 *approved.*

SECOND APPEAL from a decree of BABU SARUP NARAIN, Second Addi-

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*S. A. 436 of 1929

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RAGHUNATH v. JAINARAIN

Mukerji, J.

tional Subordinate Judge of Jaunpur, confirming a decree of MAULVI MAZHAR HUSAIN, Second Additional Munsif.

Shiva Prasad Sinha for the appellants.

P. L. Banerji and *M. A. Aziz* for the respondents.

The judgment of the Court was delivered by

MUKERJI, J.—This is an appeal by one who was the defendant No. 1 in the suit. The plaintiff-respondent Jai Narain propounded a pedigree printed at page 6 of the record and said that he was the next reversioner to the estate of Harnandan, the last male owner of the property in suit. He complained that the mother of Harnandan, Mst. Batasi, the respondent No. 2, who was in possession had executed a deed of gift in favour of the defendant No. 1 who was her brother's son, that this deed of gift was void after the lifetime of the widow, and the plaintiff, accordingly, asked for a declaration to that effect. The defence was that the defendant No. 1 had been adopted by Harnandan's father, Sarup. The suit was decreed by the courts below, and a second appeal was filed on the ground that on the pedigree propounded and found established by the court below the plaintiff was not entitled to maintain the suit for they are no *bandhus*.

The point taken is covered by the decision in *Ram Sia* v. *Bua*[1]. No attempt has been made to show that that decision to which one of us was a party was wrong. This concludes the appeal.

During the hearing a point arose, namely, whether it was open to the plaintiff to maintain a suit for a declaration seeing that the alienation was by way of a gift in which there was no question of legal necessity, and, therefore, there was no object to be gained by filing a suit for a pure declaration.

There seems to be great force in this point, but the fact remains that this point was not raised before. In *Isri Dut Koer* v. *Hansbutti Koerian*[2] their Lordships of the Privy Council remarked that where a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a court of appeal after the issues on fact and law have been decided. Further, it appears that in *Saudagar Singh* v. *Pardip Narayan*[3] their Lordships of the Privy Council approved of a declaratory decree having been granted in favour of certain plaintiffs, where the only transfer impeached was a tamlik-namah or a deed declaring that the transferee was the owner of the property.

It has been argued with a good deal of force by Mr. Shiva Prasad Sinha that their Lordships themselves in *Rangasami Gounden* v. *Nachiappa Gounden*[4] said that a deed of gift could not possibly be held to be evidence of alienation for value for purposes of necessity, and that taken by itself the document could not stand as a deed of title, and, therefore, if the document in the case of *Saudagar Singh* v. *Partap Narayan Singh* had been a deed of gift their Lordships would have decided otherwise.

As the point has been raised late in the day we do not think we should give effect to it.

In the result the appeal fails and is hereby dismissed with costs

Appeal dismissed

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[1] 22 A. L. J. R. 861

[2] I. L. R. 45 Cal. 510

[3] 10 I. A. 150=10 Cal. 324

[4] 17 A. L. J. R. 536 at 549

CIVIL

1931

March 16

SULAIMAN, A. C. J.
BAJPAI, J.

HALKA *alias* DARIYAO (*Plaintiff*)
versus
NANNHON (*Defendant*)*

Mortgage—Plaint framed as in a redemption suit—Relief—Possession—Mortgage deed unregistered—Plaintiff's title proved independently—Defendants claimed possession as mortgagees for more than 12 years—Plaintiff entitled to possession on paying amount due to defendants.

The plaint was framed as if it were one in a suit for redemption, and the substantive relief claimed was one for possession. The mortgage deed being unregistered was invalid and no suit for redemption could lie. The defendants had never set up adverse possession and had claimed possession as mortgagees for more than 12 years. The plaintiff succeeded in proving his title independently of the mortgage; *held*, that the defendants must be deemed to have acquired at least the mortgagee's rights, and the plaintiff was entitled to recover possession on payment of the mortgage money admitted by him in the plaint.

APPEAL under Sec. 10 of Letters Patent from the judgment of the HON'BLE MR. JUSTICE YOUNG.

Iqbal Ahmad and *Mansur Alam* for the appellant.

Basudeva Mukerji for the respondent.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is a plaintiff's appeal arising out of a suit for possession. According to the plaint a mortgage had been made by the plaintiff's father in 1899 for a sum of Rs. 199 and the defendants' predecessor was put in possession of the mortgaged property which consisted of occupancy holdings. The plaintiff offered to pay the amount due on the mortgage and sought recovery of possession. There were several defendants to the suit. Defendant No. 1 did not admit the title of the plaintiff or the existence of any mortgage at all. Other defendants admitted the plaintiff's title, but pleaded that the mortgaged deed alleged by the plaintiff not having been registered, the plaintiff could not claim any right under it and was not entitled to recover the property. Both the courts below overruled the pleas raised by the defendants and decreed the claim on payment of the amount admitted by the plaintiff.

The lower appellate court held that the mortgage deed being unregistered was admissible for the purpose of proving the nature of the defendants' possession.

On appeal to this High Court a learned Judge of this Court allowed the appeal and dismissed the plaintiff's suit. He came to the conclusion that in view of the provisions of Sections 17 and 49 of the Indian Registration Act the document in question was inadmissible in evidence for the purpose of proving any transaction and that under Section 91 of the Indian Evidence Act other evidence was also inadmissible for showing the nature of the transaction.

With the exception of the Full Bench case of *Ram Gopal* v. *Tulshi Ram*[1], which was not on all fours with the present case, the attention of the learned Judge was not drawn to some other cases of this High Court, *Ramzan* v. *Bhukhal*[2] and the single Judge case of *Maha Mangal Rai* v. *Kishun Kandu*[3] and the unreported decision in S. A. No. 1631 of 1927 decided on April 29, 1930 (*Srimati Radha Bai* v. *Debi Das*).

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*L. P. A. 3 of 1930

[1] 26 A. L. J. R. 952

We agree with the learned Judge of this Court that in view of the imperative provision of Section 49 of the Registration Act the un-registered document could not be received as evidence of any transaction affecting the property. It is also quite clear that when the contract was reduced in the form of writing oral evidence was not admissible to prove the contract independently of the document. It does not however follow that the plaintiff is debarred from proving his title to the occupancy holdings independently of that document. As pointed out above, all the defendants other than the defendant No. 1, admitted the plaintiff's title. The defendant No. 1, although he denied the plaintiff's title in his written statement, admitted in the witness box that the lands in suit are the occupancy holdings of the plaintiff. There is also independent oral evidence in proof of the plaintiff's title. It was not at all necessary for him to rely upon this unregistered document in order to show that the occupancy holdings belonged to him. We therefore think that there is no legal bar to the establishment of such a claim. In the absence of proof of adverse possession which would extinguish the plaintiff's claim, he would be entitled to a decree. The learned advocate for the respondent contends before us that the suit as framed does not entitle the plaintiff to a decree for possession. His contention is that the plaint was framed as if it were one in a suit for redemption, and inasmuch as the mortgage does not exist, no suit for redemption lies. In our opinion this is too technical an objection. The substantive relief claimed in the suit is one for possession and if the plaintiff is entitled to such a relief even if the mortgage is invalid there is no reason why he should be denied that relief. The burden of proving that the plaintiff's right is extinguished lay on the defendants. All the defendants except defendant No. 1 admitted that they were holding these lands as mortgagees. The defendant No. 1 was not able to explain how he was in possession; but as pointed out by the lower appellate court the defendants do not allege adverse possession over the land as proprietors. It is therefore obvious that the defendants have not acquired full proprietary rights by adverse possession over the plots. According to the entry in the revenue paper they have all along been recorded as usufructuary mortgagees. They must therefore be deemed to have claimed possession as mortgagees against the plaintiff. Although the mortgage was invalid the defendants claimed possession as mortgagees over the plots in suit for more than 12 years and must be deemed to have acquired at least the mortgagee's rights. In equity the plaintiff cannot be entitled to recover possession of the property after the lapse of so many years without paying the amount which is due to the defendants; but the burden of proving the amount due was on the defendants. We doubt very much whether the unregistered deed would be any evidence to prove the amount of the mortgage money inasmuch as that was a part of the contract which was reduced into a form of writing. But fortunately for the defendants the plaintiff himself admitted that Rs.199 was the mortgage money. In the face of this admission the defendants were not called upon to prove it. We therefore think that the decree of the court below was correct and should be restored.

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[2] 16 A. L. J. R. 747

[3] 100 I. C. 346

We accordingly allow this appeal and setting aside the decree of this court restore that of the lower appellate court with costs throughout.

Appeal allowed

RAM NARESH RAI AND OTHERS
versus
KING-EMPEROR*

Penal Code, Sec. 215—Offence under—Necessary to prove—That property lost by commission of an offence—And accused was screening offender.

> Where the accused merely undertook to endeavour to trace out and restore the lost property on payment of some remuneration, he could not be convicted of an offence under Sec. 215 Penal Code, unless over and above that the prosecution proved that the property had been lost by the commission of an offence and that the accused was endeavouring to screen the offender from justice and was not using all means in his power to cause the offender to be apprehended and convicted of the offence. *In re Hemraj* v. *Emperor,* 6 I. C. 250 and *Emperor* v. *Mangu,* 25 A. L. J. R. 866 *relied on. Emperor* v. *Mukhtara,* I. L. R. 46 All. 915 *distinguished.*

Criminal Revision from an order of Piare Lal Esq., Sessions Judge of Ghazipur.

Kumuda Prasad for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Bajpai, J.—The three applicants before me have been convicted of an offence under Section 215 of the Indian Penal Code. It appears that on the night of April 23-24 the complainant Hari Ram lost two of his bullocks and therefore on April 24, 1930, he informed the police in the following terms:— *Bajpai, J.*

> On Wednesday in the evening my four oxen were fed and then tied to pegs. When every body was asleep two of them began to fight with one another and broke the tying strings and strayed away.

It is clear, therefore, that when the bullocks were lost to the complainant, they were lost not by reason of the commission of any offence but by sheer accident. About six days later, on May 1 there was a transaction between the complainant and the accused by which the accused took Rs.50 and restored the bullocks to the complainant. I must accept the finding of the court below that the money was demanded and received by the accused, but that alone is not sufficient to bring the conduct of the accused within the purview of Section 215 of the Indian Penal Code. On behalf of the applicants the case of *In Re Hemraj* v. *Emperor*[1] and the case of *Emperor* v. *Mangu*[2] has been cited. The Assistant Government Advocate has cited the case of *Emperor* v. *Mukhtara*[3]. This last case is distinguishable because

*Cr. Rev. 132 of 1931

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[1] 6 I. C. 250

[2] 25 A. L. J. R. 866

[3] I. L. R. 46 All. 915

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in that case there was a finding that the bullocks had been stolen. In the case before me there is no evidence that the bullocks were stolen. Indeed the first information report would go to show that the bullocks had simply strayed away and it is not fair to presume that later on somebody finding the bullocks committed an act of criminal misappropriation in the absence of any evidence on that point. There is also no evidence and no finding in this case that the accused knew the offender, and, therefore, it is obvious that he cannot be said to have failed in his efforts to cause the offender to be apprehended and convicted of an offence which he might have committed. Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration then upon this circumstance alone the accused cannot be said to be guilty of an offence under Section 215 of the Indian Penal Code, unless over and above that the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed. I am, therefore, of the opinion that the conviction of the applicants is illegal.

I, therefore, set aside the conviction and sentence and direct that the fine or any portion of it if paid be refunded. The bail bonds should be discharged.

Conviction quashed

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1931
June 19
BAJPAI, J.

MOHAMMAD BASHIR AND ANOTHER
versus
KING-EMPEROR*

Excise Act (Local Act IV of 1910), Sec. 60(a)—Conviction under—Irregularity in search—Search without warrant—Effect of—Criminal Procedure Code, Sec. 103—Search witnesses—To be invariably produced by prosecution—But conviction may be based on other evidence.

Irregularity in a search and the failure to obtain warrant would always afford ground for scrutiny, but if after close scrutiny the court comes to the conclusion that an excisable article was recovered from the possession of the accused, then a conviction under Sec. 60(*a*) of the Excise Act (Local Act IV of 1910) would be sound. *Romesh Chandra Banerjee* v. *Emperor,* I. L. R. 41 Cal. 350, *Queen-Empress* v. *Pukot Kotu,* I. L. R. 19 Mad. 349 and *Emperor* v. *Allahdad Khan,* I. L. R. 35 All. 358=11 A. L. J. R. 442 *relied on.*

The search lists and the search witnesses should invariably be produced by the prosecution, and they will be guilty of suppression of material evidence if they did not produce the same. But the prosecution can prove the recovery of the incriminating article by other evidence as well. *Munni Sonar* v. *The Emperor,* 9 Cal. W. N. 438 and *Solai Naik* v. *Emperor,* I. L. R. 34 Mad. 349 *followed.*

CRIMINAL REVISION from an order of J. J. W. ALLSOP ESQ., Sessions Judge of Cawnpore.

K. D. Malaviya and *S. Majid Ali* for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

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*Cr. Rev. 256 of 1931

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MOHAMMAD BASHIR *v.* KING-EMPEROR

Bajpai, J.

The following judgment was delivered by

BAJPAI, J.—Two persons Mohammad Bashir and Bassan *alias* Bashir were convicted by a magistrate of the first class under Section 60 (*a*) of the United Provinces Excise Act and sentenced to two years' rigorous imprisonment and a fine. On appeal their convictions were maintained by the learned Sessions Judge of Cawnpore. They have applied in revision to this Court and their case has been presented before me by Mr. Kapil Deo Malaviya and he has asked me to consider the cases of the two applicants separately.

It appears that Mohammad Bashir is the occupant of the house which was raided at 6 p.m. on December 8, 1930. Some cocaine was found in his house at three or four different places. It is quite clear that the excise inspector went to the house with his peon without having taken a warrant from a magistrate and without having taken a couple of respectable witnesses of the locality. These were irregularities and a great deal has been made by the defence out of these irregularities. It is of the utmost importance that search should be conducted in a highly regular manner, so that the defence might have no opportunity to question the ***bona fides*** of the prosecution. When the excise inspector and his peon reached the house, they found Muhammad Bashir and Bassan in a room. On the approach of the party Mohammad Bashir ran away and the excise inspector ordered his peon to arrest Bassan who was in the room and Bassan was accordingly arrested. The excise inspector also told his peon that after arrest Bassan should be brought out of the room and the house then chained. The excise inspector in the meantime went in pursuit of Mohammad Bashir and after having arrested him brought him back to the house when he sent for search witnesses. The door remained chained during this time, but the fact remains that for some short time the peon entered that house when he went to effect the arrest of Bassan, and he did so in the absence of any search witnesses. Later on in the presence of the search witnesses and after the usual formalities the house was searched and, as I said before, certain quantity of cocaine was recovered at various portions of the house.

The learned Sessions Judge in appeal has been very fair to the defence and has not attached any importance to the cocaine that was recovered from places where there was a possibility of the cocaine having been planted by an outsider or an enemy, but he has attached a great deal of importance to the cocaine that was discovered in a cupboard, and he has attached some importance to certain pieces of paper that were found lying about in the room and which when sent to the Chemical Examiner were reported to contain traces of cocaine. I myself am not prepared to attach any importance to those pieces of paper, but the cocaine recovered from the cupboard has influenced my judgment to a great extent. I am, however, told by Mr. Kapil Deo Malaviya that the conviction of Mohammad Bashir is unsound for various reasons. He contends that there was irregularity in the search inasmuch as a warrant was not obtained. He further contends that the search witnesses ought to have been at the spot from the very beginning. Irregularity in a search and the failure to obtain warrant would always afford ground for scrutiny, but, if after close scrutiny the

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court comes to the conclusion that an excisable article was recovered from the possession of the accused, then I am of the opinion that the conviction would be sound. This view has been taken by the Calcutta High Court in the case of *Romesh Chandra Banerjee* v. *Emperor*[1] and by the Madras High Court in the case of *Queen Empress* v. *Pukot Kotu*[2]. The same is the view of our own High Court as would appear from the cases of *Emperor* v. *Allahdad Khan*[3], *Emperor* v. *Sayeed Ahmad*[4] and the case of *Abdul Hafiz Khan* v. *Emperor*[5]. There is yet another argument advanced on behalf of the accused. It appears that the search witnesses were examined on behalf of the prosecution, and they instead of supporting the prosecution help the defence. The search lists and the search witnesses should invariably be produced by the prosecution, and they would be guilty of suppression of material evidence if they did not produce the same. This was held in *Munni Sonar* v. *The Emperor*[6] but the prosecution can prove the recovery of the incriminating article by other evidence as well. As was held by the Madras High Court in the case of *Solai Naik* v. *Emperor*[7], the court having due regard to the statements of the search witnesses and of any other witnesses that might be produced on behalf of the prosecution has got to form an opinion of its own regarding the truth of the Crown case and the trial court and the appellate court are the final Judges on this point. In the present case I find that both the trying magistrates as well as the learned Sessions Judge have thought fit to rely upon the evidence of the excise inspector and the excise peon in preference to the evidence of the search witnesses, and I am not prepared to accept the contention on behalf of the defence that the courts had no jurisdiction to do so. It is contended that in view of the provisions of Section 103 of the Criminal Procedure Code the competent witnesses in the case were the search witnesses. This argument contravenes the provisions of Section 133 of the Evidence Act, and I am not prepared to give effect to it. Sitting as a Court of revision I must accept the finding of the courts below on the credibility of witnesses. The result is that the finding of the court below on the question that cocaine was discovered in the house which was in the occupation of Mohammad Bashir must be upheld. His conviction is sound and I maintain the same and the sentence.

Now I pass on to the case of Bassan *alias* Bashir. All that the prosecution have been able to prove against him is that he was in the house of Mohammad Bashir sitting with him in the same room, at least that is what I can gather from the judgment of the trying magistrate and from the arguments of the Assistant Government advocate. This in itself without other incriminating circumstances would be a very slender foundation for basing a conviction, but apart from that I have looked into the judgment of the trying magistrate and I find that he was discussing at length the case of Mohammad Bashir and has very very incidentally considered the case of Bassan. On appeal the learned Sessions Judge starts his judgment by saying that "the appellant Mohammad Bashir has been sentenced, etc., etc.", and all along he speaks of the case of the appellant (in the singular). He has mentioned the name of Bassan only casually in the fifth line of his judgment and nowhere else do I find any discussion of his case. That being so, I have got to choose between two alternatives: (1) to quash his conviction and (2) to remand his case either to the lower appellate court or to the trial court. As I said at the very outset, all that I could gather so far as the prosecution case regarding this accused is concerned was that he was found in the same room with Mohammad Bashir, and upon this material no useful purpose would be served by remanding the case. I, therefore, adopt the first alternative, allow his application and set aside his conviction and sentence. He need not surrender to his bail and his bail bond is discharged.

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[1] I. L. R. 41 Cal. 350

[2] I. L. R. 19 Mad. 349

[3] I. L. R. 35 All. 358=11 A. L. J. R. 442

[4] I. L. R. 35 All. 575=11 A. L. J. R. 33

[5] A. I. R. 1926 All. 188

[6] 9 Cal. W. N. 438

[7] I. L. R. 34 Mad. 349

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July 3
BAJPAI, J.

CHEDI (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Excise Act (Local Act IV of 1910), Secs. 3(2), 70 and 60—Sub-Inspector of police—Whether an 'Excise officer'—Whether empowered to file complaint under Sec. 60.

A Sub-Inspector of police, who is invested with certain powers in connection with seizure of excisable articles and the arrest of suspected persons under Sec. 10 of the Excise Act, is an 'Excise Officer' within the meaning of Sec. 3 (2); and is therefore empowered by Sec. 70 to file a complaint under Sec. 60. *Emperor* v. *Chhater Singh*, 21 A. L. J. R. 922 *relied on.*

CRIMINAL REVISION from an order of HARISH CHANDRA ESQ., Sessions Judge of Benares.

Saila Nath Mukerji for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

BAJPAI, J.—Chhedi has been convicted by a Magistrate of the first class under Sec. 60 (*a*) of the United Provinces Excise Act and sentenced to six months' rigorous imprisonment and a fine of Rs.50. His conviction was affirmed in appeal by the learned Sessions Judge of Benares, but the imprisonment was reduced to three months. He has come up in revision before this Court and Mr. Saila Nath Mukerji appearing on his behalf has taken the point that the Magistrate having no jurisdiction to try the case the conviction is bad in law. Bajpai, J.

The way in which this contention has been developed before me is that under Section 70 of Local Act IV of 1910 no Magistrate can take cognizance of an offence punishable under Section 60 except on his own knowledge or suspicion or on the complaint or report of an Excise Officer. The present trial proceeded on the report of a Sub-Inspector of police, and it is argued that a Sub-Inspector of Police is not an Excise Officer within the meaning of Section 3, Sub-clause (2) of the Act. That provision says that an Excise Officer means a Collector or any officer or person appointed or invested with powers under Section 10, and when one looks to Section 10 it appears that by no notification of the Local Government has a police officer

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*Cr. Rev. 103 of 1931

CRIMINAL

1931

CHEDI v. KING-EMPEROR

Banerji, J.

been invested with the power of filing a complaint under Section 60. The answer by the Crown is that, if a person or officer has been invested with *any* power under Section 10, then he becomes an Excise Officer for the purposes of Section 70, and my attention has been drawn to Government Notification dated July 13, 1910, as amended by notifications, dated October 11, 1913, June 6, 1917 and September 8, 1920, the conjoint effect of which Notifications is that a police officer is invested with certain powers in connection with the seizure of excisable articles and the arrest of suspected persons. A reference to all these Notifications would be found at one place on page 7 of the supplement to the Excise Manual, Volumes I and II, corrected up to July 1, 1922. I am in perfect agreement with the way in which Clause (2) of Section 3 is interpreted by the learned Assistant Government Advocate. I am supported in this view by the case of *Emperor* v. *Chhater Singh*[1], the case of *Prag* v. *Emperor*[2] and the decision of the Oudh Chief Court in Criminal Revision No. 67 of 1926 *Kallu* v. *King-Emperor*, decided on July 6, 1926. A Sub-Inspector has the power under the notifications to arrest without warrant a person found committing an offence punishable under Section 60. He has further been given the power to seize and detain excisable articles, and as was pointed out in *Chhater Singh's* case, it was unnecessary, and would have complicated matters, for the Local Government, to issue a further notification authorising persons on whom it had already conferred powers, for the purposes of the Act, to do some thing which the Act says any Excise Officer may do, that is to say, to issue a separate notification authorising him to submit a report or complaint to the Magistrate.

I am of the opinion that there is no force in this revision and I dismiss it. The accused who is on bail will surrender to his bail bond and serve out the remainder of the sentence.

Application dismissed

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[1] 21 A. L. J. R. 922

[2] 30 L. C. 143

CIVIL

1931

June 11

SULAIMAN, A. C. J.
BAJPAI, J.

BHIM SHAH AND ANOTHER (*Plaintiffs*)
versus
UDE RAM SHAH AND ANOTHER (*Defendants*)*

Pre-emption—In Kumaun—Not governed by Pre-emption Act but custom—Record does not give preference to relatives within third degree inter se.

Where, in a suit for pre-emption in Kumaun, to which the Pre-emption Act did not apply, the plaintiffs were step-brothers of the vendor, and the vendees were descended from the same grand-father as the vendor, and according to the custom prevailing in Kumaun "a relative of the vendor within the third degree has a right of pre-emption against any purchaser Who is an unrelated or a more distantly related co-sharer," *held*, that the record of custom did not mean that if both the plaintiff-pre-emptor and the vendee were within the third degree, the plaintiff would have preference if he was a nearer relation; and therefore the plaintiffs were not entitled to pre-empt.

SECOND APPEAL from a decree of F. D. SIMPSON ESQ., District Judge of Kumaun, reversing a decree of L. D. JOSHI ESQ., Assistant Collector first class of Chamoli.

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*S. A. 687 of 1930

CIVIL

1931

BHIM SHAH
v.
UDE RAM SHAH

Sulaiman,
A. C. J.

L. M. Roy for the appellants.
Ram Nama Prasad for the respondents.

The judgment of the Court was delivered by

SULAIMAN, A. C. J.—This is a plaintiffs' appeal arising out of a suit for pre-emption in Kumaun. It is not suggested that by any notification the local Government has extended the provisions of the Agra Pre-emption Act to the Scheduled districts in Kumaun. The Pre-emption Act accordingly does not apply.

The case depends on the custom prevailing in Kumaun. Mr. Stowell in the Manual of Land Tenures of the Kumaun Division at page 46 has stated the custom in the following words:

> A relative of the vendor within the third degree has a right of pre-emption against any purchaser who is an unrelated or a more distantly related co-sharer.

It is obvious that that record does not give preference to relatives within the third degree *inter se*: a relative within third degree has a right against a purchaser who is either unrelated to the vendor or is related more distantly than the third degree. It does not mean that if both the plaintiff and the vendee are within the third degree the plaintiff would have preference if he is a nearer relation. On page 27 there is the record of the same custom in different words. That too does not indicate that there is any right of pre-emption *inter se* if both the plaintiff and the vendee are within the third degree.

On page 47 Mr. Stowell has pointed out that the third degree of relationship is to be ascertained by counting back to the common ancestor who is to be No. 1.

The plaintiffs are the step-brothers of the vendor and the vendees are descended from the same grand-father as the vendor. They are therefore within the third degree. There being no preference *inter se* the suit was rightly dismissed by the lower appellate court. The appeal is accordingly dismissed with costs.

Appeal dismissed

CIVIL

1931

June 11

SULAIMAN, A. C. J.
BANERJI, J.

RAM RAJ PANDEY (*Plaintiff*)
versus
HAR PRASAD AND OTHERS (*Defendants*)*

Pre-emption Act, Sec. 19—Pre-emptor—Entitled to maintain suit—If status of co-sharer not lost till passing of first court decree—Not necessary to establish that his status could not have been challenged.

If the plaintiff-pre-emptor has the status of a co-sharer up to the time the first court passes its decree, he would be entitled to maintain the suit. It is not necessary for him to establish further that no suit to challenge his interest as a co-sharer could have been brought. Where such a suit is brought against him and decreed before the first court passes the decree in the pre-emption suit, the position would of course be different.

*S. A. 1363 of 1929

Civil

1931

Ram Raj Pandey *v.* Har Prasad

Sulaiman, A. C. J.

SECOND APPEAL from a dercee of BABU JAGANNATH SINGH, Subordinate Judge of Basti, confirming a decree of BABU KRISHNA CHANDRA, Munsif.

Harnandan Prasad for the appellant.

Shiva Prasad Sinha for the respondents.

The judgment of the Court was delivered by

SULAIMAN, A. C. J.—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff had acquired some property and became a co-sharer by virtue of a sale deed within twelve months of the sale deed in question. Before the suit was filed there was a compromise decree under which his rights as a co-sharer were finally confirmed. The claim was resisted on the ground that the plaintiff's status as a co-sharer at the time of the sale deed was not determined and his title was inchoate and that therefore he was not entitled to maintain the suit. The argument is that the plaintiff must establish that from the time of the sale deed till the time of the passing of the decree he all along had an indefeasible interest as a co-sharer.

It seems to us that it is not for the court to start any such enquiry. If the plaintiff had been given a chance he might well have shown that the other interested co-sharers had acquiesced in the sale and they had been estopped from claiming pre-emption. In addition to this the latter portion of Section 19 itself contemplates that a right of pre-emption may be lost after the passing of the first court's decree and nevertheless his right of suit would subsist. If the plaintiff had the status of a co-sharer up to the time the first court passed its decree, he would be entitled to maintain the suit. It is not necessary for him to establish further that no suit to challenge his claim could have been brought. Had a suit been brought against him and decreed before the first court passed its decree, the position would of course have been different.

The plea of estoppel raised in the trial court was not substantiated by any evidence and does not appear to have been pressed before the lower appellate court and could not be pressed as the defendant did not lead any oral evidence at all.

We think that the view taken by both the courts below that the plaintiff had no right to sue was wrong.

We accordingly allow this appeal and setting aside the decree of the courts below decree the plaintiff's claim for pre-emption of the property claimed on payment of Rs.175 within two months from this date. In case the amount is paid within the time allowed, the plaintiff will have his costs in all courts. If the amount is not deposited within the time fixed the suit shall stand dismissed with costs in all courts.

Appeal allowed

GANGA KALWAR (*Defendant*)
versus
BENI MADHO PRASAD SINGH (*Plaintiff*)*

CIVIL

1931

June 22

BOYS, J.
SMITH, J.

Abadi—Site in—Customary right of transfer by tenant to stranger—When proved—Transactions relied on to be of the same nature.

The most cogent evidence is required before a customary right of transfer of the sites of houses in a village can be held to be established.

Where in an agricultural village containing 600 houses, the transfer by a perpetual lease, was by an agricultural tenant in favour of a non-agricultural tenant, and the defendants justified the lease of the site by the production of 22 sale-deeds and 8 mortgages spread over 100 years, while the zamindar produced 14 kabuliats and 4 instances of "parjot," *held* that the custom was not established.

Where an agricultural tenant purports to transfer the right to a site in the village, and on the transfer being challenged by the zamindar, the transferee, who is a stranger to the village, sets up a custom in virtue of which a tenant has a right to transfer sites of house in the village, and relies on sale deeds and mortgages by tenants, he must satisfy the court that the transactions relied on by him were not transactions between two agricultural tenants, and the vendee or mortgagee, as the case may be, was a stranger to the village.

SECOND APPEAL from a decree of B. S. KISCH ESQ., District Judge of Allahabad, confirming a decree of MAULVI MOHAMMAD TAQI KHAN, Additional Subordinate Judge of Mirzapur.

Janaki Prasad and *Ambika Prasad Dube* for the appellant.

Shambhu Nath Chaube for the respondent.

The judgment of the Court was delivered by

Boys, J.

BOYS, J.—This is another of those cases in which the defence which is so common now-a-days is made that there is a customary right of transfer of the sites of houses in a village. We are of opinion that, as has often been said, the most cogent evidence is required before such a custom can be held to be established. It is true that zamindars like everybody else must be watchful of infringement of their rights, but that is very different matter from saying that they must be perpetually harassing their tenants and watching them to see every little thing they do. It may constantly happen that a particular tenant may exceed his rights even by the execution of a sale-deed purporting to transfer the right to a site, but the transaction may take place in circumstances in which the zamindar is either ignorant of it, or even knowing of it does not think it worth his while to worry about it. We may give an illustration of this. An agricultural tenant may part with his house and purport to part with the site also to another agricultural tenant, and the zamindar, even if he knows of it, may not feel it worth worrying about it, much less worth instituting a suit about it. On the other hand, an agricultural tenant may purport to transfer his house and site to a non-agricultural tenant, even a total stranger in the village. This may be a very serious matter for the zamindar, for if such a transfer is winked at by him and in course of time a custom is held

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*S. A. 918 of 1930

Civil

1931

Ganga Kalwar v. Beni Madho Prasad Singh

Boys, J.

to be established he is manifestly in danger of losing the whole of his rights in a village site, and having to take up further sites from the agricultural area in order to provide room for his agricultural tenants. Now, in the present case, Bindhyachal is found to be an agricultural village. The transfer, by a perpetual lease, is by an agricultural tenant in favour of a non-agricultural tenant. The defendants seek to justify the lease of the site by the production, we are told, of 22 sale-deeds and 8 mortgages, while the zamindar, on the other hand, has produced 14 kabuliats and 4 instances relating to "parjot." Both courts have held that no custom is established. The transactions relied upon by the defendants are spread over 100 years, while there are 600 houses in Bindhyachal. The lower appellate court has, even giving to the defendant full benefit of the transactions upon which he relies, held that they were not sufficient to establish the custom, and we agree. But we may add that even if we had any doubts, we should have to be satisfied that the transactions relied upon by the defendant were of the same nature as that which he endeavours now to maintain. We are told by counsel for the appellant that he has no information as to whether the transactions relied on were transactions between two agricultural tenants, or whether the vendee or mortgagee as the case may be, was a non-agricultural tenant, or whether he was a stranger to the village. In the present case it is admitted that the lessee is a stranger to the village, that is to say, he is not already a tenant of any description, and it is more than possible that none of the transactions relied on by the defendant would apply to the present case; but for the reasons that we have given we do not think it necessary to enter into this further, or to send down any issue. We agree with the lower appellate court, and the appeal is dismissed with costs.

Appeal dismissed

Criminal

1931

Sep. 3

Sulaiman, A. C. J.

Niamatullah, J.

KING-EMPEROR (*Applicant*)

versus

BAHADUR SINGH (*Opposite party*)*

Criminal Procedure Code, Sec. 121—Bond executed under Sec. 109 Cr. P. C.—Accused again found in suspicious circumstances and unable to give satisfactory explanation—No forfeiture of bond—Liability of sureties.

The accused was proceeded against under Sec. 109 Cr. P. C. Two persons stood sureties for him for his good behaviour. Shortly before expiry of the period for which the sureties had bound themselves, he was again found concealing himself under suspicious circumstances without any means of livelihood and unable to give a satisfactory account of himself, *held,* (1) that in view of the provisions of Sec. 121 Cr. P. C. there had been no forfeiture of the bond because the action of the accused did not amount to an attempt to commit an offence punishable with imprisonment, (2) that if the bond had been forfeited the sureties would have been liable whether proceedings were started against them or after the expiry of the period for which they had bound themselves.

Criminal Reference made by P. Mason Esq, District Magistrate of Dehra Dun.

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*Cr. Ref. 184 of 1931

CRIMINAL

1931

KING-EMPEROR
v.
BAHADUR SINGH

Sulaiman,
A. C. J.

M. Waliullah (Assistant Government Advocate) for the Crown

The judgment of the Court was delivered by

SULAIMAN, J.—This is a reference by the District Magistrate of Dehra Dun recommending that proceedings may be ordered against the sureties for the accused. He was proceeded against under Section 109 Cr. P. C. Two persons stood sureties for him for his good behaviour. Shortly before the expiry of the period, he was again found concealing himself under suspicious circumstances in a lonely and abandoned water-mill without any ostensible means of livelihood and unable to give a satisfactory account of himself. He was accordingly sent up again under S. 109 Cr. P. C. The Magistrate was not able to take any action against the sureties before the expiry of the period. He expressed the opinion that he was unable to take any action against the sureties. The District Magistrate considers that there was no objection to the proceedings being taken against the sureties even though there was some delay.

So far as this last matter is concerned, we agree with the District Magistrate that if the bond was forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period.

We however think that in view of the provisions contained in S. 121 Cr. P. C. there has been no forfeiture. A breach of the bond is committed when the accused commits or attempts to commit or abets any offence punishable with imprisonment. The mere fact that he is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself, which may justify a fresh proceedings against him under Section 109 Cr. P. C. would not result in the forfeiture of the first bond because that does not amount to the commission of or attempt to commit or abetment of an offence punishable with imprisonment. At most, it might be a preparation for the commission of an offence, but short of an attempt. We accordingly direct that the record may be returned.

CRIMINAL

1931

Sep. 22

NIAMAT-ULLAH, J.

KASHINATH AND ANOTHER
versus
EMPEROR*

Criminal Procedure Code, Secs. 235 and 236—Conjoint application—Whether permissible—Several charges rightly framed under Sec. 235—Whether one of such charges can be framed in the alternative under Sec. 236.

Several charges being rightly joined against the same accused under Sec. 235 Criminal Procedure Code, there can be no objection to one of such charges being in the alternative as provided by Sec. 236; nor can there be any objection to another accused being joined under Sec. 239 as regards one of those charges.

Janeshar Das v. *King-Emperor,* 1929 A. L. J. R. 329 and *Emperor* v. *Sheo Saran Lal,* I. L. R. 32 All. 219 *distinguished.*

*Cr. Rev. 432 of 1931

CRIMINAL REVISION from an order of BABU GOVIND SARUP MATHUR, Sessions Judge of Mainpuri.

Kumuda Prasad for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

NIAMATULLAH, J.—The applicants Kashinath and Dhoomi Mal have applied in revision from the order of the learned Sessions Judge, Mainpuri, who dismissed their appeal from the order of conviction passed by a Magistrate, First Class, of that district for an offence under S. 419 I. P. C. Kashinath was also convicted by the trying Magistrate of an offence under S. 411 I. P. C. or 403 in the alternative, but the learned Sessions Judge set aside his conviction on the latter charge.

It appears that both the accused travelled without tickets and on being questioned at the railway station Etawah, Dhoomi Mal represented that he was a relative of Kashinath who held a pass entitling them to travel without tickets. Kashinath produced a pass which he said entitled him as a railway servant and Dhoomi Mal his relative to travel without tickets. It was found on enquiry that the pass had been granted to one Jagannath Prasad, a railway servant, but was lost, and in some inexplicable manner came into the possession of Kashinath who, though a railway servant, was not entitled to make use of the pass which he showed at Etawah railway station on the occasion already referred to. Both the courts below have held that the applicants committed an offence of cheating. On the facts stated above there can be no doubt that they were right. Kashinath was also convicted by the trying Magistrate of an alternative charge, to which reference has already been made. The Magistrate held that apart from the offence of cheating, Kashinath being in possession of a pass which belonged to another, must have either misappropriated it or received it knowing it to be stolen from the rightful person, or misappropriated. The learned Sessions Judge, for reasons given in his judgment, set aside Kashinath's conviction of an offence under S. 411 or 403. But the learned advocate for the applicants has contended before me that there was nevertheless a misjoinder of charges which vitiates the whole trial before the Magistrate.

It is not disputed that the two accused could be jointly tried for an offence under Sec. 419 I. P. C. under S. 239 Cr. P. C.

Nor is it disputed that Kashinath could be tried under Sec. 235 Cr. P. C. for two offences, namely, an offence under Sec. 419 I. P. C. and 411, or in the alternative, of 419 and 403. It is, however, argued that in so far as a charge in the alternative could be framed and was framed with reference to S. 236 Cr. P. C., and as Secs. 235 and 236 are mutually exclusive, they should not have been invoked to justify charges contemplated by Secs. 235 and 236. I am unable to accept this contention. S. 235 Cr. P. C. permits joinder of several charges in respect of offences committed by the same person if the acts constituting such offences are so connected together as to form the same transaction. The use of the pass by Kashinath, constituting an offence under S. 419, and his possession at the time he made use of it, which constituted another offence, are acts so connected together as to form the same transaction within the

CRIMINAL
1931
KASHI-NATH
v.
EMPEROR
Niamat-ullah, J.

meaning of S. 235 Cr. P. C. So far as this reasoning is concerned, the learned advocate for the applicants has not much fault to find with it. He contends that as it could not be said positively that possession of the railway pass constitutes an offence under S. 411 as, if Kashinath himself had misappropriated the pass, he would be guilty of the offence of misappropriation under S. 403 but not one under S. 411 I. P. C. and that for this reason an alternative charge of the character described in S. 236 Cr. P. C. was rendered necessary, and such a charge could not be added without recourse to S. 236. If, therefore, the learned advocate argues, Secs. 235 and 236 are mutually exclusive, joinder of charges which necessitated the combined operation of two antagonistic sections, like Secs. 235 and 236, vitiates the trial. I am unable to accept this view. There is no reason why, if both the sections are in terms applicable to a case, and if their application does not lead to any anomalous result, they should not be applied. Reference has been made to *Janeshar Das* v. *K.-E.*[1]. It was a case of joinder of charges of misappropriation. A learned Judge of this Court held that Secs. 234 and 236 are mutually exclusive. Similarly in *Emperor* v. *Sheo Saran Lal*[2], another learned Judge of this Court thought that Secs. 234 and 235 Cr. P. C. could not operate in harmony. No case has been quoted in which the conjoint operation of Secs. 235 and 236 was considered to be obnoxious so as to vitiate the trial.

I find nothing in the language of Secs. 235 and 236 which supports the contention put forward on behalf of the applicants. Several charges being rightly joined against the same accused under S. 235, there can be no objection to one of such charges being in the alternative as provided by S. 236 nor can there be any objection to another accused being joined under Sec. 239 as regards one of those charges. No conflict arises in consequence of joinder of charges and joinder of accused in the same trial in the manner indicated above. In this view it is not necessary to consider the further question whether Kashinath having been acquitted of the charge with which he alone was concerned, any question of misjoinder of charges could vitiate the trial.

Kashinath was sentenced by the Magistrate to a fine of Rs.100 and Dhoomi Mal to a fine of Rs.75. The Sessions Judge reduced the fine in case of Kashinath to Rs.75 and of Dhoomi Mal to Rs.25. I do not think any further leniency can be shown in the matter of sentence.

The revision is dismissed.

Application dismissed

[1] 1929 A. L. J. R. 329

[2] I. L. R. 32 All. 219

CIVIL
1931
Nov. 16
MUKERJI, J.
KING, J.

A MUKHTAR OF GORAKHPUR—*In the matter of*[*]

Legal Practitioner—Threatened zemindar that tenants would stop rendering 'begar' and payment of rent—Convicted under Sec. 506 Penal Code—Appeal —Released by Local Government—In accordance with Government of India Notification dated March 5, 1931—Proceedings before High Court relating to suspension dropped—Threat did not imply violence either to person or to property.

The High Court issued a notice to a mukhtar to show cause why he should not be suspended or dismissed in as much as he was convicted under Sec. 506 of the Penal Code on the ground that he had threatened a zemindar with this consequence that his tenants would stop rendering "begar" and payment of rent. His appeal was not heard as he was released by the Local Government in accordance with the Government of India Notification dated March 5, 1931 granting general amnesty to political prisoners who had been convicted in connection with the civil disobedience movement for offences not involving violence or incitement to violence. *Held,* (1) that the release of the mukhtar amounted to an expression of opinion on the part of the Local Government that he was convicted of an offence which did not imply "violence or incitement to violence"; (2) that the threat to the zemindar, although it came within the definition of criminal intimidation, did not imply any violence either to person or to property and therefore the proceedings before the High Court should be dropped.

U. S. Bajpai (Government Advocate) for the Crown.

K. N. Katju for the Mukhtar.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—In this case a notice was issued by the High Court to Mr. Ram Dawan Singh, a Mukhtar, ordinarily practising in the district of Basti

> to show cause why he should not be suspended or dismissed inasmuch as he was convicted by a criminal court of the offence of criminal intimidation under Section 506 of the Indian Penal Code.

Mr. Ram Dawan Singh has appeared by counsel to show cause.

Among other matters, Dr. Katju, the learned counsel appearing for Mr. Ram Dawan Singh, has drawn our attention to the notification issued by the Government of India in the Home Department, bearing date March 5, 1931 and published at page 89 of the Gazette of India Extraordinary bearing the same date. It appears that by the said notification, the Government of India issued a sort of amnesty to political prisoners and to prisoners who were being tried for political offences. Clause 12 (*iii*) runs as follows:—

> Where a local Government has moved any High Court or has initiated proceedings under the Legal Practitioners' Act in regard to the conduct of legal practitioners in connection with the civil disobedience movement, it will make application to the Court concerned for permission to withdraw such proceedings, provided that the alleged conduct of the persons concerned does not relate to violence or incitement to violence.

Clause 13 (*i*) runs as follows:—

> Those prisoners will be released who are undergoing imprisonment in connection with the civil disobedience movement for offences which did

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[*] Mis. Case 539 of 1931

Civil

1931

A Mukhtar of Gorakhpur *in re*

Mukerji, J.

not involve violence, other than technical violence, or incitement to such violence.

We have been informed that the opposite party, who was convicted under Section 506 of the Indian Penal Code and was sentenced to undergo two years' rigorous imprisonment, filed an appeal but was released by the Local Government in accordance with the notification issued by the Government of India stated above. The result was, the appeal was not heard and the appellant before the court was released.

The release of Mr. Ram Dawan Singh amounted to an expression of opinion on the part of the Local Government, that he was convicted of an offence which did not imply "violence or incitement to violence".

We have ourselves examined the judgment of the criminal court. That court found that Mr. Ram Dawan Singh threatened one Mr. Sakhawat Ali with this consequence that his tenants would stop rendering of unpaid labour or "Begar" and payment of rent. In our opinion, this threat, although it did come within the definition of criminal intimidation, did not imply any violence either to person or to property. This being our view, we think that the proceedings before us should be dropped. We note that the Board of Revenue has renewed the certificate of Mr. Ram Dawan Singh to practise as revenue agent in the revenue courts. We direct that the proceedings be dropped. We make no order as to costs. The certificate to practise will be renewed accordingly.

MUNICIPAL BOARD, ETAH *through* THE CHAIRMAN (*Defendant*) *versus* ASGHARI JAN *alias* LAPPO (*minor*) THROUGH BISMILLA (*Plaintiff*)*

Civil

1931

Nov. 30

Sen, J.
Niamat-ullah, J.

Municipalities Act (Local Act 2 of 1916), Sec. 298, List I, Group H, Cl. (e)—Bye-law under—Prohibiting public prostitutes from residing within specified areas and streets—'Public Prostitutes'—Interpretation of—Civil Procedure Code, Or. 26—Whether court can issue commission to a person—To hear a woman sing and report whether she was a public prostitute.

A minor girl, whose mother and other relations were prostitutes, and who lived in the city with her mother, was served with a notice by the municipality forbidding her to carry on her occupation as prostitute in her house, in pursuance of a bye-law framed under Sec. 298 of the Municipalities Act prohibiting prostitutes from residing within specified areas and streets. It was found that the girl carried on the occupation of singing and dancing and lived for about two months as a concubine of a certain man and there was nothing to show that their intimacy was not of an exclusive character. *Held,* that the plaintiff was not a public prostitute and the bye-law could not apply to her case.

A public prostitute is a woman who openly and habitually offers her person to promiscuous sexual intercourse for gain, and who advertises and acknowledges her occupation by word of mouth, deportment or conduct.

For the bye-laws framed under Section 298 of the Municipalities Act to be applicable a woman should be not only a prostitute but a public prostitute.

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*S. A. 886 of 1929

CIVIL

1931

MUNICIPAL BOARD, ETAH v. ASGHARI JAN

There is nothing in the Code of Civil Procedure authorizing a court to issue a commission to a person directing him to hear a woman sing and then report not only as to her skill as a singer but also as to her occupation in life so far as it could be deduced from her musical talents.

SECOND APPEAL from a decree of ALI AUSAT ESQ., Additional District Judge of Aligarh reversing a decree of BABU HARI SHANKAR, Munsif of Etah.

K. Verma for the appellant.

A. M. Khwaja for the respondent.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by the defendant from the appellate decision of Mr. Ali Ausat who on February 28, 1929, overset the judgment of B. Hari Shanker Vidyarthi, Munsif of Etah, in a suit in which the plaintiff-respondent had asked for the following relief:—

> It may be declared that the notice dated December 6, 1927 sent and signed by the secretary of the defendant and issued to the plaintiff is illegal, null and void, that the rule relied on and referred to in the notice does not apply to the plaintiff and that under it, the defendant has no legal remedy (sic.) or right to take proceedings against the plaintiff in case of breach of order by her.

The suit was instituted by Asghari Jan *alias* Lappo, caste prostitute, with her mother Mst. Bismilla for her next friend and was directed against the Municipal Board of Etah. The plaintiff with her mother lived in a house situate on the Grand Trunk Road in the city of Etah. The house presumably belonged to Mst. Bismilla, the plaintiff's mother. On December 6, 1927, a notice was served upon the plaintiff in which she was asked not to carry on her occupation as a prostitute at her place of residence, after a week from the date of the notice, otherwise legal steps would be taken against her. It was stated in this notice that bye-laws had been framed by the Municipal Board and sanctioned by the Local Government whereby prostitutes were prohibited from carrying on their occupation in houses on the Grand Trunk Road, Kutcherry Road, Naththa Park Road and Mst. Bismilla Road and that information of this fact had been given to the public generally by proclamation and by beat of drum, but that notwithstanding this, the plaintiff was carrying on her occupation within the prohibited area. Hence the warning.

The plaintiff alleged that she was a *virgo in tacta,* that her profession was singing and dancing, that no sort of fornication was practised in the house occupied by her "and that the bye-laws framed by the Municipal Board were therefore not applicable to her". These allegations were traversed by the defendant in the written statement dated March 28, 1928. This written statement was signed and verified by the Municipal Vice-Chairman Pundit Shiva Datt, B.A., LL.B., Vakil, Etah courts. He declared that paragraphs 1 to 13 of his written statement were true to his belief which was founded upon a perusal of papers. In paragraph 7 of the written statement he denied that the plaintiff was a minor. In paragraph 8 he stated as follows:—

> The plaintiff's allegation that she follows the profession of dancing and singing only and is not a public prostitute is absolutely wrong. The plaintiff is a public prostitute. This is the means by which she earns her

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> livelihood and this is her ordinary profession.

Pt. Shiva Datt did not figure as a witness in this case and we are not aware of the documents, if any, on which the allegations contained above were founded.

Three issues were framed by the trial court:—

> 1. Whether the plaintiff is an adult, if so, how does it affect the case?
> 2. Whether the plaintiff is not a public prostitute and is she entitled to a declaration sought for?
> 3. Whether the suit is barred by limitation?

The learned Munsif decided the first and the third issues in favour of the plaintiff. On the first issue he remarked as follows:—

> The statement of the Civil Surgeon supported by the entry in the defendant's own birth register very satisfactorily proves that the plaintiff is merely 15½ years of age By appearance too the plaintiff does not appear to be an adult.

On issue No. 2, the plaintiff produced a number of persons who deposed that they had approached the *plaintiff* through her mother and had made overtures to her but she had refused to have sexual intercourse with them. The Munsif disbelieved this evidence. The Municipal Board produced certain witnesses who deposed that they were on terms of intimacy with the plaintiff and had sexual connection with her. One of these witnesses was ryot of Rai Inder Narain, the Chairman of the Municipal Board. Another witness was the cousin of the Municipal contractor. The Munsif believed this evidence and he drew an adverse presumption against the plaintiff on account of her refusal to submit to a medical examination. He accordingly dismissed the suit.

Plaintiff appealed. The procedure adopted by the appellate court was curious, and his theories were somewhat farfetched. The learned Judge says:

> When the case was first argued before me and the oral evidence was read over, I thought that having regard to the age of the plaintiff, she could not remain a virgin and so I asked her counsel to produce her and get her examined by a lady doctor about this point. The counsel agreed to this course and then plaintiff appeared and plaintiff's counsel stated to the court that the girl lost her virginity two months ago as she is in the keeping of a gentleman (sic) at some place. *Still I was not satisfied with the story that plaintiff lost her virginity only two months ago and I asked the plaintiff's pleader to get the plaintiff examined by a lady doctor about the fact whether she had been used to cohabitation only for two months or for two years*, but plaintiff's mother appeared and said that she does not want to examine her daughter by a lady doctor nor has she got the fee. The statement that she has got no fee is not correct, so it is fair to infer that the girl is given to cohabitation *since two years.*

We are not aware if any scientific data could be available to a medical expert to enable him to give an opinion with anything like reasonable certainty as to the probable period for which a fairly grown up woman was carrying on sexual intercourse. We are also not aware of any law which renders it permissible for a judge to draw an inference against a woman from her refusal to submit to a medical examination that she was "given to cohabitation *since two years.*" At another place the learned Judge makes an observation which appears to us to be inconsistent with what he has said before:—

> It is true that plaintiff has connection with some person, whether since two months or one year, it is difficult to say

The learned Judge discards the oral evidence produced by the parties and we are of opinion that there was ample justification for this.

During the progress of the hearing of the appeal, the learned Additional District Judge passed a long order, couched in the following terms:—

> The defendant's counsel says that though defendant's vakil in the court below admitted that plaintiff knows singing and dancing but that is not her chief profession and she does not practise singing and dancing as an art. On the other hand, plaintiff's counsel says that plaintiff practises as an art and follows it as a profession. As the question largely hinges on the point whether the chief business of plaintiff is public prostitution or her chief business is singing and dancing as an art, so in order to decide this point it is necessary that some one who is an expert in this art should be examined. The expert should see the girl's singing and dancing and then should give his evidence before this Court. The expert's fee will have to be paid by the plaintiff. Mr. A. A. Jilani, M.A. LL.B., Vakil is present in court. He says that he can work as an expert. I appoint him as an expert. He should have the performance of singing and dancing of the girl at some place and give evidence before this Court on February 26, 1929. His fee will be fixed later on.

Mr. A. A. Jilani got a performance of music of Mst. Asghari Jan made on the night of February 25, 1929. The performance lasted from 9-30 p. m. to 1-30 a. m. He had "invited the best educated singers of the city to hear the singing and to help him as assessors." He "took help from them". He "weighed their opinion with his opinion in forming the opinion about the art of the plaintiff." Mr. A. A. Jilani was examined in court on February 27, 1929. The following portions of his statement may be reproduced:—

> 1. In my opinion she is a tolerably fair singer and knows the art.
> 2. She is a trained girl in the art of music and is not an ordinary public prostitute.
> 3. I noted seven special features in her performance.
> 4. A girl who is habituated to promiscuous cohabitation like a public prostitute can in no way possess a melodious and sustained voice and from this I say that plaintiff is not a public prostitute.

While candidly admitting that he had not received training in music in any school Mr. Jilani tried to support his pretentions as expert in the art of vocal music:—

> I have been regularly hearing singing of dancing girls since twelve years. Last year when the Municipal Board of Aligarh were intending to pass a resolution that prostitutes should be segregated and removed from the various quarters of the city then I was appointed by S. M. Koil to *make a local inspection* and *ascertain the value of the houses* at present occupied by such prostitutes and submit a report. In connection with that enquiry I made a *thorough inspection* and became acquainted with a large number of public prostitutes. With the exception of one or two public prostitutes in Aligarh, the rest had no arrangement for singing and so I could not hear their singing. I am generally engaged by prostitutes in Aligarh in their cases and so I had many opportunities of mixing with them. I have heard singing of only 2 or 4 public prostitutes in Aligarh because public prostitutes here generally do not know singing.

The procedure adopted by the learned Additional District Judge in requiring the production of additional evidence in the case is no less novel and startling than the nature and character of the evidence itself. The parties had closed their case. No evidence available to the plaintiff or necessary for the decision of the case had been improperly shut out by the trial court. The question in issue in the case was whether the plaintiff was a public prostitute within the meaning of that expression in the bye-laws framed by the Municipality of Etah. It is a matter of common knowledge that in this country, women who habitually allow the use of their person for sexual intercourse in lieu of hire do also cultivate the art of singing and dancing as an adjunct, as much for purposes of gain as for additional attraction. All the world over, some women take to the life of a public prostitute either from choice or by force of circumstances. In the oriental countries, not uncommonly, there is a caste of public prostitutes. In India, such is the case amongst Hindus and Mohammedans and the occupation of a public prostitute descends from mother to daughter. These prostitutes carry on the occupation of sexual intercourse for a consideration and also associate with themselves the occupation of a singing and dancing for hire. The fact that some of these women are more respectable than the rest, in so far as they earn more by singing and dancing, does by no means place them in a category different from that of public prostitutes.

The plaintiff has been described in the plaint as belonging to the caste of prostitutes. Her mother had admittedly been a public prostitute. Her mother's sisters excepting one are still carrying on this occupation. In view of her antecedents and environment, it may not be difficult to make a forecast of the plaintiff's future life.

But the question is whether the lower appellate court was justified in recording the evidence of Mr. A. A. Jilani and using that evidence in support of the conclusion that the plaintiff was not a public prostitute. The deduction of Mr. A. A. Jilani that because the plaintiff had a trained, melodious and cultivated voice and that she could sustain her voice at a loud pitch for a considerable length of time, therefore she could not be a public prostitute—does not appear to us to be an infallible, unerring or even a necessary deduction. The musical characteristics noticed by Mr. A. A. Jilani may well be found in a person given to sexual excess or sexual abuse. The presence or absence of those characteristics may vary with the changeable phases of temperament and physical constitution in individuals. Upon his own showing Mr. A. A. Jilani is not an expert in music and his statement is not of any value in deciding the main issue.

As we have noticed already, the learned Additional District Judge has rejected the oral evidence produced by the parties. He accepts the statement of Mr. A. A. Jilani in its entirety

> the whole thing turns to a great extent upon the evidence of Mr. Jilani commissioner It is clear to me from the evidence of Mr. Jilani that a public prostitute hardly knows her singing and dancing and it is a matter of common knowledge that the girls who carry on the profession of singing and dancing and know the art do not generally carry on the profession of a public prostitute because thereby they lose their tone and melody.

The saying is that one cannot blow hot and cold in the same breath. We hope the learned Additional District Judge understood and appreciated the application of the saying last-quoted to the facts that he was dealing with.

The powers of a court to issue a commission have been provided for in Section 75 and Order 26 of the Code of Civil Procedure. Commissions may be issued for holding a local investigation, to examine accounts or to make partitions. But there is nothing in the Code of Civil Procedure authorising a court to issue a commission to a person directing him to hear a woman sing and then to report not only as to her skill as a singer but also as to her occupation in life so far as it could be deduced from her musical talents. Further there is nothing in law to authorise the commissioner so appointed to try the issue referred to him with the aid of assessors. This is what has in effect been done.

Under Order 41, Rule 27(1)(*b*), an appellate court may allow a witness to be examined, where the said court requires such witness to be examined to enable it to pronounce judgment or for any other substantial cause. In Clause (2) it has been provided that where additional evidence is allowed to be produced by an appellate court, the court shall record the reasons for its admission. Rule 29 provides that where additional evidence is directed or allowed to be taken, the appellate court can specify the points to which the evidence is to be confined and record on the proceedings the points so specified. The appellate court has admitted additional evidence in this case in utter disregard of the provisions referred to above. There was no justification for the evidence of Mr. A. A. Jilani and his statement should be ruled out. In taking this view, we are supported by the decision of the Privy Council in *re Man Mohan Das* v. *Ram Dei*[1].

History illustrates that prostitution has been inseparable from human society in large communities. It has been observed that

> In different countries and ages it (prostitution) has in turn been patronised and prohibited, ignored and recognised, tolerated and condemned, regulated and let alone, flounted and concealed.

(Encyclopaedia-Britannica, Vol. 22). In different ages and climes, laws and regulations had to be introduced to minimise the evil of prostitution as far as possible, with a view to preserve public order and decency. There is a reference to houses known as the *dicteria* so far back as the laws of Solon. These were houses of prostitution and were confined to certain local areas. The *dicteriades* were forbidden the superior parts of the town. In all countries, legislation with a view to combat or uproot this evil has met with varying degrees of unsuccess. The Municipality is entitled to make bye-laws with a view to preserve order and decency; but the bye-laws must be strictly construed where they trench upon the rights of a citizen.

Section 247 of the U. P. Municipalities Act (II of 1916) provides as follows:—

> When a Magistrate of the first class receives information
> (*a*) that a house in the vicinity of a place of worship or an educational institution or a boarding house, hostel or mess used or occupied by students

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[1] 1931 A. L. J. R. 550

> is used as a brothel *or for the purpose of habitual prostitution* or by disorderly persons of any description, or
> (*b*) that any house is used as aforesaid to the annoyance of respectable inhabitants in the vicinity or
> (*c*) that a house in the immediate neighbourhood of a cantonment is used as a brothel or for the purpose of habitual prostitution.
>
> We may summon the owner, tenant, manager or occupier of the house to appear before him either in person or by any agent; and if satisfied that the house is used as described in Clause (*a*), Clause (*b*) or (*c*) may by a written order direct such owner, tenant, manager or occupier, within a period to be stated in such order not less than 5 days from the date thereof, to discontinue such use;
>
> Provided that action under this Sub-section shall be taken only—
> (*i*) with the sanction or by the order of the District Magistrate,
> (*ii*) on the complaint of three or more persons residing in the immediate vicinity of the house to which the complaint refers, or
> (*iii*) in the case referred to in Clauses (*a*) and (*c*) of this Sub-section, on the complaint of the Board.
> 2. If a person against whom an order has been passed by a Magistrate under Sub-section (1) fails to comply with such order within the period stated therein; the Magistrate may impose on him a fine which may extend to Rs.25 for every day after the expiration of the period during which the house is so used.

The procedure indicated herein was not adopted in this case, nor was this section utilised or enforced.

Section 298 of the Act authorises a Municipal Board to make certain bye-laws (*E*) (*b*), permitting, prohibiting or regulating the use or occupation of any or all public streets or places by itinerant vendors, or by any person for the sale of articles or *for the exercise of any calling* or for the setting up of any booth or stall, and providing for the levy of fees for such use or occupation. The same section under the heading of Public Safety and Convenience (*H*) in Sub-clause (*e*) *authorises the making of bye-laws for prohibiting, in any specified street* or area, *the residing of public prostitutes and the keeping of a brothel,* or the letting or other disposal of a house or building to public prostitutes or for a brothel.

The Municipal Board of Etah in pursuance of Section 298 framed a bye-law which provided that "no public prostitute shall reside within the areas or in the streets specified below." The streets "specified below" are those which are referred to in the notice dated December 6, 1927.

It has been argued that the Municipal Board of Etah was not competent to frame the bye-law in question and, that this bye-law is *ultra vires.* We are of opinion that the use of the word "and" between the words "prohibiting in any specified street or area the residing of public prostitutes" and "the keeping of a brothel" is unhappy and that the intention of the legislature was to provide against two evils and not one. The residence or occupation of public prostitutes is an item separate and distinct from the keeping of a brothel. This meaning is apparent from the words which follow, namely, 'the letting of a house or building to public prostitutes *or* for a brothel'. In our view, the bye-law framed by the Municipal Board is not *ultra vires* and is in keeping with the object and intention of the statute.

The term "public prostitute" has not been defined in the U. P. Municipalities Act. The common type of a public prostitute is a woman who exhibits herself on the balcony or other prominent part of her house to attract people. In our view, a *public prostitute* is a woman who usually and generally offers her person to sexual intercourse for hire and who openly advertises and acknowledges her occupation by word of mouth, deportment or conduct. For the bye-laws to be applicable, a woman should be not only a prostitute but a public prostitute. A great degree of moral degradation alone will attract the application of a drastic law which involves the consequence of a woman being compelled to leave her house in which she might have invested her fortune or might have other associations. It could not have been said at the date of the notice issued by the Municipal Board or when the suit was instituted that the plaintiff was a public prostitute simply because she belonged to the caste of prostitutes or that her mother and mother's sisters were public prostitutes.

Even eliminating from the record the statement of Mr. Jilani, there were materials before the court below for coming to the conclusion that the plaintiff was not a public prostitute. She is a minor of about 16 years of age. She carries on the occupation of singing and dancing for the present and lived for nearly two months as a concubine or mistress of a certain man in the district of Etah and there is nothing to show that their intimacy is not of an exclusive character or that it may not assume the form of a more lasting alliance. In the present circumstances and on the facts established by evidence it cannot be said that she has so far led the life of a public prostitute. It is, however, possible her occupation may in future take a turn which is inconsistent with any other hypothesis than that she is a public prostitute. Upon these facts, it could not be said that she was a woman who openly and habitually offered her person to promiscuous sexual intercourse for gain. It follows therefore that the plaintiff is not a public prostitute and the bye-law cannot apply to her case.

The lower appellate court has found that the plaintiff is about 16 years old. As quaintly put by the learned Additional District Judge "the suit was properly instituted under the *next friendship* of mother." We are of opinion that there is no defect in the frame of the suit. The appeal fails and is dismissed with costs.

Appeal dismissed

Civil

1931

June 18

Sulaiman, A. C. J.
Allen, J.

JAGANNATH PRASAD (*Decree-holder*)
versus
JAMUNA BAI AND OTHERS (*Judgment-debtors*)*

Civil Procedure Code, Sec. 47 and Or. 21, R. 58—Suit filed after debtor's death against his daughter's son only—Decree—Execution—Daughter's objection that her property cannot be attached allowed—Objection under Or. 21, R. 58 and not under Section 47.

Where, after the death of his debtor, plaintiff sued deceased's daughter's son *only* alleging that he was the sole legatee of the deceased under a will, and having obtained a decree against the assets of the deceased in the hands of the son, he tried to execute it by attachment and sale of the property in the hands of the daughter, but an objection by her that the property was her own was allowed, *held,* that the objection was under Or. 21, R. 58 and not an objection under Section 47 C. P. C. as there was no dispute between the parties to the decree or their representatives. No appeal therefore lay from the order. *Kaliappan Servaikaran* v. *Varadarajulu,* I. L. R. 33 Mad. 75 *relied on.*

Execution First Appeal from a decree of Babu Radha Kishen, First Subordinate Judge of Cawnpur.

M. L. Chaturvedi for the appellant.

S. N. Seth and *G. S. Pathak* for the respondents.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

Sulaiman, A. C. J.—This is an appeal by the decree-holder from an order passed by the execution court allowing the objection of Mst. Jamna Bai.

A preliminary objection is taken that no appeal lies from this order as she was not a judgment-debtor.

Hazari Lal was the plaintiff's debtor and after his death the plaintiff filed a suit against his daughter's son Achhey Lal alleging that he was the sole legatee of the deceased under a will executed by him. He did not implead his daughter Mst. Jamuna Bai or any other relation. A money decree was obtained against the assets of the deceased Hazari Lal which, if any, may be in the hands of Achhey Lal.

The decree-holder then tried to execute the decree by attachment and sale of some property in the hand of the deceased's daughter Mst. Jamuna Bai who at once objected and alleged that the property sought to be attached was her own property and no part of the deceased's assets at all. Her objection has been allowed and the decree-holder's application dismissed. It is quite obvious that no appeal lies from the order inasmuch as the dispute cannot be said to have been one under Section 47 C. P. C. between the parties to the suit in which the decree was passed. If the objection of Mst. Jamuna Bai was in the nature of an objection by a stranger to the suit under Order 21, Rule 58, the order passed by the court would be final and no appeal would lie therefrom. The learned advocate for the decree-holder has cited before us some cases in which it has been laid down that if a party dies during the pendency of the suit and the court brings one person on the record as his legal representative, the decree may be

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*E. F. A. 413 of 1930

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Sulaiman, A. C. J.

executed against other persons who are in possession of the assets and who may be heirs though they were not impleaded.

He has also cited some cases showing that even if after the decree the execution is sought against one heir at first, proceedings may be continued against the other heirs of the deceased. In our opinion neither of these sets of rulings is at all applicable to the case before us. If death takes place during the pendency of a suit it is the duty of the court under Order 22, Rule 5 to determine who is the legal representative of a deceased plaintiff or a deceased defendant, and a 'legal representative' is defined in Section 2 as meaning a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. In the same way it is equally clear that no question of substitution of the names of heirs in the ordinary sense in which it is understood arises when the death takes place after the decree. Rule 12 of Order 22 expressly provides that nothing in Rules 3, 4 and 8 of that Order shall apply to proceedings in execution of the decree. The decree-holder in such a case therefore is not bound to implead all the heirs in the first instance.

The case before us is one in which the debtor had died before any suit was brought against him. The suit was brought against Achhey Lal who was treated as the heir of the deceased and the decree was against the assets of the deceased which may be in the hands of Achhey Lal. It is Achhey Lal who is the judgment-debtor under the decree. Mst. Jamuna Bai was not a judgment-debtor. If she is setting up her own independent title in the property which is sought to be attached, her capacity was that of an entire stranger to the suit. Her objection was under Order 21, Rule 58 and was not an objection under Section 47 C. P. C. as there was no dispute between the parties to the decree or their representatives. A similar view was expressed in *Kaliappan Servaikaran* v. *Varadarajulu*[1]. We agree with the view expressed therein.

It is therefore clear that no appeal lies. The appeal is dismissed with costs.

Appeal dismissed

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[1] I. L. R. 33 Mad. 75

CIVIL

1931

June 30

SULAIMAN, A. C. J.
SEN, J.

HAKIM MOHD. FAZIHZZAMAN (*Defendant*)

versus

ANWAR HUSAIN (*Plaintiff*)*

Transfer of Property Act, Secs. 108 and 111(a)—Second lease to take effect after first lease for 10 years had expired—First lease expired by efflux of time under Sec. 111(a)—First lessee holding over—Whether second lessee entitled to eject first lessee.

Defendant obtained a lease of a house for a period of ten years. A few months before the expiry of the lease, the lessor executed another lease in favour of the plaintiff for a further period of ten years. The second lease was to take effect a few days after the expiry of the first lease. As the first lessee, whose lease determined by efflux of time under Sec. 111(*a*) T. P. Act, was holding over, the second lessee brought a suit for ejectment of the first lessee from the house, *held,* that under Sec. 108 T. P. Act the second lessee was entitled to eject the first lessee who was holding over. *Achayya* v. *Hanumantraydu,* I. L. R. 14 Mad. 269 *relied on.*

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*L. P. A. 45 of 1930

CIVIL

1931

HAKIM MOHD. FAZIHZZAMAN *v.* ANWAR HUSAIN

LETTERS PATENT APPEAL against the judgment of the HON'BLE MR. JUSTICE BOYS.

A. M. Khwaja for the appellant.

G. S. Pathak for the respondent.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is a defendant's appeal arising out of a suit for ejectment of the defendant from a house and shops. A lease had been granted by plaintiff No. 1 Mst. Muhammadi Begam to the defendant for a period of ten years on July 23, 1917. Before the expiry of that period, namely, on May 6, 1927 she executed another lease in favour of Anwar Husain plaintiff No. 2 for a further period of 10 years. The former lease was to expire on July 22, 1927 and the second lease was to take effect from August 1, 1927.

The suit was originally filed jointly by Muhammadi Begam and Anwar Husain and it was for ejectment and mesne profits. Later on Mst. Muhammadi Begam's name was transferred from the array of the plaintiffs to that of the defendants. The plaint however was not substantially amended. The courts below have decreed the claim for possession and that decree has been affirmed by a learned Judge of this Court. The claim as regards mesne profits for the period prior to the lease in favour of Anwar Husain has been disallowed by the learned Judge.

The defendant has filed this appeal in Letters Patent and there is no cross-appeal on behalf of the plaintiff.

It is contended on behalf of the defendant that the frame of the plaint as it stands disentitles Anwar Husain from getting a decree. This is wholly a technical plea inasmuch as the parties have all along had knowledge what the dispute between them was and no substantial injustice has been done inspite of the omission to amend the plaint so as to put it in a proper form.

The main contention is that the plaintiff Anwar Husain is not entitled to a decree for possession against the defendant lessee. The first argument is that there was a contract for the grant of a fresh lease between Mst. Muhammadi Begam and the contesting defendant and the second lease was given to the plaintiff Anwar Husain in breach of that contract. It is therefore urged that the suit must fail. If there was any such contract it can be specifically enforced by a separate suit and if Anwar Husain had knowledge of that previous contract it can be enforced as against him also. As no registered lease was executed in favour of the contesting defendant we cannot take this circumstance into account at this stage. As a matter of fact both the courts below have come to the conclusion that there was no completed contract in favour of the defendant-respondent which would bind Mst. Muhammadi Begam and that the amount of Rs.10 which had been sent to her was not by way of earnest money but with a view to inducing her to come to Bareilly.

The main ground urged in defence is that the subsequent lessee has no right to eject the previous lessee who is holding over. It is contended

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that his remedy is only as against the lessor for the recovery of possession and mesne profits and he alone can maintain a suit for ejectment against the previous lessee. Strong reliance is placed on the case of *Ibadullah Khan* v. *Ram Charan Sah*[1]. That was however a case where the property in dispute consisted of an agricultural tenancy and the previous tenant could lawfully have been ejected only through the revenue court. A suit brought by a subsequent lessee in the civil court was held not to be maintainable. It is not necessary for us to express any opinion on that case as the facts of that case are quite different. In the present case the lease in favour of the defendant was for a fixed period of 10 years and was governed by the Transfer of Property Act. Under Section 111 (*a*) it was determined by the efflux of time limited by the lease as a period was fixed. It must be presumed that notice was by implication given at the time when the lease was executed. No notice under Section 106 was accordingly required for the termination of this lease. Section 108 provides that the lessor is bound on the lessee's request to put him in possession of the property, and further provides that the benefit of such contract shall be annexed to, and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. There can therefore be no doubt that the lessee is entitled to enforce his right to obtain possession of the land leased to him so that he may enjoy its usufruct. There seems to be no reason why he should not be allowed to enforce his right against another person who is holding under his lessor, who is bound to put him in possession. The defendant's lease terminated automatically. A Bench of the Madras High Court in *Achhayya* v. *Hanumantraydu*[2] came to the same conclusion on general grounds and independently of the express provisions of the Transfer of Property Act.

Of course, if there were any estoppel against the lessor arising out of circumstances which existed previous to the grant made to Anwar Husain, the plaintiff may not succeed. But nothing done by the lessor subsequent to the grant of the lease by him would disentitle him because the lessor could not be allowed to derogate from it. The mere fact that Mst. Muhammadi Begam in the course of the present suit entered into a compromise with the defendant which had been called by the lower appellate court as collusive would not disentitle the plaintiff lessee from obtaining his decree.

The only other point urged was that the plaintiff has obtained a lease from Mst. Muhammadi Begam and did not himself execute a counterpart of the lease. It was urged that the lease was imperfect and could not be enforced. This contention in our opinion has no force whatever. Some doubts have been expressed as to the validity of a lease where only a counterpart has been executed by the lessee and no lease by the lessor; but it has never been suggested that the execution of a lease by the lessor does not create a valid lease in favour of the lessee. There is therefore no forçe in this contention.

The result therefore is that this appeal is dismissed with costs.

Appeal dismissed

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[1] 53 I. C. 140

[2] I. L. R. 14 Mad. 269

CIVIL

1931

July 21

MUKERJI, J.

KANHAIYA LAL AND ANOTHER (*Defendants*)
versus
R. H. SKINNER AND OTHERS (*Plaintiffs*)*

Tenancy Act (II of 1901), Secs. 165 and 194—Suit for profits against co-sharers—Lambardar included as a co-sharer—Collections by co-sharers—Basis of division—Co-sharer—Position of—In relation to other co-sharers.

A co-sharer is not an agent for the other co-sharers and holds no fiduciary position as regards the other co-sharers of the village. If a co-sharer is not entitled to make any collections under any village custom, he may be sued in the civil court for usurping the shares of other co-sharers. If a co-sharer has been, by custom, allowed to make collections for other co-sharers, he may be treated as the *de facto* lambardar, and may be sued under Sec. 164 of the Tenancy Act of 1901 (=Sec. 226 of Act III of 1926). The mere fact that a man who is not an agent has acted contrary to his rights, will not make him an agent for other co-sharers.

In a suit under Sec. 165 of Act II of 1901 (=Sec. 227 of Act III of 1926) the lambardar, in the array of the defendants, cannot be treated as a lambardar, but must be treated as a co-sharer; and therefore he is entitled to deduct out of the collections made by him his full share of the profits of the mahal, the balance alone being divisible among the other co-sharers.

Where in a suit under Sec. 165 of Act II of 1901 it was proved that a *karinda* made collections on behalf of certain co-sharers, one of whom was the lambardar, the collection must be treated as a collection by the defendant co-sharers, and not as a collection on behalf of the lambardar alone, and the liability of the co-sharers must be a joint one.

FIRST APPEAL from the decision of the Assistant Collector First Class of Meerut.

This appeal was heard by Pullan and Niamatullah, JJ. who delivered dissentient judgments, and a reference was made to a third Judge, Mukerji, J. The dissentient judgments are reproduced below.

Pullan, J.

PULLAN, J.—These four appeals arise out of two suits for profits brought by R. H. Skinner and others for their share of the profits of the villages of Karanpur Jatta and Dhaulana respectively under S. 165 of the Agra Tenancy Act (No. II of 1901). Both these villages are included in the Skinner etsate of thirteen villages belonging to the late Stuart Skinner, and on the death of the said Stuart Skinner, the property devolved on his three sons and two daughters. Each son received a one-fourth share and the two daughters received a one-fourth share between them. The one-fourth share of Robert Skinner, one of the sons of Stuart Skinner, was purchased at an auction sale by R. H. Skinner, the husband of Ada Skinner, one of the daughters of the late Stuart Skinner, and as the result of this purchase R. H. Skinner, his wife Ada Skinner and her sister Fanny Skinner, became the owners of one-half in both these villages. One of the two remaining shares, the share of George Skinner, another son of Stuart Skinner, was sold and purchased first by one Dargahi Lal and afterwards on April 4, 1923 by three persons, Banarsi Das, Kanhaiya Lal and Gobind Sarup. The present suits were filed against these persons and also against Victor Skinner, the son of Robert Skinner, who was in the year 1330 Fasli the lambardar of the village Karanpur Jatta, and James, son of George Skinner, who was for the same period the lambardar of the village of Dhaulana, and the suits are for settlement of accounts and profits said to be due to the plaintiffs from these their other co-sharers. The fact that Banarsi Das became the lambardar of these two villages in the year 1330 Fasli is not mentioned in either of the plaints; nor is this fact stated in any of the written statements. The cases are brought by a co-sharer for profits against other co-sharers under S. 165 of the Agra Tenancy Act (No. II of 1901).

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*F. A. 328 of 1927 (connected with F. A. 329, 337 and 338 of 1927)

The assistant collector found that these co-sharers had collected in excess of their shares and he passed decrees in both suits. In respect of the village of Karanpur Jatta he gave a decree for Rs.971 odd against Victor Skinner and for Rs.1,674 against Banarsi Das and Kanhaiya Lal but exempted Gobind Sarup. In respect of the village of Dhaulana he gave a decree for Rs.1,219-12-0 against James Skinner and for Rs.3,749 against Banarsi Das and Kanhaiya Lal, again exempting Gobind Sarup. The two Skinners, Victor and James, have not appealed, but appeals have been preferred in each case by Banarsi Das and Kanhaiya Lal on the one hand and by the plaintiffs on the other. The case set up by the defendant-appellants in the lower court was that there was a partition in the year 1918 among the members of the Skinner family by which each member collected his own share, and that consequently the defendants having purchased the share of George Skinner the plaintiffs had no concern with the defendants' collections. This question, however, is not raised in appeal because it is not now disputed that the defendants-appellants have collected rents much in excess of their one-fourth share which they purchased from George Skinner. Their main grounds of appeal are, first, that the suits were not validly presented on behalf of Ada and Fanny Skinner; secondly, that the defendants have not received credit for certain expenses incurred by them, and, thirdly, that decrees should have been passed against Gobind Sarup also. The first two grounds of appeal carry no weight. The suits were presented in a legal manner on behalf of the two ladies who were duly represented by their general attorney. The attempt made to show that this man's power to act for the ladies had been cancelled and not restored has been rightly rejected by the court below.

As to the question of expenses, the lower court has certainly adopted an improper method for calculating village expenses. He should have allowed a certain percentage on the actual collections. But the amount allowed is a reasonable amount in whichever way it is calculated. I would not be prepared to interfere with the discretion of the lower court in this matter.

The last question as to the liability of Gobind Sarup must be considered in connection with the appeals filed by the plaintiffs. In these appeals the main question raised is whether the whole amount collected by the defendants should have been divided rateably among the co-sharers including the plaintiffs, or whether the plaintiffs were entitled only to a share of the balance after the defendants had taken for themselves their own proportionate share of the profits. The learned assistant collector says, "The plaintiffs' contention that the defendants should have got their profits only rateably cannot possibly stand in a suit for settlement of accounts under S. 165 of Act II of 1901." This view of law has been challenged before us on behalf of the plaintiffs. But, in my opinion, the view taken by the assistant collector is correct. A co-sharer as such is not required to make any collections on behalf of other co-sharers. Where there is no arrangement to the contrary, a co-sharer can collect from the tenants the amount due to himself, and there is no law which requires him to make good any defect in collections of his other co-sharers. A co-sharer, therefore, can only be sued under S. 165 of the Agra Tenancy Act (II of 1901) for any amount which he has collected over and above his own share. It is only where the duty of making collections has been entrusted to one person such as a lambardar that a suit can be brought against him for the rateable distribution of the profits of a mahal. The Agra Tenancy Act applies only to the territory within the jurisdiction of the Allahabad High Court. The views taken by other courts as to the rights and duties of co-sharers under similar enactments elsewhere cannot be taken into account by this Court. I can find no case in which the Allahabad High Court has ever expressed the opinion that a co-sharer as such can be held liable for anything more than the excess which he has collected and which is due by him to other co-sharers. This is clearly the view underlying the decision of a Bench of this Court in the case of *Koka* v. *Chunni*, 25 A. L. J. R. 1057 where the learned judges observed: "It must be shown by figures that the other co-sharers had no claim to the excess which the particular co-sharer who is plaintiff is claiming." To hold otherwise would, in my opinion, involve the treatment of all co-sharers as though they were lambardars, and that is not the intention of the Tenancy Act. It is true that in this particular case one of the defendants, namely, Banarsi Das, was the lambardar of both villages from the year 1330 Fasli till the year 1332 Fasli, and he is still the lambardar of the village of Dhaulana, but the suits have not been brought under S. 164 of the Tenancy Act, and there is no mention anywhere in the plaints or in the written statements that Banarsi Das is being sued as a lambardar. If the plaintiffs have chosen to treat the suits at those for profits between co-sharers they must, in my opinion, accept any disadvantage which may result from their own choice. They have wrongly in their plaints asked for decrees based upon gross rentals which could only be done in a suit brought against the lambardar in which negligence was alleged, yet to suit their own purposes they have declined to sue Banarsi Das as lambardar. In my opinion, the assistant collector is right in holding that the plaintiffs are only entitled to their share of the excess profits over and above that which has been collected by the other co-sharers in respect of their own shares.

This leads to the question of the liability of the several defendants. The learned counsel for the appellants has pointed out that the decision of the lower court that Gobind Sarup should be exempted has not been given effect to in the decrees. If Gobind Sarup made no collections the amount collected on his behalf by Banarsi Das and Kanhaiya Lal should be regarded as an excess collection and should be subjected to a division among the other co-sharers. This plea is, in my opinion, right, but I am not satisfied with the decision of the lower court that Gobind Sarup should be exempted from the decrees. No doubt both Kanhaiya Lal and Gobind Sarup stated at one time or another that they made no collections, yet the decrees have been passed against Kanhaiya Lal, and not against Gobind Sarup, apparently because certain receipts were signed by Kanhaiya Lal and none were signed by Gobind Sarup. But the evidence shows that the share of George Skinner was purchased jointly by these three persons, Banarsi Das, Kanhaiya Lal and Gobind Sarup, and the evidence of their agent Sri Ram, which is supported by that of the village Patwari, shows that all the collections were made by Sri Ram on behalf of all these three persons. I consider, therefore, that the collections were made by Gobind Sarup in the same way that they were made by Banarsi Das and Kanhaiya Lal, and, consequently, all these three co-sharers are able to take from their joint receipts the amount due to themselves and they are all similarly liable to make good to the other co-sharers their share of the balance. The decrees of the lower court should be extended to Gobind Sarup, and this ground of appeal is met by the necessary alteration in the decrees.

In both suits a commissioner was appointed at the request of the plaintiffs for going through the accounts of collections made by the defendants. The lower court has said that no appreciable difference was detected by the commissioner between the actual collections and those admitted by the defendants, and he has refused to burden the defendants with the expenses incurred on account of the commissioner's fees and the diet money of a large number of tenants who were summoned to court uselessly. This decision is challenged in appeal in both suits. But in my opinion the assistant collector exercised a proper discretion in the matter and was right in not taxing these costs.

The last point raised relates only to the village Karanpur Jatta where there is

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a tenant named Bhuria whose rent of Rs.72 was omitted from the list of collections given by the defendants. The assistant collector gave half this amount to the plaintiffs, but as he had himself found that the defendants had already collected their own dues none of this sum could be claimed by them. Consequently three-quarters of this amount is due to the plaintiffs and one-quarter to the other co-sharers who took no part in the proceedings. Thus the amount to be added to the sum due from the defendants in the appeal relating to the village of Karanpur Jatta should be not Rs.46 as decreed by the lower court but Rs.69.

In my opinion, therefore, the defendants' appeals in both cases should be allowed to this extent only that the decrees should be passed against Gobind Sarup as well as against Banarsi Das and Kanhaiya Lal, and the plaintiffs' appeal in the case of Dhaulana should be dismissed and their appeal in the case of Karanpur Jatta should be allowed to this extent only that the sum decreed against the defendants will be Rs.1,697 instead of Rs.1,674.

NIAMATULLAH, J.—I agree with the conclusions arrived at by my learned brother in these appeals on all the points, except:—

(1) The principle on which the plaintiffs' share of profits has been worked out, and

(2) The extent of liability of the lambardars, Kanhaiya Lal and Gobind Sarup.

The facts, which are not in dispute, are as follows:—

Villages Karanpur Jatta and Dhaulana belonged to the following persons in the following shares:—

Victor Skinner	4 annas.
James „	4 annas.
Thomas „	4 annas.
Ada „	2 annas
Fanny „	2 annas.

Victor Skinner's share was sold to R. H. Skinner in execution of a decree. James Skinner's share was sold to one Durgahi Lal and subsequently purchased by Banarsi Das, Kanhaiya Lal and Gobind Sarup, defendants 1 to 3, who are not members of the same family and whose shares *inter se* are not specified. Victor Skinner was lambardar of village Karanpur Jatta up to Kharif 1330 Fasli, and he alone made collections up to that time. James Skinner was lambardar of village Dhaulana up to the same period, and he alone made collections in that village up to that time. Banarsi Das, defendant No. 1, was appointed lambardar of both the villages with effect from Rabi 1330 F., and held that office till the end of 1332 F. One Sri Ram alone made collections during that time. He says he acted as the 'karinda' of Banarsi Das, Kanhaiya Lal and Gobind Sarup. R. H. Skinner, Ada Skinner and Fanny Skinner, representing an eight anna share, brought two suits for profits under Sec. 165 of the Tenancy Act against all the co-sharers, including the past and present lambardars, for their shares of profits for the years 1330 to 1332 F. No question of misjoinder of defendants or of causes of action was raised in the lower court or in appeal. No notice thereof need, therefore, be taken of a possible defect on that score.

The plaintiffs' shares of profits payable by Victor Skinner in respect of village Karanpur Jatta for Kharif 1330 F., and that due by James Skinner in respect of village Dhaulana for Kharif 1330 F. have been separately ascertained. Similarly, their shares of profits in respect of the two villages for the period Rabi 1330 F. to the end of 1332 F. payable by Banarsi Das and Kanhaiya Lal have been ascertained and decreed, Gobind Sarup having been exempted by the trial court.

The method of calculating the plaintiffs' share of profits was as follows:—

From the collections made by Victor Skinner in respect of Karanpur for Kharif 1330 F. was deducted his share of the entire gross rental, and the plaintiffs were given half of the balance. Similarly, from the collections made by James

Skinner in respect of Dhaulana for Kharif 1330 F. his share of the entire gross rental was deducted, and the plaintiffs were given half of the balance. Collections made by Sri Ram were considered to have been made by Banarsi Das and his immediate co-sharers Kanhaiya Lal and Gobind Sarup. Accordingly, the full share of all the three in the gross rental was deducted, and half of the balance was given to the plaintiffs. Each of the co-sharers was debited with his share of the Government revenue, public charges and village expenses. There is no question as to this. The result of this mode of calculation is that the lambardars together with Kanhaiya Lal and Gobind Sarup received every pie of what was due to them in respect of the gross rental of the village, collected and uncollected, while the plaintiffs got half of the balance and half of the uncollected rental which must include a fair percentage of bad debts. On the face of it, this mode of division is inequitable.

The assistant collector has held that the "plaintiffs' contention that the defendants should have got their profits only rateably cannot possibly stand in a suit for settlement of accounts under Section 165 of Act II of 1901". My learned brother has accepted this view on the ground that if a suit had been brought under S. 164 of the Act collections would have been divisible rateably among the co-sharers; but inasmuch as the plaintiffs chose to bring a suit under S. 165, the lambardar is entitled first to deduct his own share of the gross rental from the collections in his hands and divide the balance. Kanhaiya Lal and Gobind Sarup who are not lambardars, are *a fortiori* entitled to do so according to the above view. I regret I am unable to hold that such result necessarily follows from the plaintiffs' action in framing their suit as one under S. 165. I am of opinion that if the issue arising between the parties is identical, it does not matter whether the suit is under one or the other of the two sections. In other words, if the rights and the liabilities of the lambardar are in question in a suit under Section 165, the answer to the issue cannot be different to that to be given to an identical issue arising in a suit under S. 164. This remark is however applicable only to the collections made by the lambardar, against whom the suit is substantially one under S. 164. For reasons, which I shall presently explain, collections, said to have been made by Kanhaiya Lal and Gobind Sarup, should be considered as those made by Banarsi Das, the lambardar, in the peculiar circumstances of the case.

Sec. 164 of the Tenancy Act (II of 1901) entitles a co-sharer to "sue the lambardar for his share of the profits of a mahal or any part thereof". It also makes a lambardar liable for what has been left uncollected through his negligence. The section merely defines the rights and obligations of the co-sharers and the lambardar *inter se*. Such rights and obligations are to be enforced between them whenever a question arises in any proceeding. S. 165 of the same Act, likewise, entitles a co-sharer to "sue another co-sharer for a settlement of account and for his share of the profits of a mahal or any part thereof." It defines the rights and obligations of co-sharers *inter se* in respect of the "profits of the mahal" of which every one of them should have a share. Every lambardar must also be a co-sharer, so that, if a suit is brought under S. 165, a lambardar must be made a party along with other co-sharers in whose presence the accounts are to be settled. It is to be noted that in either case, whether it is one under S. 164 or S. 165, what the plaintiffs is to sue for is "his share of the profits of a mahal or any part thereof." "Part of a mahal" in this connection can mean nothing more or less than a definite share of a mahal, such as "thok' or 'patti'. Similar expression has been used in S. 106 of the Land Revenue Act, which provides for partition of "a mahal or part thereof."

Another section, which must be taken into account in determining the question is S. 194 which provides as follows:—

"(1) Where there are two or more co-sharers in any right, title or interest, all things required or purported to be done by the possessor of the same shall be done both conjointly, unless they have appointed an agent to act on behalf of them all.

(2) Nothing in Sub-section (1) shall affect any legal custom or special contract by which a co-sharer in an undivided property is entitled to receive separately his share of the rent payable by a tenant".

We have it from the patwari that, according to the 'dastur dehi' only the lambardar can make collections in the villages in suit.

The conjoint effect of Ss. 164, 165 and 194 in the absence of a custom entitling a co-sharer to make collections for himself alone and in respect of his share, is that the lambardar alone is entitled to collect the rent and to divide the profits in his hands among the co-sharers, including himself, in proportion to their shares, after deducting public charges and incidental expenses. He is not entitled to do otherwise. If, with the consent of co-sharers, collection of rent is to be made, not by the lambardar but by another co-sharer, not in respect of his share alone but in respect of the entire gross rental, his liability is the same as that of the lambardar for the obvious reason that he occupies a fiduciary position with reference to other co-sharers. If any authority is needed for this proposition, *Harcharan* v. *Bindu*, I. L. R. 32 All. 389 may be referred to. It is, however, open to question whether such co-sharer is liable, like a lambardar, for neglecting to collect —a point on which I express no opinion.

As already stated, lambardar alone is entitled to collect rents in the villages in question according to the 'dastur dehi' or village custom. It follows that no co-sharer is entitled to collect part or whole of the rent of a tenant, and a tenant making payment to any one of them, not being the lambardar, cannot get a discharge in a suit for arrears of rent brought against him by the lambardar, who will be entitled to a decree in respect of the entire rent, the tenant having his remedy of refund from the co-sharer who collected in contravention of S. 194 and the local custom referred to.

A lambardar, being a representative of all co-sharers, cannot give himself the first charge on the collections in respect of his share of the entire gross rental. Having collected as a representative of the co-sharers, he must distribute his collections among the co-sharers, including himself, in proportion to their shares.

As to whether collections made by Sri Ram should, in the circumstances of the case, be considered to be those made by Banarsi Das lambardar or by all the three, including Kanhaiya Lal and Govind Sarup, I am of opinion that former should be taken to be the case. Sri Ram has stated that "in the said villages all the servants used to remain under my supervision, and I also used to distribute their pay. It was I who used to prepare accounts The account relating to collections which has been filed is quite correct to my knowledge and belief There was a 'roznamcha' in which I used to enter daily the amounts of collections and the expenditure I used to work under the supervision of all the three co-sharers, and the one who would come to me would take money from me. I did not ever take a receipt from them." Banarsi Das, the lambardar, had no right to associate with himself two favoured co-sharers to the detriment of others; and if he did so for his own convenience or theirs the rights of other co-sharers cannot be prejudiced. Sri Ram cannot, in my opinion, be implicitly trusted when he says that he made collections on behalf of all the three. Banarsi Das is a pleader. It is probable that he is attempting to make out such a case to enable Kanhaiya Lal and Gobind Sarup to recover their whole share of the gross rental from the collections, leaving the balance in his hands and the uncollected rent divisible among other co-sharers. Sri Ram holds no power of attorney. We have not been told how much of the collections has been appropriated by Kanhaiya Lal and Gobind Sarup. The latter says he got nothing. It is not stated by Banarsi Das as to whether Kanhaiya Lal has been allowed to take one-third of the collections made by

Sri Ram. I am of opinion that Banarsi Das, the lambardar, who alone is entitled and responsible to make collections, should be considered as having made them. Where a lambardar delegates his functions in whole or in part to another co-sharer, he is as much responsible for collections made by such co-sharers as for those made by a Karinda appointed by a lambardar is liable not only for what he actually collects, but also for what he neglects to collect.

Assuming, for the sake of argument, that each of Kanhaiya Lal and Gobind Sarup collected, through Sri Ram, one-third of the total collections, I think their liability is not different from that of Banarsi Das. Sri Ram made collections of the entire rental of the villages and did not profess to collect only the shares of his masters. Kanhaiya Lal and Gobind Sarup should, therefore, be deemed to have collected jointly with Banarsi Das not their shares alone but what was payable to all the co-sharers. It is not suggested that by arrangement or local custom they were entitled to collect their own shares.

Except in a case where a co-sharer acts for himself and is entitled, under an arrangement or local custom, to collect his share of rent payable by each tenant or his share of the entire rental payable by all the tenants, he should be deemed to be acting for the whole body of co-sharers. The fact that he demands the whole rent payable by a tenant clothes him with a fiduciary character. To my mind, there is no difference, in principle, between a case where one of the co-sharers appropriates part of the common land and where a co-sharer collects part of the rent due to all the co-sharers. In the first case, it is settled law that other co-sharers can recover joint possession and it would be no defence to their claim, by the co-sharer who has taken exclusive possession of part of the common land, to say that there are other lands of a similar quality with similar advantages and the complaining co-sharer can appropriate to himself such land in proportion to his share, the principle being that no co-sharer can make a partition for himself by taking possession of what he thinks is less than his share. Similarly, in the second case, if a co-sharer collects part of the rent which belongs to all the co-sharers jointly he must allow them to participate in the collections made by him and should not be allowed to direct other co-sharers to recoup themselves by collecting the arrears. In such a case, law fastens a constructive trust on the co-sharer who collects money due to himself and others jointly. Section 90 of the Indian Trust Act, which occurs under Chap. IX, headed as "On certain obligations in the nature of trust", provides, *inter alia*, that:—"Where a co-owner or other qualified owner of any property by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner, as representing all persons interested in such property gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage."

There can be no doubt that Kanhaiya Lal and Gobind Sarup availed themselves of their position as co-sharers, and collected the rent due to themselves and other co-sharers. They could not have made any collections, except under cover of their position as co-sharers. Every tenant who made payment to them must have thought that he was discharging his obligation to all the co-sharers to whom the rent was payable. They, on the other hand, must have, expressly or impliedly given the tenants to understand that they would secure a discharge as against all the co-sharers by making payments to them through their 'karinda' Sri Ram. There is, therefore, no doubt that they availed themselves of their position as co-sharers. It was obviously in derogation of the rights of other co-sharers in so far as they collected not only their own shares but what was payable to all. To hold otherwise would be to open a door for endless scramble. An influential and resourceful co-sharer may, in disregard of the power of the lambardar, steal a march over him and other co-sharers by collecting from the best tenants to the extent of his share of the gross rental and leaving irrecoverable rents for the rest. This state of things, if permitted by law, would be intolerable and will lead to gross abuse in certain cases. I am clearly of opinion that Kanhaiya Lal and Gobind Sarup, assuming they acted through Sri Ram, must be taken to have occupied a fiduciary position in reference to other co-sharers, including the plaintiffs, and that they must throw their collections into the hotchpot for proportionate share among all the co-sharers.

The rights being what I have stated them to be, effect should be given to them in a suit for settlement of account and "for profits of the mahal" under Section 165. If money collected by Kanhaiya Lal and Gobind Sarup is part of the "profits of the mahal" within the meaning of that Section, as I hold them to be the plaintiffs are entitled to sue for their share of it. In my opinion there is no rule of law which deprives the plaintiffs of what is in law due to them, or allows the defendants to retain what they in law are bound to pay to the plaintiffs. The claim was laid under S. 165, because the suit was directed not against the lambardar alone but also against other co-sharers, specially Kanhaiya Lal and Gobind Sarup. The plaintiffs could not for obvious reasons have confined it to a claim against Banarsi Das alone without running the risk of being met with the plea that Banarsi Das made no collections and that Sri Ram made collections on behalf of Kanhaiya Lal and Gobind Sarup. Moreover, Victor Skinner and James Skinner had also collected rents in Kharif 1330 F. The suits may possibly be considered to be defective for misjoinder of defendants and causes of action; but no such question has been raised. The plaintiffs cannot, in my opinion, be penalised for having instituted a suit for settlement of account. They made no incorrect allegations. The facts being all admitted, such reliefs should be granted to them as the law entitles them to.

The result of my findings is:—

(1) That a decree should be passed against Victor Skinner in respect of village Karanpur for Kharif 1330 F., James Skinner in respect of village Dhaulana for Kharif 1330 F., and against Banarsi Das who alone should be considered responsible for collections in respect of both the villages for Rabi 1330 and the whole years of 1331 and 1332 F.

(2) That collections should be divided among all the co-sharers in proportion to their shares.

(3) That Kanhaiya Lal and Gobind Sarup should be left to settle their accounts with Banarsi Das in the manner they deem fit.

(4) That in any case collections made by Victor Skinner, James Skinner and Banarsi Das should be divided in the manner mentioned in (2) above.

(5) That the liability of each defendant should be specified by the decree, as required by the mandatory provision of S. 165(2).

BY THE COURT—The members of this bench having delivered dissentient judgments a reference of the following questions is made to a third Judge or a larger bench as the Hon. Chief Justice may be pleased to nominate:

[The questions are reproduced in the judgment of Mukerji, J.]

As the decision of a learned Single Judge (Sulaiman, J.) in *Lala Durga Prasad* v. *Ganga Saran* (70 I. C. 763) may possibly be so construed as to make it in conflict with the opinion expressed by one of us and in view of the questions involved, we think it is a fit case in which the reference should be made to a bench of three Judges.

Panna Lal for the appellants.

B. Malik, *M. A. Aziz* and *S. N. Seth* for the respondents.

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KANHAIYA LAL
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Mukerji, J.

The following judgment was delivered by

MUKERJI, J.—This is a reference by two learned Judges of this Court, who have differed on certain questions of law. The points that have to be decided by me are as follows:—

> 1. Whether in a suit purporting to be one under Section 165 of the Agra Tenancy Act, II of 1901, a plaintiff is entitled to a proportionate share of the collections made by a lambardar or only to a proportionate share of the balance left after deduction of the lambardar's full share of the gross rental of the mahal?
>
> 2. Whether all the collections made by Sri Ram should be considered to have been made by Banarsi Das the lambardar?
>
> 3. Assuming that collections made by Sri Ram were in part, made for and on behalf of Kanhaiya Lal and Gobind Sarup,
>
> (*a*) whether Banarsi Das, the lambardar, is liable to the plaintiffs for their share in such collections?
>
> (*b*) Whether, if Kanhaiya Lal and Gobind Sarup are liable, the plaintiffs are entitled to a proportionate share of the balance left after deduction of the full shares of Kanhaiya Lal and Gobind Sarup in the gross rental of the mahal?

The facts are given in the judgment of the two learned Judges, and I need not mention them again. Suffice it to say that there were ten co-sharers in the village of Dhaulana, and there were seven co-sharers in the village of Karanpur Jatta. In respect of each of these villages separate suits were brought for settlement of accounts and recovery of a share of profits. The two suits are, in their main features, similar, and therefore they have been decided together.

The plaintiffs asked, as I have already said, for a settlement of accounts, and asked for their share of the profits. In paragraph 2 of the plaint in suit No. 8 out of which appeals Nos. 328 and 338 have arisen, it is stated that

> the defendants had been co-sharers in the said village in the years in question, and had made collections, and therefore they are liable for the profits of the plaintiffs.

A similar statement was made in the connected suit No. 7 of 1926.

It happens that two of the defendants, Banarsi Das and James Skinner, in suit No. 8, and Banarsi Das and Victor Skinner in suit No. 7 of 1926, were lambardars, the Skinners for kharif 1330 Fasli, and Banarsi Das for the rest of the period in suit. The court of first instance found that James Skinner and Victor Skinner had actually made collections during the period for which they were lambardars and giving credit to them for their shares of the profits, directed that the balance should be divided among the co-sharers, and gave the plaintiffs a decree for half the sum (the balance), because the plaintiffs owned a half share. As regards the collections made for the remaining period of the years in suit, the first court found that Banarsi Das and Kanhaiya Lal, defendants Nos. 1 and 2 alone had made the collections, and the Assistant Collector similarly dealt with the amount collected. In other words, he gave Banarsi Das and Kanhaiya Lal credit for the shares of the profits due to them, and directed the balance to be divided.

The learned Judges have differed as to this point, namely, whether the whole of the amounts collected by Banarsi Das and Kanhaiya Lal for one period, and James Skinner and Victor Skinner for the other, should have been divided *pro rata* among the co-sharers, thus giving the plaintiffs a half share in the collections.

One of the learned Judges was of opinion that although the suit was framed as a suit under Section 165 of the Tenancy Act of 1901, it was virtually a suit under Section 164 of the same Act, and that Banarsi Das or James Skinner or Victor Skinner could not escape liability because the suit was framed under Section 165 of the Act. It was found by the first court that the actual collections were made by a karinda, Sri Ram, on behalf of Banarsi Das and Kanhaiya Lal, and that Kanhaiya Lal, also made some collections. One of the learned Judges thinks that this collection of Sri Ram should be taken, in law, as a collection by Banarsi Das, the lambardar alone and as being a collection made at the instance of him. The other learned Judge is of opinion that the collection made by Sri Ram should be treated as a collection made on behalf, not only of Banarsi Das and Kanhaiya Lal, but also on behalf of Gobind Sarup, the three gentlemen having jointly made the purchase of a 0-4-0 share

Before I come to give my answer to the several questions put by the learned Judges in their order of reference, I would like to say a few words on the principle on which the questions that have arisen must be decided.

A lambardar's position is well known. He is an agent on behalf of all the co-sharers for certain purposes, principally for the collection of the rent payable by tenants and payment of land revenue. At some places, he is entitled to let out the vacant land to tenants and do similar things for the benefit of the entire body of co-sharers. In this Court it has been held that he is not an agent on behalf of the co-sharers, when they have any claim against some of themselves. See *Koka* v. *Chunni*[1]. Thus, the position of the lambardar is well defined, and there is no dispute about that. But as regards a co-sharer, is he also an agent for the other co-sharers. I have not been able to find any authority for the argument that a co-sharer, merely as a co-sharer, holds any fiduciary position as regards the other co-sharers of the village. As a co-sharer, a person is entitled to certain privileges, and is also subject to the liability to pay the land revenue, not only for his own share, but for the share of his co-sharers, where the liability is joint. But beyond this no liability exists in a co-sharer. He is not an agent for the other co-sharers, and there is nothing in the constitution of a village which makes a co-sharer an agent for other co-sharers. Nobody has appointed a co-sharer an agent for others, and the position in the village of a co-sharer does not make him an agent for other co-sharers. The only authority that has been found in this Court is a decision of a learned single Judge of this Court, and is reported in *Lala Durga Prasad* v. *Ganga Saran*[2]. It was held there that a co-sharer was not an agent for other co-sharers, and I entirely agree with this view.

It has been urged that, having regard to Section 194 of the Tenancy Act of 1901, it is the duty of all co-sharers to join to make collections, and where only one co-sharer has attempted to make collections for himself, he should be treated as an agent for other co-sharers. This would

[1] 25 A. L. J. R. 1057

[2] 70 I. C. 763

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mean that a mere usurper may be treated as an agent for the person whose property he has usurped. If a co-sharer is not entitled to make any collections under any village custom, he may be sued in the civil court for usurping the shares of other co-sharers. If a co-sharer has been, by custom, allowed to make collections for other co-sharers, he may be treated as the *de facto* lambardar, and may be sued under Section 164 of the Tenancy Act of 1901. The mere fact that a man who is not an agent has acted contrary to his rights, will not make him an agent for other co-sharers.

Holding the view of the law explained above, I proceed to examine the questions propounded by the learned Judges in their order of reference.

The first question is "whether in a suit purporting to be one under Section 165 of the Agra Tenancy Act, II of 1901, a plaintiff is entitled to a proportionate share of the collections made by a lambardar, or only to a proportionate share of the balance left after deduction of the lambardar's full share of the gross rental of the mahal?"

As to this question, my answer is that if the suit is under Section 165, no question of one of the defendants being a lambardar can arise. The plaintiffs claimed as against, not the lambardar, but against all the co-sharers, as co-sharers, the lambardar being treated not as a lambardar, but as a co-sharer. In the circumstances, I fail to see how a plaintiff can be allowed to change his case, unless he is permitted by the court to amend his plaint for good reasons given by him. This being my view, my answer to the question is that the lambardar, in the array of the defendants, cannot be treated as a lambardar, but must be treated as a co-sharer, and therefore he is entitled to deduct out of the collections made by him his full share of the profits of the mahal, the balance alone being divisible amongst the other co-sharers.

The point No. 2 is "whether all the collections made by Sri Ram should be considered to have been made by Banarsi Das the lambardar?"

This question may appear to a person who has not studied the facts of the case as a question of fact, and not as a question of law. I take it, however, that it was meant to be a question of law, because only a question of law can be referred to a third Judge. The idea underlying the question undoubtedly is "whether the collection made by Sri Ram, although he professed to have collected, not on behalf of Banarsi Das, the lambardar, alone, but on behalf of Banarsi Das, Kanhaiya Lal and Gobind Sarup, can be treated as a collection by Banarsi Das alone?" In my opinion, there is no reason for ignoring the other co-sharers on whose behalf Sri Ram may have made the collections. The question to be decided by the learned Judges of the Division Bench is whether Sri Ram's collection is on behalf of Gobind Sarup also or not. If it be found that Sri Ram collected for all the three co-sharers, defendants Nos. 1 to 3, or if it is found that Sri Ram collected on behalf of only the first two defendants, in either case. the collection must be treated as a collection by co-sharers, and not as a collection on behalf of the lambardar alone. This is my answer to the question.

The third question is divided into two portions. The first portion would be read as follows:—

> 3 (*a*) Assuming that collections made by Sri Ram were, in part, made for and on behalf of Kanhaiya Lal and Gobind Sarup, whether Banarsi Das,

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the lambardar, is liable to the plaintiffs for their share in such collections.

As I have said above, Banarsi Das as lambardar has no existence in the present proceedings. The accident that Banarsi Das is a lambardar has been completely ignored by the plaintiffs, and, in my opinion, the question cannot be revived. That being so, the liability of the first two defendants, or the first three defendants, as the case may be, must be a joint one and Banarsi Das's liability cannot be separated from the liability of the other co-sharers who may have jointly collected the profits with Banarsi Das.

The last question is:—

> 3 (*b*) Assuming that the collections made by Sri Ram were, in part, made for and on behalf of Kanhaiya Lal and Gobind Sarup, whether, if Kanhaiya Lal and Gobind Sarup are liable, the plaintiffs are entitled to a proportionate share of such collections or only to a proportionate share of the balance left after deduction of the full shares of Kanhaiya Lal and Gobind Sarup in the gross rental of the mahal.

I have already given my answer to this question in discussing the general principles on which a suit for profits and a suit for accounts should be decided. In the view already expressed, a deduction should be made for the entire shares of Kanhaiya Lal and Gobind Sarup, along with the share of Banarsi Das, and after full credit has been given for the shares of the three defendants the balance alone will be divisible amongst the other co-sharers.

Let these answers be laid before the Bench who made the reference.

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July 27
SULAIMAN, A. C. J.
BAJPAI, J.

AVINAS CHANDRA BANERJI—IN THE MATTER OF*

Succession Act (XXXIX of 1925), Sec. 291 and Contract Act, Secs. 129 and 130—Administration Bond—Surety to—Whether can claim as of right to be released from future liability—Court's power to release surety from future liability—When to be exercised.

A surety to an administration bond cannot claim *as of right* to be relieved of all further liability by merely expressing his intention to do so either by notice or by a proper application to the court. Secs. 129 and 130 of Contract Act do not apply to such a surety.

The court has power to release a surety for the administrator of the estate of a deceased person from all liability for future transactions from a date when full accounts are rendered and the assets duly accounted for, if it is satisfied that there is ground for it, and after providing safeguards for the heirs of the deceased. Such release however will only be operative after the date of the release and the surety will continue to be liable for any maladministration that might hereafter be discovered and which was committed prior to the date of release.

Dabendra Nath Dutt v. *Administrator-General of Bengal*, I. L. R. 35 Cal. 955 *distinguished. Raj Narain Mookerjee* v. *Ful Kumari Debi*, I. L. R. 29 Cal. 68 *referred to.*

O. M. *Chiene* for the applicant.

K. N. Katju, Banke Behari and *R. N. Basu* for the opposite party.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is an application by the surety for Dr. P. D. Banerji who was at one time appointed an administrator of the estate

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*Testamentary Case 23 of 1929

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Sulaiman, A. C. J.

of his deceased father Dr. Abinash Chandra Banerji.

A preliminary objection is taken to the hearing of this application on the ground that there is no provision of law under which a surety can be discharged and the High Court has no jurisdiction to entertain such an application. Reliance is placed by the learned counsel for the opposite party on the case of *Kandhya Lal* v. *Manki*[1] but in that case the learned Judges did not expressly lay down that they had no jurisdiction to direct that a surety be discharged. They certainly held that he could not of his own free will withdraw from his suretyship and they also remarked that there was no express provision in the Probate and Administration Act. But that case is no authority for the proposition that the High Court to which the security bond is given has no power whatsoever to relieve the surety from all future liability. The case directly in favour of the applicant is *Raj Narain Mookerjee* v. *Ful Kumari Debi*[2], although it went to a length to which it is not necessary for us in this case to go. That case accordingly was not approved of by the Madras High Court in the case of *Subroya Chetty* v. *Ragammall*[3]. The case decided by their Lordships of the Privy Council in *Debendra Nath Dutt* v. *Administrator-General of Bengal*[4] is distinguishable because their Lordships merely held that the security bond given by the surety did not become void when the letters of administration were cancelled, and that, while they remained unrevoked, the grantee was to all intents and purposes administrator of the estate, and for his acts and defaults as administrator the sureties were and remained responsible.

It seems to us that although it is true that a surety cannot claim as of right to be relieved of all liability by merely expressing his intention to do so either by notice or by a proper application to the court and although it is also true that the case of a surety whose security has been accepted by a court, cannot be treated as one falling under Sections 129 and 130 of the Indian Contract Act so as to entitle him to put an end to the guarantee at his will, yet that is quite a different thing from saying that the High Court to which the guarantee is given has itself no power to exonerate the surety from all liability for future transactions. It may well be that at the time when the surety furnished security, the administrator was honest and was believed to be capable of administering the estate in a proper way but he might subsequently become dishonest or might mismanage the estate, and so it would be astonishing if there were no provisions of law which would give the surety remedy by way of applying to the court and asking to be relieved. He cannot merely sit idle and watch the administrator committing waste and misappropriation, knowing full well that the liability will be his own. Similarly there may be a case where the security bond becomes inoperative subsequently, as where after a security bond is accepted by the court the surety becomes an insolvent. If the preliminary objection is sound, the court would become *functus officio* after the earlier document was filed, and would be unable to direct a fresh security to be filed by another surety. It seems to us that when the guarantee or undertaking is given to the court itself, there is

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[1] I. L. R. 31 All. 56
[2] I. L. R. 29 Cal. 68
[3] I. L. R. 28 Mad. 161
[4] I. L. R. 35 Cal. 955

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AVINAS CHANDRA BANERJI *in re*

Sulaiman, A. C. J.

nothing to prevent the court, if satisfied that good cause is shown, from cancelling that undertaking. In the present case the letters of administration were subsequently revoked because it was found that the administrator had omitted to bring to the knowledge of the court certain facts relating to a will of the deceased, and the administrator ceased to be liable for the administration of the estate. We think that this is a sufficient ground for the surety to be relieved from all further liability from a date when full accounts are rendered and the assets duly accounted for. In ordinary cases of surety for appearance of the parties there is express provision in the Code of Civil Procedure for release. Similarly the surety can under certain circumstances be relieved from further liability under the Contract Act. On the same analogy it would seem that we have full power to grant release if satisfied that there is ground for it, after providing safeguards for the heirs of the deceased. Such release however will only be operative after the date of the release and the surety will continue to be liable for any maladministration that might hereafter be discovered and which was committed prior to the date of release. We accordingly overrule the preliminary objection.

It however appears that the opposite party does not think that the account has been fully rendered. We accordingly allow three months time for the opposite party to file written objections of which a copy should be supplied to the applicant.

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Nov. 17

MUKERJI, J.
NIAMATULLAH, J.

GOPI SHANKER (*Plaintiff*)

versus

LILAWATI (*minor*) THROUGH SHIMBHU NATH NAZIR AND OTHERS (*Defendants*)*

Abadi—House in—Whether appurtenant to holding—Question of fact—No presumption of law—House appurtenant to holding—Meaning of.

There is no presumption of law that the house occupied by a cultivator in a village is appurtenant to his holding, and either the house or the site must be given up, simply because the tenancy has either been lost or has lapsed by death in favour of the zemindar.

Dubri Lal v. *Dholu Rai,* 3 A. L. J. R. 619, *Nazir Hasan* v. *Shibba,* I. L. R. 27 All. 81, *Shobrat Singh* v. *Jhagru,* 13 A. L. J. R. 745 and *Bhaddar* v. *Khairuddin Husain,* I. L. R. 29 All. 133 *referred to.*

Per NIAMATULLAH, J.—When it is said that a house is an appurtenant to a holding, what is meant is that the site was let to the tenant for the construction of his residential house on the express or implied understanding that it would go with the holding and that, if he be ejected from the latter or voluntarily relinquished it, his right to occupy the site would cease.

There is no presumption that a tenant is entitled to occupy the site of his house so long as he retains his holding, and the landlord must establish by direct evidence or proof of circumstances which justify the inference that the defendant's right to the site is dependent on his right to retain the holding.

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*S. A. 73 of 1929

SECOND APPEAL from a decree of BABU RATAN LAL, Additional Subordinate Judge of Farrukhabad, reversing a decree of BABU SHEOBARAN SINGH, Munsif of Kanauj.

U. S. Bajpai for the appellant.

K. C. Mital for the respondents.

The following judgments were delivered:—

Mukerji, J.

MUKERJI, J.—This appeal has been referred to a Bench of two Judges, because the learned Judge before whom it came thought that the matter under consideration required careful examination. The plaintiff is the zemindar of the village and the defendant, who is a minor, is the daughter of a tenant who cultivated some of the plaintiff's lands in the village. The tenant having died and, under the tenancy law, the daughter not being an heir to the tenant, the tenancy lapsed to the plaintiff. He, thereupon brought the suit out of which this appeal has arisen, to recover possession over the house occupied by the late tenant, on the allegation that the house also lapsed to the zemindar. The plaintiff accordingly asked for possession over the house. In the plaint, the plaintiff suggested that the court might, if it thought necessary, allow the defendant to remove the materials of the house leaving the site to be occupied by the plaintiff.

The defence was that the plaintiff had no right to turn the defendant out of the house, that the house had been occupied for a hundred years by the defendants' ancestors and that the mere fact that the tenancy lapsed to the plaintiff would not be any ground for the plaintiff to take possession of the late tenants' house. The court of first instance decreed the suit for possession of the site and allowed the defendant three months' time to remove the materials. On appeal the learned Additional Subordinate Judge of Farrukhabad dismissed the suit in its entirety. He held that the house was not an appurtenance to the holding of the late tenant Girwar.

In this Court it was urged that the presumption of law was that the house was an appurtenance to the holding, especially as the house in dispute was the only one occupied by the deceased. Other points were taken in the grounds of appeal but they were not pressed.

The only point of law that we have to decide is whether there is any presumption in the case of a house occupied by a tenant cultivating land in the village that the house is an appurtenance to the holding and when the holding lapses to the zemindar, the house also lapses to him, or in any case the zemindar is entitled to take away the site leaving the lawful heir of the late tenant to remove the materials.

I have always held that whether a house is an appurtenance to a holding or not is not a question of law but is a question of fact. That this must be so ought to be clear on a consideration of what follows.

To enable the residents of a village to receive a supply of their many necessaries of life the zemindar must allow many such people to occupy the site of the *abadi* as do not cultivate the land. For example, a blacksmith, a carpenter, a presser of oil seeds, a grain parcher, a weaver of cloths and others carrying on similarly useful but humble professions would be needed to be settled in a village. These artisans need not necessarily cul-

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tivate land. Some of them, if and when the family grew up might think of adding to their income by cultivating some land, taking it not necessarily, from the zemindar but from tenants of the village or other holders of land. If these artisans should, later on, give up the land which they cultivate, can it be said that their house was an appurtenance to their holding? Again suppose these artisans *after they have been settled* take a lease of certain lands for cultivation from the zemindar himself, can it be said that their residential houses are appurtenances to their holdings? The answer must be in the negative.

If it had been the case that none but a cultivator of land was necessary in the village economy, it might have been argued that a cultivator settled in the village simply because he is a cultivator and nothing else. I have omitted to mention an important class of people who are found settled in villages and who are very useful as labourers, but who do not necessarily cultivate lands. These are *chamars,* sweepers and others who mostly work as labourers, and cultivate lands, if ever, mostly as sub-tenants. In their case, the cultivation is more or less nominal. The *chamars* supply the shoes, the leather bags for drawing water, the whips for driving cattle, and they are remunerated, sometimes, by a share in corn and sometimes by cash and sometimes by being given a few bighas of land to cultivate. It is always a question of fact at what time the cultivator came to live in the village and at what time did he take up the cultivation of land. There is not the least reason to suppose that the cultivation of every man in the village synchronizes with his occupation of a site in the village *abadi.*

On general considerations I feel bound to entertain the opinion which I have always entertained and which I have described above.

Looking to the authority, I do not find that there is any uniformity in the decisions. In the case of *Dubri Lal* v. *Dholu Rai*[1] the zemindar sued to eject the defendants from his two houses, on the allegations that they had been newly built without his consent. The defence was that the defendants were cultivating land in the village, that the houses were more than fifty years old and had been erected with the zemindar's consent. The first court decreed the suit on the ground that the defendants were mere licensees and could be ejected at any time by the zemindar. The lower appellate court dismissed the suit holding that the houses were more than twelve years old and the plaintiff appealed. Banerji, J. remarked that as the defendants were cultivating land in the village, they were entitled to live in the village and occupy the sites so long as they cultivated the land. Then he said:

> If they are not in possession as tenants, their possession would be deemed to be adverse. In either case the plaintiffs were not entitled to eject them.

This decision recognizes the fact that a person could be occupying a village site otherwise than a cultivatory tenant. His lordship did not decide that every cultivator's house was necessarily a part of the holding and must be given up when the holding is lost. In deciding this case Banerji, J. professed to follow an earlier case, viz., *Nazir Hasan* v. *Shibba*[2]. There the suit was for the ejectment of the defendants from a room. The two learned Judges who decided the case said:

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[1] 3 A. L. J. R. 619

[2] I. L. R. 27 All. 81

> Now it is apparent that either the tenants are entitled to the room in question as appurtenant to their holding or, if it be not appurtenant to their holding, they have acquired it by adverse possession.

This observation clearly recognizes that a man occupying a portion of a village site does not necessarily occupy it as a cultivator.

In the case of *Moti Ram* v. *Mewa Ram*[3] it was definitely laid down by Banerji, J., who had a considerable experience of this part of the country, that there was no legal presumption that every dwelling house belonging to an agriculturist was appurtenant to his holding. He remarked:

> A house may or may not be appurtenant to the holding, and the fact that it was appurtenant to the holding must be established in each case upon evidence.

A similar view was expressed by Rafiq, J. in *Net Ram* v. *Tej Ram*[4].

The same view was adopted in the case of *Moti* v. *Munna* mentioned in the Reporter's Diary at page 3 of the Journal portion of 10 Allahabad Law Journal.

No doubt there are cases in which it has been remarked that so long as a tenant cultivates land in a village, he is entitled to stick to the *abadi* land on which his residential house is, but these remarks cannot be construed as meaning that whenever the tenancy is lost the right to the house is also lost. In the Full Bench case of *Saddu* v. *Behari Singh*[5] there was a partition in the village and a tenant's holding fell into the share of one co-sharer and his residential house fell into the share of another co-sharer. The co-sharer in whose mahal the tenant's residential house had fallen demanded rent from the tenant, and in the alternative sought his ejectment. It was held that so long as the tenant cultivated the land in the village, he was entitled to occupy the site of his house, and the mere fact that the zemindar co-sharers had divided the village lands could not put the cultivator in a worse position. This case only lays down this that a person cultivating land in the village *has a right* to occupy his house if one is there in the village, so long as he cultivates the land. As I have said, the converse proposition does not follow, viz., when the cultivator ceases, the house must go.

Devolution of property other than cultivatory holding is regulated by the personal law of the tenant, while the rule as to devolution of a tenancy holding is liable to fluctuate and has indeed been fluctuating from time to time. Under Act XII of 1881 (N. W. P. Rent Act Section 9) the rights of an occupancy tenant devolved "as if it were land." If that law had still been in force, the daughter of the deceased tenant would have inherited the cultivatory holding as much as she has inherited her father's house. The law of inheritance as to cultivatory holding was changed in 1901 and a daughter was excluded from inheritance. Unless, therefore it can be established as a matter of fact that the house is nothing but a part and parcel of a tenancy, it cannot be said that the daughter is not entitled to inherit the house. If she is entitled to inherit the house, she is entitled to live in it, unless it is proved that there was a contract to the contrary.

In *Dalel* v. *Bhajju*[6] a cultivator used a piece of land for a long time as threshing floor. The zemindar sought to eject the cultivator from his threshing floor, and it was held that the tenant held it as part of the contract of tenancy. This decision implies that what is the contract of tenancy is a question of fact. This decision was followed by myself and Sulaiman, J. in Letters Patent Appeal No. 121 of 1923 decided on July 24, 1924.

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[3] Unpublished Decisions, Vol. II 720

[4] 11 A. L. J. R. 445

[5] I. L. R. 30 All. 282

[6] I. L. R. 16 All. 191

There can be no doubt that in the case of *Shohrat Singh* v. *Jhagru*[7] Knox, J. went so far as to lay down, as the general law of the land, that where a tenant is ejected from his tenancy or abandons it, unless there be some special custom to the contrary, the site on which he has built his house reverts to the zemindar and the tenant must remove the materials therefrom. With all respect I am unable to accept this view of the learned single Judge. It lays the burden of proof on the defendant and not on the plaintiff. The village site may be the property of the zemindar. but under Section 110 of the Evidence Act when a person is shown to be in possession of any property the presumption is that he is the owner of that property, and any person who asserts to the contrary must prove that fact. In view of the fact that a zemindar is usually the owner of all the village sites, it may be conceded that the zemindar has the proprietary right in the site, but it does not follow that the man in possession of the house is liable to be ejected at the sweet will of the proprietor of the site.

It is not the case here that the plaintiff-zemindar is seeking ejectment of the minor daughter of his deceased cultivator, on the ground that he is the owner of the site and he asked the minor to vacate the land, and, therefore, she must prove her right to continue in occupation of the site. It has been proved in this case "that the appellant and her ancestors have been occupying the house since over a hundred years and on plaintiff's evidence themselves built it." Even if the original right to occupy the house started as a matter of license from the zemindar, it may very well be said that, on the basis of the license, a permanent building has been erected and the right to revoke the license has come to an end.

I have so far not considered the case of those persons who were once zemindars of a village and in that capacity lived on the village site and subsequently lost the zemindari right but continued to cultivate certain lands in the village either as ex-proprietary tenants or as ordinary tenants with no rights of occupancy. How can it be said in the case of such persons that the house is appurtenant to the tenancy.

Enough has been said to establish, and I hold accordingly, that there is no presumption of law that the house occupied by a cultivator in a village is appurtenant to his holding, and either the house or the site must be given up, simply because the tenancy has either been lost or has lapsed by death in favour of the zemindar.

In the result I would dismiss the appeal with costs throughout.

Niamatullah, J.

NIAMATULLAH, J.—I agree with the view expressed by my learned brother on the sole question arising in this appeal, namely, whether the site of a tenant's house should be presumed to be an appurtenant to his holding, so that, in case he is ejected from the latter or voluntarily relinquishes it without a fresh arrangement with the landlord as regards the site, he must surrender the site also. It is clear to me that, if the site of a house occupied by a tenant in an agricultural village is not an appurtenant

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[7] 13 A. L. J. R. 745

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Gopi Shanker v. Lilawati

Niamat-ullah, J.

to his holding, the landlord is not at liberty, in the absence of a custom to the contrary, to require the tenant to vacate the site of his house on payment of the value for the superstructure by the landlord or by requiring him to remove the materials if the tenant so desired. In such a case, the landlord and the occupier of a house on a village site stand in the relationship of a licensor and licensee. If, acting upon the license, the licensee executed a work of a permanent character and incurred expenses in the execution thereof, a licensor is not at liberty to revoke the license. Unless the house is of a temporary and inexpensive character a riaya's house is to be deemed as a work of a permanent character (see *Bahadur* v. *Khair-ud-din Husain*[1]). If, on the other hand, the house is an appurtenant to the cultivatory holding of the occupier thereof, it should go with the holding. When it is said that a house is an appurtenant to a holding, what is meant is that the site was let to the tenant for the construction of his residential house on the express or implied understanding that it would go with the holding and that, if he be ejected from the latter or voluntarily relinquished it, his right to occupy the site would cease. It cannot be doubted that landlords in this Province allow people to settle in their villages not only because they become tenants, but also for purposes having no reference to cultivation of land. It happens not infrequently that a member of a tenant's family decides to separate from his father or brother and to build a separate house for himself with the permission of the landlord, though he cultivates no land himself for years to come. Similarly, where the population of a village is sparse and the landlord desires to increase it by pursuading people from outside to settle in his village, not only to give him a larger number of persons willing to cultivate the village lands but to enable him to have a larger supply of labourers, he having a big farm or indigo factory of his own. Even in cases in which tenants cultivating land are also occupiers of houses, such houses are not appurtenants to particular holdings. The holdings of tenants and their sizes frequently change; but the tenants continue to occupy their houses. In such cases, it is difficult to say that the house occupied by a particular tenant, who has had a shifting and varying holding, is appurtenant to any particular holding. If, in such a case, the tenant is liable to ejectment from the site of his house, on being ejected from his holding, which is not the same as the one he occupied when he built his house, it can only be on the supposition that he was allowed to build his house on the village site on the understanding that he would vacate it not when he is ejected from his then holding, but when he altogether ceases to be a cultivator in the village. In all these circumstances it is not always possible to say that the right of occupiers of village sites to retain them depends upon their right to retain their cultivatory holdings. Whether it is so must be found in each individual case, having regard to the character of the village and the circumstances in which the house was built and the cultivatory holding of the occupier came into existence. In cases of old inhabitants of a village who have cultivated land and occupied houses in the village abadi as far back as living memory goes, it is most difficult for the tenant to establish that his tenure of the site of his house and cultivatory holding

[1] I. L. R. 29 All. 133

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had different origins and that his right to occupy the site did not, in any manner, depend upon his cultivating land in the villages. On the other hand, it is difficult for the landlord to establish the contrary.

There is no rule of law which raises a presumption that the occupier of a house in village abadi, if he happens to be also a cultivator in the village, is entitled to retain the site so long as he cultivates land in the village. The court may, however, presume the existence of any fact which it thinks likely to have happened, regard being had to the natural course of events, human conduct and public and private business in their relation to the facts of a particular case, (Section 114, Indian Evidence Act). While, therefore, the circumstances of a particular case may give rise to an inference that a tenant is entitled to occupy part of the village site, so long as he is a cultivator in the village, or so long as he cultivates a particular holding, it is not permissible to presume generally that the right to occupy the site of a house in the village abadi ceases when he ceases to cultivate land in the village or is ejected from a particular holding. I do not think the practice of the landlords to allow people to build houses on village sites on the understanding, express or implied, that the latter would vacate them on ceasing to be cultivators or on being ejected from their holdings is so common as to justify a presumption to that effect. The cases in which it has been definitely held that there is a presumption that a tenant is entitled to occupy the site of his house so long as he retains his holding are decisions by single judges, whose views are opposed to those by other learned judges sitting singly in other cases. There is no decision of a Division Bench of this Court on the point; and we are free to accept one or the other of the two views. I am not prepared to accept the proposition that a landlord seeking to eject his tenant from the site of his house after his ejectment from his agricultural holding starts with a presumption in his favour. He must establish by direct evidence, or by proof of circumstances which justify the inference that the defendant's right to the site is dependent on his right to retain the holding. It is not possible to lay down any general rule. Each case must depend upon its own peculiar features.

I agree with the order which my learned brother proposes to pass.

BY THE COURT—We dismiss the appeal with costs throughout.

Appeal dismissed

Civil

1932

Jan. 2

King, J.

MOHAMMAD SALIM-ULLAH KHAN (*Plaintiff*)
versus
KHALIL-UR-RAHMAN KHAN (*Defendant*)*

Court-Fees Act, (VII of 1870), Art. 1(d)—Memorandum of objections filed under Or. 41, R. 26 C. P. C.—Not liable to court-fee—Memorandum neither an "application" nor a "petition".

> No court fee is chargeable upon a memorandum of objections filed under Or. 41, R. 26 C. P. C. *Damodar Prasad* v. *Masudan Singh*, A. I. R. 1928 Pat. 85 *followed.*
>
> Such a memorandum cannot properly be held to be either an "application" or a "petition" presented to the High Court.

First Appeal from the decision of the Assistant Collector 1st. Class of Aligarh.

A. M. Khwaja (with him *B. E. O'Conor* and *T. A. K. Sherwani*) for the appellant.

The following judgment was delivered by

King, J. King, J.—This is a reference under Section 5 of the Court Fees Act, 1870.

The question is whether a court fee is chargeable upon a memorandum of objections filed under O. 41, R. 26 C. P. C.

There is no express provision in the Act making such a document liable to the payment of a court fee. The practice hitherto has been to levy a court fee of Rs.2 on such documents. It is suggested that this practice is justified under Art. 1(*d*) of Schedule II which makes an application or petition presented to a High Court chargeable with a court fee of Rs.2. The question is whether a memorandum of objections filed under O. 41, R. 26 C. P. C. should be held to be an application or petition presented to the High Court. In my opinion the answer is in the negative. The memorandum does not request the Court to take any action or to pass any order. Its object is to inform the Court and the opposite party that the objector challenges the finding of the court below on certain points or on certain grounds. I do not think it can properly be held to be either an "application" or a "petition". Fiscal statutes must be strictly construed and if a document is not clearly chargeable under the statute the person sought to be charged in respect of document is entitled to the benefit of doubt.

In *Damodar Prasad* v. *Masudan Singh*[1] a single Judge of the Patna High Court has expressly held that no court fee is chargeable upon a memorandum of objections filed under O. 41, R. 26. I agree to his reasoning and conclusion.

No authority to the contrary has been shown to me.

Following the ruling cited I hold that no court fee is chargeable upon a memorandum of objections filed under O. 41, R. 26 C. P. C.

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*Stamp Report in F. A. 464 of 1929

[1] A. I. R. 1928 Pat. 85

CIVIL

1931

July 16

SEN, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*)

versus

GIRDHARI LAL SHAMBHUNATH (*Defendant*)*

Succession Act (XXXIV of 1925), Secs. 214 and 381—Property descends to Crown by escheat—Whether Sec. 214 applicable.

Where the property descends to the Crown by escheat, it could not be said that the Crown was claiming the property by right of 'succession' within the meaning of Sec. 214 of the Succession Act. The Succession Act is not applicable to the Crown where it takes the property upon escheat.

CIVIL REVISION from an order of MAULVI S. M. SAIDUDDIN, Subordinate Judge of Agra.

Sankar Saran for the applicant.

N. P. Asthana and *Baij Nath Sahai* for the opposite party.

The following judgment was delivered by

Sen, J.

SEN, J.—This is an application for civil revision by the Secretary of State for India in Council who figures as plaintiff in the action. The suit was to recover interest on five hundis of various dates which were drawn by the firm Ram Narain Chunni Lal on the firm Girdhari Lal Shimbhu Nath. The hundis were payable 61 days after the date of execution.

The firm of Ram Narain Chunni Lal was owned by Chunni Lal. He died in April 1925 before the hundis had matured. He is said to have died without leaving any issue.

Upon his death, three rival claimants appeared on the scene; one claimed to be the collateral heir of Chunni, the second claimed under a will, and the third in the right of escheat. A triangular contest is going on between these three and I am informed that litigations are pending in appeal before this Court.

On July 14, 1925, Rai Bahadur Seth Soorajbhan, Government Treasurer of Agra, sent a notice on behalf of the Collector of Agra to the defendant calling upon him to pay up the principal and interest due on the hundis. The defendant did not make the desired payment.

On April 21, 1927, the defendant appears to have to a certain extent changed his mind; for on that date the defendant deposited the principal amount due on the hundis in the Imperial Bank of Agra to the credit of the Collector of Agra.

The Collector served a notice upon the defendant asking him to pay the interest due on the hundis from the date of their maturity upto April 21, 1927, when the principal sum was paid. The defendant did not respond to this notice; hence the suit.

The suit was instituted on March 5, 1929.

Various points were raised in defence but the one which was seriously pressed was that, in view of the provisions of Sections 214 and 381 of the Indian Succession Act (XXXIX of 1926) the plaintiff was not entitled to claim interest without obtaining a succession certificate. It may be noticed that this plea had not been taken in the written statement as

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*Civ. Rev. 486 of 1930

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Sen, J.

originally filed. At a later stage, the defendant applied for the amendment of his written statement by the inclusion of this plea. His written statement was allowed to be amended.

On December 20, 1929, the court passed an order directing the plaintiff to obtain a succession certificate. Thereupon the plaintiff applied for and obtained the required certificate on June 2, 1930. This certificate was duly filed in court. The court however dismissed the plaintiff's suit on the following ground:—

> The present plaintiff obtained succession certificate on June 2, 1930 after the filing of the present suit. Evidently upto June 2, 1930, there was none who could give a valid discharge and so the defendant cannot be held liable for interest for the period in question.

Where there is a vacant inheritance, the property lapses to the Crown by the rule of escheat. The escheat to the Crown is not due to any rule of succession. The right of escheat is a prerogative of the Crown and the said prerogative is recognised universally in every system of civilised jurisprudence. I would emphasise the fact that upon the death of a person without leaving any heirs his estate devolves upon the Crown under its general prerogative and not by the reason of any rule of succession. Escheat is the vanishing point in the law of inheritance. Where succession ends, escheat begins. The law on the subject has been discussed in a number of cases and reference may be usefully made to *the Collector of Muslipatam* v. *Cavaly Vencata Narrainpah*[1], *Cavaly Vencata Narrainpah* v. *The Collector of Muslipatam*[2] and *Sonet Kooer* v. *Himmat Bahadur*[3].

Section 214 of the Indian Succession Act provides that

> no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming *on succession* to be entitled to the effects of the deceased person or to *any part* thereof except on the production by the person so claiming of (III) a succession certificate granted under Part X and having the debt specified therein.

Where the property descends to the Crown by escheat it could not be said that the Crown was claiming the property by right of '*succession*' within the meaning of Section 214 of the Indian Succession Act. Section 381 of the Indian Succession Act provides that

> the succession certificate granted by the District Judge with respect to debts and securities specified therein will be conclusive against the person owing such debts or liable on such securities and shall afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

No authorities have been cited in support of the proposition that the provisions of Sections 214 and 381 of the Indian Succession Act are applicable to the Crown where the property vests in the Crown by reason of a vacant inheritance. This case therefore is one of first impression. Upon general principles, I am of opinion that the Indian Succession Act is not applicable to the Crown, when it takes the property upon escheat. The ground therefore upon which the judgment proceeds cannot be supported.

An important plea was raised by the defendant in paragraph 9 of written statement which runs as follows:—Neither were the hundis presented to the contesting defendant on the due date nor did there appear any person entitled to take the money. The question therefore which still remains for determination is whether the plaintiff could claim interest on the hundis without presenting the hundis after their maturity.

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[1] 8 Moore's I. A. 500

[2] 11 Moore's I. A. 619

[3] I. L. R. 1 Cal. 391 at 401

I allow the application, set aside the decree of the court below and remand the case to that court for disposal of the case with reference to the issue indicated above. Costs here and heretofore shall abide the event.

Revision allowed

In re THE OFFICIAL RECEIVER*

Civil
1931
July 23
Mukerji, J.
Sen, J.

Provincial Insolvency Act (V of 1920), Sec. 57(4)—Government Notification 359|VII-277 dated March 11, 1930—Official Receiver—Remuneration fixed at 5% of "gross assets"—Meaning of "gross assets"—Interest of mortgagee—Not to be taken into account in estimating the assets of insolvent debtor.

Where the houses owned by insolvents were subject to a mortgage of Rs.2,500, and the insolvents, the creditors and the mortgagee agreed that this property should be sold to the mortgagee for Rs.3,500, and the latter was to keep Rs.3,125 for himself and pay Rs.375 to the unsecured creditors; and by a Government Notification No. 359|VII-277, dated March 11, 1930 the remuneration of the official receiver was fixed at '5% of the gross assets coming into his hands, subject to a minimum commission of Rs.5 in each case', *held*, that the words 'gross assets' in this particular case must mean that portion of the property which was represented by the amount Rs.375. The official receiver therefore should have his remuneration calculated on the sum of Rs.375.

The word 'assets' means 'effects of an insolvent debtor or bankrupt applicable to the payment of his debts'. This definition implies that the interest of the mortgagee is not to be taken into account in considering what are the assets of an insolvent debtor, because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. *In re The Official Receiver*, 1930 A. L. J. R. 1497 and *E. V. David* v. *The Judge Small Causes*, 1931 A. L. J. R. 670 *distinguished.*

Reference in the matter of the Official Receiver's remuneration.

Shabd Saran for the Official Receiver.

The judgment of the Court was delivered by

Mukerji, J.

Mukerji, J.—This is a reference by the Insolvency Judge of Agra, through the District Judge of the same place, as to what is the remuneration, which should be paid to the official receiver under the circumstances of this case.

The circumstances are these:—The insolvents owned property, which consisted of two houses and some movables. The houses were subject to an encumbrance, presumably, simple mortgage, of Rs.2,500. The insolvents and the creditors and the mortgagee came to terms with the result that they agreed that the houses should be sold to the mortgagee for Rs.3,500, that the mortgagee should pay three annas in the rupee to all the unsecured creditors of the insolvent and keep the balance for himself, in full satisfaction of the mortgage. It has been ascertained that this arrangement would enable the mortgagee to keep Rs.3,125 for himself and he would be liable to pay Rs.375 to the unsecured creditors.

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*Mis. Case 101 of 1931

The remuneration of the official receiver has been fixed by a notification of the Government. This notification is for Agra and will be found published in the U. P. Gazette of March 15, 1930. The Notification bears No. 359|VII-277, dated March 11, 1930. It runs as follows:—

> The remuneration of the abovementioned official receiver is fixed at 5 per cent of the gross assets coming into his hands, subject to a minimum commission of Rs.5 in each case.

We have to construe the words "gross assets" having regard to the circumstances of the present case.

The learned counsel, who appears for the official receiver, has brought to our notice two cases decided in this Court in which it was held that where an official receiver is allowed to sell property, which was encumbered, as free from encumbrance, with the consent of the mortgagee, the total price fetched by the sale of the property was to be taken as the "gross assets" in that case. These cases cited before us are, *in re The Official Receiver*[1] and *E. V. David* v. *The Judge Small Causes*[2]. It has been argued that the present case is on all fours with the cases decided in this Court and that the official receiver should be paid 5 per cent on the sum of Rs.3,500.

We are not prepared to accept this contention. We have consulted Murray's English Dictionary and we find that the word 'assets' is defined as 'effects of an insolvent debtor or bankrupt applicable to the payment of his debts'. This definition implies that the interest of the mortgagee is not to be taken into account in considering what are the assets of an insolvent debtor. This must be so, because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. In the cases quoted on behalf of the official receiver, the entire property of the insolvents, free from encumbrance, came into the hands of the official receiver, and he was enabled by the consent of the mortgagee to sell the property. For this reason, it was held that the property sold by the official receiver was the gross assets of the insolvents.

The word 'gross', again, means the 'whole', 'entire' and 'total'. This word qualifying 'assets' does not give the latter word any extended meaning beyond this that the entirety of the assets have to be taken into consideration.

In the case before us the rights of the mortgagee have not been waived and the official receiver never had in his hands the property of the insolvents as it was before the mortgage.

That being the case we are forced to the conclusion that the words 'gross assets' in this particular case must mean that portion of the property which is represented by the amount of Rs.375. The official receiver therefore should have his remuneration calculated on the sum of Rs.375.

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[1] 1930 A. L. J. R. 1497

[2] 1931 A. L. J. R. 670

Nothing has been said in the reference as to what became of the movable properties attached. If those properties came into the hands of the official receiver he would be entitled to his 5 per cent commission on the value of those properties as well. This is only for the information of the insolvency court lest it should be the case that it has overlooked this point.

We may point out that an objection was taken by the insolvents before the insolvency Court, that the official receiver has done nothing for the benefit and in the interest of the insolvents or the creditors and therefore he should get nothing. As the insolvency court has pointed out, the official receiver will do all that is necessary to complete the scheme at which the parties have arrived and he was always prepared to do all that was necessary to be done in the case. We think, therefore, that the insolvency court was right in holding that the official receiver was entitled to such remuneration as the rules awarded him. We direct that a copy of this order be sent to the insolvency court through the District Judge of Agra as our answer to the reference.

CRIMINAL
1931
Sep. 3
SULAIMAN, J.
NIAMATULLAH, J.

HURMAT (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Municipalities Act (Local Act II of 1916), Sec. 307—Recurring fine—Cannot be imposed on first conviction.

Under Sec. 307 of the Municipalities Act (II of 1916) a recurring fine cannot be imposed at the time of the first conviction but on the second conviction when it is proved that the offender has persisted in the offence for which he was first convicted. *Amir Hasan Khan* v. *Emperor,* 16 A. L. J. R. 527 *relied on.*

CRIMINAL REFERENCE made by RADHA KISHEN ESQ., Additional Sessions Judge of Agra.

K. D. Malaviya for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

SULAIMAN, J.

SULAIMAN, J.—This is a criminal reference by the Additional Sessions Judge of Agra recommending that the recurring fine of Re.1 per day imposed on the accused should be set aside.

A notice was issued by the Municipal Board to the accused for removal of certain constructions. The accused failed to comply with the notice and was prosecuted. The learned Judge has agreed that his conviction was proper.

The magistrate, however, in addition to imposing a fine of Rs.20 for the offence has ordered that if the construction be not removed within ten days, the accused shall further pay a fine of Re.1 per day.

The learned Sessions Judge has rightly referred to the case of *Amir Hasan Khan* v. *Emperor*[1] in which a learned Judge of this Court held that such a recurring fine should not be imposed at the time of the first conviction itself.

*Cr. Ref. 194 of 1931

[1] 16 A. L. J. R. 527

Section 307 of the Municipalities Act (Act II of 1916) provides that the person shall be liable

> on a conviction before the magistrate to a fine which might extend to Rs.500 and in case of a continuing breach he shall be liable to a further fine which might extend to Rs.5 for every day after the date of the first conviction during which it might be proved against him that he had persisted in the offence.

The expression "first conviction" suggests that the recurring fine is to be imposed on the second conviction. This conclusion is quite clear when it is borne in mind that before the recurring fine is imposed the offender must be "proved" to have persisted in the offence. It is obvious that in this trial there is no evidence, much less any proof that the offender has persisted in the offence or that he would persist in the offence. The magistrate was therefore not justified in presuming that he might persist and imposing on him the fine in advance. If the accused does persist in the offence, he is of course liable to be prosecuted a second time, on which occasion the recurring fine can be imposed. We accordingly accept this reference and set aside that portion of the order of the magistrate which imposed the daily fine.

Reference accepted

CRIMINAL
1931
Sep. 3
SULAIMAN, J.
NIAMATULLAH, J.

ABDUL RAHMAN (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Criminal Procedure Code, Sec. 195 (1) (a) (as amended in 1923)—District Magistrate granted 'sanction'—Believing that Superintendent of Police would thereby be enabled to prosecute accused—Whether a proper complaint.

An information lodged by accused having been found to be false, the investigating officer moved the Superintendent of Police for the prosecution of accused under Sec. 182 Penal Code, whereupon the Superintendent enquired of the District Magistrate whether he had any objection to the prosecution of accused who was the reader of the Tahsildar of Konch, and the District Magistrate merely granted "sanction" for accused's prosecution believing that the Superintendent would thereby be enabled to prosecute accused, *held*, that there was no complaint either by the Superintendent or by the District Magistrate for the prosecution of accused, and therefore the conviction under Sec. 182 Penal Code was unsustainable for want of a proper complaint as required by Sec. 195 (1) (*a*) Cr. P. Code (as amended in 1923).

CRIMINAL REFERENCE made by L. V. ARDAGH ESQ., Sessions Judge of Jhansi.

Krishna Murari Lal for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is a reference by the learned Sessions Judge of Jalaun recommending that the conviction of one Abdul Rahman of an offence under S. 182 I. P. C. be set aside. The learned Judge is of opinion that there was no complaint such as is required by S. 195 (1) (*a*) of the Criminal Procedure Code for the prosecution of the accused.

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*Cr. Ref. 210 of 1931

The accused lodged an information at the police station to the effect that the motor lorry belonging to a certain person had been over-loaded. On investigation the police found that the information was false. Accordingly the investigating officer moved the Superintendent of Police that the accused be prosecuted for an offence under S. 182 I. P. C. The Superintendent of Police endorsed the following note addressed to the District Magistrate:

> District Magistrate. The accused is the reader of the Tahsildar of Konch. Have you any objection to his prosecution?

The District Magistrate, instead of signifying his wishes in the matter to the Superintendent of Police recorded an order to the following effect:

> I sanction the prosecution of Abdul Rahman Judicial Moharrir Konch. Case to S. D. M. for disposal. The Moharrir will be suspended till the disposal of the case.

The learned Sessions Judge making the reference is of opinion that there was no complaint either by the Superintendent of Police or by the District Magistrate for the prosecution of the applicant and that for want of a proper complaint the conviction is unsustainable.

We think the learned Sessions Judge has taken a right view of the case. The Superintendent of Police did not in fact make a complaint to the District Magistrate for the prosecution of the applicant. He merely tried to ascertain the wishes of the District Magistrate as the person to be proceeded against was a revenue official, being the reader of the Tahsildar. If the Deputy Commissioner had intimated to that officer that he had no objection to the revenue official being prosecuted, the Superintendent of Police would probably have filed a regular complaint under S. 195 (1) (*a*) Cr. P. C. The District Magistrate, however, thought that he had been asked to grant sanction under S. 195 Cr. P. C. Apparently he overlooked the change introduced by the Act of 1923 which has done away with sanctions, and prosecutions for offences mentioned in S. 195 can be started by complaints only. We do not think that the District Magistrate intended to act as the head of the police, nor did he intend to make his order a complaint as defined in the Criminal Procedure Code. We do not intend to lay down that if what substantially amounts to a complaint is defective in form it cannot be the basis of prosecution. If there is an allegation that an offence has been committed by a person known or unknown, made orally or in writing and addressed to a magistrate with a view to his taking action under the Code of Criminal Procedure, it will amount to a complaint. In the case before us, it does not appear that the District Magistrate intended it to be the complaint or that he himself intended to allege that the applicant had committed an offence. He merely granted "sanction" believing that the Superintendent of Police would thereby be enabled to prosecute the applicant. The case of *Baldeo Singh* v. *King-Emperor*[1] seems to be in point.

For the reasons mentioned above, we accept the reference, set aside the conviction of the applicant and direct that the fine if paid be refunded.

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[1] A. I. R. 1926 All. 566

CRIMINAL

1931

Sep. 3

SULAIMAN, J.

KING-EMPEROR (*Applicant*)
versus
HARIHAR KALWAR (*Opposite party*)*

Criminal Procedure Code, Secs. 117(3) and 118—Order under—Text of—Bond with sureties—To be in form given in Sch. V—Magistrate to satisfy himself that sureties would be able to make good the amount—Hypothecation bond may be taken in addition by way of precaution.

Where the magistrate issued an order under Sec. 117(3) Cr. P. C. against a person to execute a personal bond, with "two reliable sureties *in movable properties*", *held*, that in the order the magistrate should follow the words of Sec. 117 and not introduce the restrictive words "in movable property".

When sureties are produced, the magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. The primary consideration is whether the surety is likely to fulfil the undertaking given by him. When they have been accepted, the bond executed by them should be in the form given in Sch. V. A registered security bond is not necessary under the Code, nor is a magistrate bound to accept such security if offered, but if the magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may by way of precaution accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties.

CRIMINAL REFERENCE made by HARISH CHANDRA ESQ., Sessions Judge of Benares.

M. Waliullah (*Assistant Government Advocate*) for the Crown.

The opposite party was not represented.

The following judgment was delivered by

Sulaiman, J.

SULAIMAN, J.—On February 15, 1931, the Magistrate issued an order under Section 117(3) Cr. P. C. against Hari Har accused to execute a personal bond in Rs.1,000, with two sureties in like amounts, each in cash, for keeping the peace until the conclusion of the enquiry.

The Sessions Judge modified the order on February 24, 1931, and ordered his release on his executing a bond for Rs.1,000, with two sureties in like amounts to the satisfaction of the court concerned. The accused, however, was not released, because he was involved in another offence. When the District Magistrate was moved, he pointed out that the Sessions Judge had no power to interfere with the order under Section 107 read with Section 117(3) Cr. P. C. but might have reported to the High Court. When the matter came up again before the Sessions Judge, he admitted that he had mistaken the order to be an order of bail and had wrongly amended it. He passed a fresh order on March 12, that unless the original order was amended by the Magistrate in the light of the observations contained in his order dated February 24, 1931 the record be submitted to the High Court with the recommendation that the words "in cash" be deleted. On receipt of this direction, the Magistrate on March 19, amended his previous order and substituted "two reliable sureties in movable properties" instead of "two cash sureties". The Magistrate this time used the word

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*Cr. Ref. 226 of 1931

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Sulaiman, J.

"securities" without carefully reading his previous order which had said "sureties". Then on March 24 the Sessions Judge again expressed an opinion that "a surety in cash" had no meaning at all. He directed the record to be submitted to the High Court, and asked for the explanation of the Magistrate. The Sessions Judge gave his reasons for holding that it is not open to a Magistrate to direct that the property which is offered as security by the sureties be of a particular nature. The Magistrate submitted his explanation and the District Magistrate added a supplementary explanation, stressing that the Magistrate was not bound to accept security of immovable property, which would cause considerable difficulty in realization in case of forfeiture. After this, the Sessions Judge passed a fresh order on March 25, 1931, submitting the record to the High Court along with a copy of the previous order passed by him in the case of another accused person, dated July 7, 1930, which gave fuller reasons in support of his view.

The case went backwards and forwards on so many occasions because there was a difference of opinion between the Sessions Judge and the Magistrate as to the nature of the security that can be demanded.

No reported case has been brought to my notice which would throw light on this divergence of views.

It is to be noted that both Section 117 and Section 118 refer to the execution of a bond by the accused "with or without sureties". The expression "security" is not used. The sections do not contemplate the furnishing of a registered hypothecation bond as good security. It obviously requires guarantees given by the sureties.

Section 118 applies equally to an order to give security for keeping the peace under Section 107 and for maintaining good behaviour under Sections 108, 109 and 110 Cr. P. C.

In Schedule V a form is given for the execution of a bond by sureties for the accused's good behaviour. The form merely requires a written undertaking given by the sureties that in case of the accused making default, they bind themselves jointly and severally to forfeit to His Majesty a particular sum of money. It does not go on to add that they are hypothecating any property for that sum. It seems to me that the same form is intended for sureties for the accused's keeping the peace. It is, therefore, obvious that what the Code requires is that there should be sureties able to make good the amount. These persons should be reliable and be possessed of such status, means or property that the amount would be recovered by seizure of their properties or, if arrested, they would make good the amount.

No doubt under Section 514 Cr. P. C. when there is a forfeiture of the bond, the Magistrate cannot proceed by attaching and selling any immovable property of the surety but can only seize his movable property. But if the penalty cannot be recovered by attachment and sale of the movable properties the person can be arrested and imprisoned. This in many cases would be just as effective to compel him to pay up, provided, of course, he has the means. It, therefore, does not follow that a person cannot be a good surety unless he is actually possessed of movable properties sufficient to yield the amount of his bond. Indeed, movable properties which can be easily removed or transferred may in most cases be the flimsiest security. It may equally well happen that a person is of respectability and good social status and possessed of considerable immovable property and one who can be relied upon to procure the amount in case of the accused's default, and yet he may not for the time being be in possession of movable properties of the value of the bond. There would be no reason to reject such a person merely because some inconvenience might be felt afterwards in recovering the amount from him. It would be unfair to accused persons if any general rule or practice were laid down that no person who is not possessed of sufficient movable properties should be accepted as a surety.

It would not be improper for a Magistrate in case of doubt to permit a surety who has signed the bond in the form mentioned above also to execute separately a registered bond hypothecating immovable property in order to satisfy the Magistrate that he is possessed of sufficient means. But neither such a registered security bond is necessary under the provisions of the Code, nor is a Magistrate bound to accept such security if offered.

The Magistrate has to satisfy himself as to the means and station in life of the surety as well as his character. He has to exercise his discretion in accepting him; but that discretion must not be exercised in an arbitrary manner. The primary consideration is whether the surety is likely to fulfil the undertaking given by him.

The amended order of the Magistrate says "two reliable sureties in movable property". Although I do not agree with all that the Sessions Judge has said, I agree with him that in the order itself there should be no restriction as regards movable property. So far as the order goes, the Magistrate should follow the words of Section 117 and not introduce the restrictive words "in movable property". When sureties are produced, the Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted, the bond executed by them should be in the form given in the Schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may by way of precaution accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties.

I accordingly order that the words "in movable property" after the word "sureties" in the order of the Magistrate dated March 19, 1931, be deleted.

CRIMINAL

1931

Sep. 21

NIAMATULLAH, J.

SUNDER LAL
versus
EMPEROR THROUGH RADHEY SHIAM*

Criminal Procedure Code, Secs. 181(2) and 222(2)—Misappropriation of gross sum made up of five items—Some items received in places where magistrate had no territorial jurisdiction—Whether magistrate had jurisdiction in respect of all items.

Where on the complaint of a zemindar his agent was charged under Sec. 222(2) Cr. P. C. with misappropriation of a gross sum made up of five items, some of which were received by him in villages situate in Tahsils over which the trying magistrate had no territorial jurisdiction, *held*, that under Sec. 181(2) the magistrate had jurisdiction in respect of all the sums alleged to have been misappropriated by the accused.

CRIMINAL REVISION from an order of P. C. PLOWDEN ESQ., Sessions Judge of Bareilly.

G. S. Pathak for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

Durga Charan Singh for the opposite party.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This application for revision raises a question of jurisdiction in a case of criminal breach of trust against the applicant pending in the court of the Sub-Divisional Magistrate, Baheri, District Bareilly.

The applicant Sunder Lal was the agent of Udainath Shah, who is the owner of a number of villages in the Bareilly district lying in various tahsils and including some in tahsil Baheri. A complaint was filed on his behalf against the applicant in the court of the Sub-Divisional Magistrate, Baheri charging the applicant with embezzlement of large sums of money which he is said to have collected in all the villages in the Bareilly district. The question is whether the Sub-Divisional Magistrate, whose territorial jurisdiction is limited to Tahsil Baheri, had jurisdiction to try him for embezzlement of what might have been collected in villages situate in other Tahsils, the proceedings having so far advanced that a charge has been framed against the applicant. It was some time after the charge was framed that the applicant took objection to the court having jurisdiction in respect of all the sums alleged to have been misappropriated by him. That objection was overruled by the Magistrate, and an application in revision made to the Sessions Judge questioning the correctness of the Magistrate's view was unsuccessful. The present application for revision was then filed, and the correctness of the view taken by the learned Sessions Judge in agreement with the Magistrate has been impugned in this Court. A learned Judge of this Court had the occasion to hear this case twice, and in view of obscurity regarding certain material facts he asked for an explanation from the Magistrate who framed the charge. That explanation is now before me.

It appears that the applicant has been charged with criminal breach of trust in respect of a gross sum consisting of five items, three of which were received by him in villages in Tahsils other than Baheri. The fourth item is part of a larger sum received by him as rent paid by tenants in a number of villages situate in different Tahsils including some in Baheri. He credited the major part of the sums thus received, but is alleged to have misappropriated Rs.44 odd. Thus it cannot be said with certainty whether this sum is part of what he had collected from tenants of villages situate in Tahsil Baheri. It is equally doubtful whether it represents part of collections made in villages situate in Tahsils other than Baheri. The fifth item is one of Rs.1,036 which was not actually received by the applicant from the tenants, but represents consideration of certain bonds which were executed by the tenants in lieu of arrears payable by them. The applicant is alleged to have obtained the bonds in his own name and not in that of his master. The process of reasoning by which this sum of Rs.1,036 is probably considered to have been misappropriated by the applicant is that having become the creditor of the tenants to the extent of Rs.1,036 it was his duty to have paid an equal sum to or to the credit of his master, and having failed to do so and having obtained the bonds for himself he should be deemed to have misappropriated that amount. It is premature to consider the precise criminal liability, if any, of the applicant as regards this sum of Rs.1,036. At the present stage I merely assume that the complainant's allegation that Rs.1,036 was misappropriated is well founded. It is not disputed that the tenants who executed bonds in favour of the applicant were all from villages situate in Tahsil Baheri.

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*Cr. Rev. 179 of 1931

The charge which has been framed by the Magistrate is one under Section 222 (2) Cr. P. C., and specifies merely the gross sum made up of the five items above referred to without mentioning the dates on which criminal misappropriation of the particular items occurred. It follows, in terms of Section 222 (2) that the applicant is charged with one offence in respect of the gross sum and not with five offences each having reference to a specific item.

Section 181 (2) Cr. P. C. provides that

> the offence of criminal misappropriation or of criminal breach of trust may be enquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

It should be observed that according to the provision quoted above the place where the sum has been received may determine the forum even though the actual embezzlement might have taken place outside the jurisdiction of the court before whom the accused is being tried.

It is nowhere alleged on behalf of the prosecution that each of the five items to which reference has been made was separately misappropriated. As is usual in such cases, it is alleged that the applicant received a number of items on various dates and subsequently embezzled the entire sum or part thereof in his hands. In any case it is open to the complainant and the Magistrate to consolidate all the items which the applicant is alleged to have received, and to frame a charge under Section 222 (2) in respect of only one offence, instead of many offences, as would be the case if each item received by him is to be the subject of a separate charge.

CRIMINAL

1931

SUNDER LAL
v.
EMPEROR

Niamat-ullah, J.

The combined effect of Section 222 (2) and 181 (2) is that the applicant can be tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by him. As shown already, he is alleged to have received a part of the gross sum which he is alleged to have criminally misappropriated in villages situate in Tahsil Baheri within the jurisdiction of the Magistrate before whom the case against him is pending.

The learned advocate for the applicant has referred to *Emperor* v. *Mohan Singh*[1], in support of an ingenious contention. He argues that, as held in that case, no charge under Section 222 (2) can be framed if the accused was an agent not only entitled to receive the money on behalf of his principal but empowered also to make disbursement, and if the charge relates to the balance left in his hand after proper disbursement. I express no opinion as regards the soundness of the legal proposition involved in this contention. If it is a correct view of law and if it appears in course of the trial that the applicant was an agent who was empowered not only to receive but also to make disbursements on behalf of the complainant, the prosecution will have to take the consequences of a charge under Section 222 (2), if it is not applicable. So far as the question of jurisdiction is concerned, it has to be determined on the assumption that the charge framed by the learned Magistrate at the instance of the complainant is not open to any fatal objection. On that assumption, as I have already stated, the Magistrate has jurisdiction, and this application is dismissed.

Application dismissed

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[1] I. L. R. 42 All. 522

CRIMINAL

1931

Nov. 2

MEARS, C. J.
SEN, J.

KING-EMPEROR
versus
SHAMBHU*

Criminal Procedure Code, Sec. 164—Confession—Magistrate to record questions and answers by means of which he has satisfied himself that confession is voluntary—Accused implicating co-accused in his statement—When statement admissible—Retracted confession—Value of.

Where there is nothing in the statement to show that besides the usual and stereotyped questions any serious attempt has been made by the magistrate recording the confession to find whether the statement was voluntary or otherwise, the court should hesitate to accept his certificate at its face value. It is the imperative duty of the magistrate to record those questions and answers by means of which he has satisfied himself that the confession is, in fact, voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the magistrate recording the confession furnishes data which enable the court of Sessions and the High Court to form an independent estimate as to the voluntary nature of the confession.

When an accused person in his statement or confession imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused. *The Queen* v. *Belat Ali*

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*Cr. A. 674 of 1931

CRIMINAL

1931

KING-EMPEROR

v.

SHAMBHU

Moonshee, 19 W. R. (Cr.) 67 and *Empress of India* v. *Mulu,* I. L. R. 2 All. 646 *referred to.*

The evidentiary value of a retracted confession is very little and it is not safe to act on such a confession unless it is corroborated in material particulars.

CRIMINAL APPEAL from an order of ZIAUL HASAN ESQ., Second Additional Sessions Judge of Cawnpore.

S. B. Johari for the appellant.

U. S. Bajpai (Government Advocate) for the Crown.

The accused who were convicted under Sec. 302 I. P. C. appealed to the High Court. The case for the prosecution turned mainly on the confession of one of the accused. In the course of the judgment their Lordships made important observations on the admissibility of incriminating statement of a co-accused, and the method in which confessions ought to be recorded by magistrates. Portions of the judgment dealing with these points are reproduced below.

Sen, J.

SEN, J.—The incriminating statement of a co-accused is no more than the tainted testimony of an accomplice. The statement is without the safeguards of either oath or cross-examination. When an accused person in his statement or confession imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused. (Vide *The Queen* v. *Belat Ali Moonshee*[1], *Empress of India* v. *Ganraj*[2], *Empress of India* v. *Mulu*[3] and *Re petition of Kapur Singh*[4]. A similar view appears to have been taken by a Division Bench of this Court in *re Chheddu Khan*[5]. One of the questions in issue was as to whether the statement of Kheoraj approver could be accepted and acted upon. The following observations occur in the judgment:—

> A still more important fact in connection with his evidence is this, that in every dacoity of which he gives an account he takes care to keep himself free from any direct act of violence. He assigns to himself positions either outside the house dacoited or away from those who were committing these acts of violence. To use an expression which Mr. Justice Straight on a similar occasion used very happily 'while tarring others, he takes care not to tar himself with the same brush'.

Safeguards have been provided for against errors and abuses in the matter of recording confessions under Section 164 of the Code of Criminal Procedure. Where there is nothing in the statement to show that besides the usual and stereotyped questions any serious attempt has been made by the Magistrate to find whether the statement was voluntary or otherwise, we should hesitate to accept his certificate at its face value. We should refer to the following observations of the Chief Court of Oudh, in *re Prag* v. *King-Emperor*[6]:

> It is with regret that we note that Babu Bhagwati Prasad Sinha, the Deputy Magistrate, who recorded these confessions, has completely disregarded the standing order of Government as to the method in which confessions ought to be recorded. Paras 852, 853 and 853-A of the Manual of Government

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[1] 19 W. R. (Cr.) 67

[2] I. L. R. 2 All. 444

[3] I. L. R. 2 All. 646

[4] W. N. 1881 20

[5] Cr. A. 754 of 1910 decided on April 22, 1911

[6] A. I. R. 1930 Oudh 449 at 451

> Orders, Vol. 1, lay down definite rules in this matter for the guidance of all magistrates throughout British India. These standing orders of the Government are based upon instructions issued by the Government of India and embodied in G. G. O., Home Department (Police) No. 36-C. dated January 5, 1916. In the record of the confessions of Prag and Mst. Bishna (not to speak of the confessions of Mst. Naraini and Ram Bali) in the present case there is nothing to show that Babu Bhagwati Prasad Sinha informed any of these confessing prisoners that he was a Magistrate of the first class empowered under the law to record a confession which could subsequently be utilised in the Court of Session and be sufficient to base a conviction of the confessing prisoner on the capital charge of murder. Had he done so, one of the confessing accused could not subsequently with any show of reason or decency, have urged (as did Mst. Naraini afterwards) that the person recording the confession was understood by the prisoner to be a police officer and "not a Magistrate".
>
> As pointed out by Government in Para 853-A of the Manual of Government Orders quoted above, it is the Magistrate's duty to satisfy himself in "every reasonable way that the confession is made voluntarily; and it is further the imperative duty of the Magistrate to record those questions and answers by means of which he has satisfied himself that the confession is, in fact, voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the Court of Session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come, as regards the voluntary nature of the confession. Without supplying these data or materials it is impossible for the trial court (i.e., the court of session) or for this Court to form any estimate as to the voluntary nature of these confessions. The Court of Sessions or this Court cannot merely accept the *ipsi dixit* of the Deputy Magistrate recording the confession as to its being voluntary. The genuineness of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the court of session and of this Court and neither the court of session nor this Court can blindly accept the ready-made opinion of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these crucial questions on which the fate of the accused hangs.

The remarks made here have our concurrence and approval.

The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.

Appeal allowed

CIVIL

1931

Dec. 2

NIAMATULLAH, J.

MOHAMMAD ISMAIL (*Applicant*)

versus

LIYAQAT HUSAIN (*Opposite party*)*

Court-Fees—Court parts with seisin of case—Whether has power to direct recovery of court-fees by attachment of property—Court-Fees—To be determined with reference to plaint as it is, and not as it ought to have been.

There is no provision in the Court-Fees Act which justifies a process of attachment for recovery of court-fee after the court finally parts with the seisin of a case, even if the court-fee is payable in law. *L. Daulat Ram* v. *Mst. Chawali,* Civ. Rev. 330 of 1928 *relied on.*

The question of court-fees must be determined with reference to the plaint as it is and not as it ought to have been. If, having regard to the nature of his claim, plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to Sec. 42, Specific Relief Act; but the court cannot say that the plaintiff should have claimed consequential relief and not having done so, he should be deemed to have claimed the consequential relief and was therefore liable to pay an *ad valorem* court-fee on the consequential relief.

CIVIL REVISION from an order of MAULVI SYED MUHAMMAD JUNAID, Subordinate Judge of Agra.

B. Malik for the applicant.

Sankar Saran for the opposite party.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an application for revision against the order of the Subordinate Judge of Agra declaring that a sum of Rs.160 was payable by the applicant as deficiency of court-fee and directing that the same be recovered by attachment of his property.

It appears that the applicant was the plaintiff in a suit in which he claimed a declaration that a certain decree, obtained by the defendant, was void and ineffectual against him, the same having been obtained by the exercise of fraud. No consequential relief was claimed. The suit was dismissed by the first court. An appeal was also dismissed by the learned Subordinate Judge. Sometime during the pendency of the litigation the Chief Inspector of Stamps reported that the plaintiff was liable to pay Rs.160 the *ad valorem* court-fee on the consequential relief which he ought to have claimed. No action appears to have been taken on this report before the appeal was decided by the learned Sub-judge. Somehow the matter was brought to his notice on February 2, 1931, after the appeal had been decided when he passed the order sought to be revised. The court has no right to say that the plaintiff should have claimed consequential relief and that not having done so he should be deemed to have claimed the consequential relief and is, therefore, liable to pay the court-fees. If, having regard to the nature of his claim, the plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to S. 42, Specific Relief Act. The question of court-fees must be determined with reference to the plaint as it is and not as it ought to have been.

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*Civ. Rev. 274 of 1931

The learned Sub-judge had no power to direct the recovery of the court-fees by attachment of the applicant's property, even if the court-fees in question was payable in law. There is no provision in the Court-Fees Act which justifies a process of attachment for recovery of court-fees after the court finally parts with the seisin of a case. This view is in accord with what was held by this Court in *L. Daulat Ram* v. *Mst. Chawali* (Civil Revision No. 330 of 1928) decided by the Hon'ble the Chief Justice on February 15, 1929.

In these circumstances, this revision must succeed. The order of the lower court is set aside. No order is passed as to costs.

Criminal
1931
Dec. 7
Bennet, J.

RAM KHELAWAN

versus

SHEO NANDAN AND OTHERS*

Criminal Procedure Code, Sec. 350A—Bench of Magistrates—One member not present during examination-in-chief of witnesses for complainant—Whether order invalid.

Where one of the magistrates constituting the bench, which ultimately decided the case, was not present during the examination-in-chief of the witnesses for the complainant, *held,* that the order was invalid under Sec. 350A C. P. Code and inasmuch as the complainant had not had a fair hearing, the order of acquittal should be set aside and the case retried.

Criminal Reference made by Babu Piare Lal Rastogi, Sessions Judge of Ghazipur.

M. Waliullah (Assistant Government Advocate) for the Crown.

A. P. Pandey for the opposite parties.

The following judgment was delivered by

Bennet, J.

Bennet, J.—This is a recommendation by the learned Sessions Judge of Ghazipur that a certain order of acquittal passed by a bench should be set aside and a retrial ordered. The facts are very simple. The complainant produced his witnesses before the bench and while his witnesses were making their examination-in-chief a member of the bench, B. Sheo Shankar Singh, was absent. This Magistrate was present during the rest of the trial and he took part in the decision along with two other magistrates who had been present during the whole trial. Of the two magistrates present during the whole trial one was for acquittal and one was for conviction. B. Sheo Shankar Singh was for acquittal, and therefore the accused was acquitted on the decision of B. Sheo Shankar Singh and B. Tirloki Nath Singh. Learned counsel first of all relied on the ruling reported in *Emperor* v. *Mathura*[1] in which it was held that the provisions of Section 350 Cr. P. C., would apply to a somewhat similar case before a bench. But subsequent to that ruling by Act XVIII of 1923 an additional Section 350A was added to the Cr. P. C. specially dealing with this question of changes in the constitution of a bench of magistrates during the hearing of a case. That section therefore alters the law which was laid down in the ruling quoted, and the ruling is no longer any authority for the present law. Sec. 350A clearly

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*Cr. Ref. 644 of 1931

[1] I. L. R. 41 All. 116=16 A. L. J. R: 884

CRIMINAL

1931

RAM KHELAWAN *v.* SHEO NANDAN

Bennet, J.

states that the order of a bench of magistrates would not be invalid on account of changes where the bench was duly constituted, "and the magistrates constituting the same have been present on the bench throughout the proceedings". In the present case one of the magistrates constituting the bench which passed the order was not present throughout the proceedings. The order is therefore invalid according to the provisions laid down in Section 350A. Learned counsel next argued that this court should not interfere in revision in a case of this nature, because the order was one of acquittal and because the Local Government might have appealed under Section 417 Cr. P. C. and did not appeal. It is obvious in the first place that this Court has power to interfere with an order of acquittal in revision otherwise the Code would not contain the provision in Section 439(4) that in revision a High Court should not convert a finding of acquittal into one of conviction. The question is one of discretion as to whether in any particular case the High Court should or should not order a retrial. In *Pehalwan Singh* v. *Sahib Singh*[2] at page 383 Stuart, J. laid down:

> The acquittal is a good order of acquittal in so far that it contains no inherent defects,

and therefore in that particular case he would not interfere. The present case, however, is very different because there are inherent defects in the order of acquittal, and under Section 350A it is an invalid order. In that particular case on page 384 it was stated:

> Whether the decision was right or wrong, it is idle to suggest that there has been a miscarriage of justice.

The present case however seems to be rather different, as the complainant has not had a fair hearing and one member of the court which decided the case did not hear the statements of the witnesses for the complainant in examination-in-chief. Learned counsel went into details of the case and pointed out that it was a case where the complainant stated that he had sowed a certain crop as a tenant and the accused as zamindars had uprooted that crop by force and taken it away. The two magistrates who acquitted the accused considered that it was not satisfactorily proved that the complainant sowed the crop or that the accused uprooted it. If the complainant succeeded in proving his case the complainant would probably receive compensation from the accused and therefore the matter would be one of importance to him. Under these circumstances I consider that this order of acquittal should be set aside, and I accordingly set it aside and direct that the case be retried according to law.

Acquittal set aside
Retrial ordered

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[2] 19 A. L. J. R. 382

CRIMINAL

1931

Dec. 8

BENNET, J.

ALI HUSAIN AND ANOTHER
versus
LACHHMI NARAIN MAHAJAN AND OTHERS*

Provincial Insolvency Act (V of 1920), Secs. 28(2) and 31—Judgment-debtor adjudicated insolvent—No protection from arrest in execution of decree—Until protection order made under Sec. 31.

Sec. 28 of the Provincial Insolvency Act (V of 1920) does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. *Maharaj Hari Ram* v. *Sri Krishan Ram,* I. L. R. 49 All. 201=25 A. L. J. R. 152 *followed.*

Under Sec. 31 of the Provincial Insolvency Act of 1920 a discretion is granted to the court either to make an order for protection of the insolvent from arrest for all debts or make a limited order or not to make a protection order at all; and it is no longer a matter of right for a judgment-debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest.

The words "or person" were deliberately taken out of the present Sec. 28 by the legislature because provision was made in Sec. 31 for dealing with the question as to how far insolvency proceedings bar the arrest of a judgment-debtor.

CRIMINAL REFERENCE made by MAULVI S. IFTIKHAR HUSAIN, Sessions Judge of Farrukhabad.

S. N. Verma for the applicants.

G. S. Pathak for the opposite parties.

The following judgment was delivered by

Bennet, J.

BENNET, J.—This is a reference by the learned Sessions Judge of Farrukhabad of an acquittal by a magistrate of five persons who were charged under Section 186 I. P. C. The complaint was made by the Subordinate Judge. The magistrate recorded no evidence but he made an order on August 8, 1931 setting forth the facts of the case and stating that the contention on behalf of the defence was an argument of law. The facts set forth were as follows:—

> The said Lachhmi Narain has been declared an insolvent on 14-9-27. In execution proceeding the request was to arrest Lachhmi Narain. Lachhmi Narain was arrested on June 4, 1931. On June 5, 1931 Lachhmi Narain was put up before the court which had ordered the arrest. The court ordered a peon to take Lachhmi Narain to the latter's house and realise the decretal amount. The peon took Lachhmi Narain to his (Lachhmi Narain's) house. Lachhmi Narain while going to his house got into the shop of Lalman and refused to accompany the process server. The accused obstructed the process server doing his duty of taking Lachhmi Narain to court.

Now the offence of Section 186 I. P. C. was a summons case and the procedure of the magistrate should have been governed by Chapter XX Cr. P. C. The accused had appeared on this date and under Section 242 the magistrate should have stated the substance of the accusation to the accused and asked if they had any cause to show why they should not be convicted. Under Section 243 if the accused admitted the offence they might have

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*Cr. Ref. 657 of 1931

CRIMINAL

1931

ALI HUSAIN
v.
LACHHMI NARAIN

Bennet, J.

been convicted, but that is not the case here. The accused pleaded that the acts alleged formed no offence. The duty of the magistrate therefore lay under Section 244 to hear all the evidence in support of the prosecution. The language is compulsory and says:

> The magistrate shall take all such evidence as may be produced in support of the prosecution.

There were eleven witnesses named in the complaint and it was the duty of the magistrate to take the evidence of these eleven witnesses. The magistrate did not take the evidence of any of these witnesses apparently as the order sheet is silent on this point, but the magistrate proceeded to write an order ending with the words:

> I therefore discharge the accused, this being a summons case.

Later the magistrate altered the word 'discharge' to 'acquit'. Learned counsel for the accused cannot point to any section of the Code under which the procedure of the magistrate could be justified. There was therefore no trial at all before the magistrate. The learned Sessions Judge has not made the reference on account of this defect in procedure but because he considers that the legal reasons given by the magistrate are incorrect. The magistrate relied on the following rulings of other High Courts *Solayappa Naicker* v. *Shunmugasundaram Pillai*[1], *Firm Partab Singh Pradhan Singh* v. *Firm Bhai Mewa Singh Jodha*[2] and *Tan Seik Ke* v. *C.A.M.C.T. Firm*[3]. These rulings lay down that under Section 28 (2) of the Provincial Insolvency Act (Act V of 1920) a creditor is barred from applying in execution for the arrest of a judgment-debtor against whom an order of adjudication is passed. A contrary view has been taken in *Maharaj Hari Ram* v. *Sri Krishan Ram*[4] by a bench of this Court which has held that Section 28 does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. There is also a similar ruling in *Mahomed Roshan Sheikh Alli Kaskar* v. *Gulam Mohiddin*[5]. The ruling of a bench of this Court is binding on a single Judge, and therefore I am bound to follow it. Learned counsel has however addressed me on the strength of various rulings with the request that for the reasons given in those rulings I should ask that this question should be referred to a Full Bench. I find myself unable to see any merit in the rulings to which counsel refers, and they seem to me to be singularly devoid of reasons for what they state. In *Hit Narayan Singh* v. *Brij Nandan Singh*[6] there is a mere statement that the latter part of Section 28 (2) of the Provincial Insolvency Act would refer to the person. This is what it is required to prove, and merely stating a proposition is not the same as adducing reasons for that proposition. *Alamelu Ammal* v. *Venkatarama Iyer*[7] a single Judge ruling, made no reference at all to Section 31 of the Provincial Insolvency Act, which deals with the question of the freedom from arrest, and again there is a mere assumption that Section 28 will be a bar. *C. A. Easwara Iyer* v. *K. Govindarajulu Naidu*[8] deals with the Presidency Towns Act and not with the Provincial Insolvency Act and again there is an absence of reasons for the conclusion, even if we assume that the language

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[1] A. I. R. 1926 Mad. 510

[2] A. I. R. 1928 Lah. 258

[3] A. I. R. 1928 Rang. 109

[4] I. L. R. 49 All 201

[5] A. I. R. 1929 Bom. 135

[6] 1931 Pat. A. I. R. 357

[7] A. I. R. 1927 Mad. 919

[8] I. L. R. 39 Mad. at 689

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Bennet, J.

of the various sections in the Presidency Towns Act is similar. Part of the reasoning is based on "Section 41 of the old Act" and that does not appear to refer to any of the Provincial Insolvency Acts.

I may briefly set forth the reasons which lead me to conclude that the ruling of this Court reported in *Maharaj Hari Ram* v. *Sri Krishan Ram*[*] is correct, and a ruling from which I see no reason to differ. In the former Act, the Provincial Insolvency Act (Act III of 1907), there was a paragraph in Section 16(2) which ran as follows:—

> On the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt payable under this act shall during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the court and on such terms as the court may impose.

Now Section 28(2) of the Provincial Insolvency Act (Act V of 1929) reproduces these provisions with an important difference. In place of the words "no creditor shall have any remedy against the property or person of the insolvent" we now have the phrase "no creditor shall have any remedy against the property of the insolvent". The difference is that the two words "or person" have now been omitted. Learned counsel for the accused admits that under Act III of 1907 it was these words "or person" which prevented a creditor from applying to an execution court for process of arrest against a judgment-debtor when his judgment-debtor had been adjudicated an insolvent. It would follow therefore that if this is provided by that part of Section 16 of Act III of 1907 the remaining words which are separated by the conjunction 'or', that is, "or commence any suit or other legal proceeding" are not the words under which a creditor was prevented from applying for arrest of his judgment-debtor. Now in the present Act (Act V of 1920) the words "or person" no longer exist, but the rulings on which learned counsel for the accused relies assume that the words "or other legal proceedings" are words which now bar a creditor from applying for execution by arrest of his judgment-debtor. It is to me a very strange method of construction to hold that the question of freedom from arrest could come under one part of the paragraph in Act III of 1907 and when that part is omitted in Act V of 1920 that the same provision should be held to exist under another and separate part of that paragraph. It appears to me that the courts have gone out of their way to hunt about in various parts of this paragraph and have seized on any phrase which they think can give shelter to the provision in question. I consider that this method of construction of changing the meaning of words from one Act to another Act, and of holding that in one Act they bear one meaning and in another Act the same words bear another meaning is a method which is radically unsound.

There is another reason as to why the ruling of this Court is sound. In the present Provincial Insolvency Act there is a new section introduced, Section 31, which provides for an insolvent applying for a protection order to the insolvency court. The language used is that the court "may make such an order on application" and that the order may "apply to any or all of the debts as the court thinks fit". There is therefore a discretion granted to the court either to make such an order or make a limited order or not to make a protection order at all. It is no longer a matter of right for a judgment-debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest. It appears clear to me that the words "or person" were deliberately taken out of the present Section 28 by the legislature, because provision was made in Section 31 for dealing with this particular matter of how far insolvency proceedings bar the arrest of a judgment-debtor. When we find that in the new Act certain changes have been made in the old Act by the omission of a provision dealing with a certain matter and the introduction of new provisions dealing with that matter, the natural conclusion should be that the new provisions are intended to deal solely with that matter and that the courts should look for guidance to these new provisions and not attempt to read provisions into general words in other parts of the Act. I note that the rulings on which learned counsel for accused relies do not in general deal with this point of view. For these reasons I consider that in the present case the judgment-debtor was not barred from being arrested in execution and the action of the learned Subordinate Judge in issuing a warrant of arrest was perfectly legal and the warrant was a perfectly legal warrant. The persons who were carrying out that warrant would be protected by Section 186 I. P. C. The magistrate therefore was not only wrong in his procedure but he was wrong in his substantive law. Having been wrong on both points, it appears to me that his proceeding was an absolute miscarriage of justice.

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[*] I. L. R. 49 All. 201=25 A. L. J. R. 152

Further argument has been made as to whether the case is not one in which this Court should exercise its discretion and interfere in revision. Learned counsel for the complainant has pointed out that this Court has ordered a retrial where there was an acquittal in 19 A. L. J. R. 589 and 6 A. L. J. R. 758. In the present case it appears to me that the trial is of some public importance because it is a case of the execution of a warrant by the Civil Court process servers, and it is necessary that such process servers should be supported in the exercise of their duties. For these reasons I accept this reference and I set aside the order of acquittal of the magistrate and I direct that the accused shall be retried by a magistrate having jurisdiction. The record will be sent to the District Magistrate for directions for retrial.

Reference accepted

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1931
Dec. 18
PULLAN, J.
NIAMAT-ULLAH, J.

ABDUL WAHAB (*Defendant*)
versus
SUGHRA BEGUM (*Plaintiff*)*

Mohammedan Law—Waqf—Provision for salary and pension of servants—A valid object—Whether mutwalli can reduce amount—Waqif can reserve to himself the power of naming beneficiaries subsequent to the execution of deed.

A provision for the salary and pension of servants is a valid object of waqf.

On general grounds there is nothing to prevent a waqif from reserving to himself the power of naming beneficiaries subsequent to the execution

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*S. A. 473 of 1929 (connected with S. A. 474 of 1929)

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of the deed of waqf, provided charitable intention is clearly indicated in the deed.

If the pay or pension of servants is made a valid object of the waqf, it is not open to any mutwalli to interfere with it.

SECOND APPEAL from a decree of J. ALLSOP ESQ., District Judge of Aligarh, confirming a decree of MAULVI SIRAJUDDIN, Munsif of Koil.

T. A. K. Sherwani for the appellant.

A. M. Khwaja for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—These are defendant's appeals arising out of two suits, one brought by Mst. Sughra Begum, the respondent in Second Appeal No. 473 of 1929 and the other by Rahim Bakhsh, the respondent in Second Appeal No. 474 of 1929, for recovery of arrears of maintenance fixed by Khurshed Ali Khan who executed a deed of waqf on April 1, 1919, by which he dedicated property yielding a net income of Rs.7,000 a year for certain charitable purposes. Khurshed Ali Khan died on December 28, 1926 up to which date he acted as mutwalli. The defendant-appellant succeeded his father in the office of the mutwalli. Among other provisions contained in the deed of waqf one is in favour of the respondents who were old servants of Khurshed Ali Khan. A certain amount was mentioned in the deed of waqf to be paid as salaries and pensions of the waqif's servants whose names were not specified, nor were the amounts mentioned. It was, however, clearly stated that particulars as regards names and the amounts should be taken from the pay bills bearing his signature. Apparently the waqif had not decided as to what amount should be paid to each servant, and he reserved the power of nominating beneficiaries out of the servants and the allowances to each for a subsequent occasion. During the seven years which intervened between the date of the waqf and his death he paid Rs.60 a month to Mst. Sughra and Rs.30 a month to Rahim Bakhsh. It should be mentioned that the two are wife and husband. The pay bills in which these salaries are entered bear the signature of Khurshed Ali Khan. It has also been found by the lower courts that the defendant-appellant himself paid allowances to the respondents at the above rates after the death of Khurshed Ali Khan before the period in suit. Relations between the parties became strained, and it became necessary for the respondents to institute the suits which have given rise to these appeals. The defence, so far as it is necessary to state for the purposes of the present appeals, was that, according to Mohammedan Law, it is not one of the valid objects of the waqf to make provisions for salaries and pensions of servants; that no allowances having been fixed in the deed of waqf, subsequent action of Khurshed Ali Khan should be considered the act of mutwalli who is not entitled to amend the provisions of the deed of waqf and that in any case, it is open to a succeeding mutwalli to reduce the salaries and pensions to reasonable amounts. Both the lower courts have overruled these defences and decreed the plaintiff's claim.

The learned District Judge, who has written an excellent judgment, dealing with the various questions raised before him, has held, and we think rightly, that a provision for the salary and pension of servants is a valid object of waqf. In Ameer Ali's Mohammedan Law, Volume I, page 276, Fourth Edition a number of valid objects of waqf are stated. One of them is the waqif's own descendants, another is kindred and neighbours. Even strangers are mentioned as objects of bounty. Defendants and servants are specifically mentioned as persons for whose maintenance provision can be made in a waqf. Tyabji in his notes under Section 457 of his book on Mohammedan Law, Second Edition, has also mentioned that provisions for individuals may be a charitable object according to Mohammedan notions. We entertain no doubt that the view taken by the learned District Judge is correct and is borne out by the authorities to which reference has been made. The learned counsel for the appellant contended that only the poor can be beneficiaries under the waqf, if they do not belong to the family of the waqif. He argues that in so far as Mst. Sughra and Rahim Bakhsh are possessed of other sources of small incomes, they cannot be classed among the indigents. He has quoted no authority in support of his contention which is opposed to the rules given by Ameer Ali and Tyabji already referred to. The words "rich and poor" are relative terms, and it cannot be stated that a person having a certain minimum income cannot be considered to be indigent in any circumstances. It is obviously a very laudable act for a Mohammedan to make a provision for his faithful servants. We may note that the pensions granted to the repondents are for their life only and that after their death, that part of the income will lapse into the general purposes of the waqf.

It is next contended that the waqf deed being silent as regards the amount payable to each servant, and the allowance having been fixed by Khurshed Ali Khan at the time when he was not the owner of the property but a mutwalli, the respondents are not entitled to the allowances claimed by them. On general grounds there is nothing to prevent a waqif from reserving to himself the power of naming beneficiaries subsequent to the execution of the deed of waqf, provided charitable intention is clearly indicated in the deed. In Ameer Ali's Book on Mohammedan Law, Volume I, page 426, Fourth Edition it is stated to be the rule that

> the waqif can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust by either adding to their number or excluding some, or to increase or reduce their interest in it. He cannot do so afterwards.

It is obvious that, if a provision is expressly made in the deed of waqf, it is not open to the waqif to revoke it, or to derogate from it. But if he has deliberately deferred making provision on a particular subject to a future date and does make such provision, such provision should be considered to be part and parcel of the deed itself. As regards the contention that it is open to a subsequent mutwalli to reduce the amount fixed by the waqif, we are clearly of opinion that, if the pay or pension was made a valid object of the waqf, as we think it is in the present case, it is not open to any mutwalli to interfere with it. This contention has in our opinion no force.

In the view of the case we have taken, these appeals have no force and are dismissed with costs.

Appeal dismissed

CIVIL

1931

July 3

MUKERJI, J.
ALLEN, J

SECRETARY OF STATE FOR INDIA
versus
BASANT RAI AND ANOTHER*

Income-tax Act, Sec. 66(5)—High Court judgment—Reassessment—Question to be considered by Income Tax department in the light of High Court's judgment and in the presence of the assessee.

> It is the duty of the Income Tax department to take up the question of reassessment, after a reference by the Commissioner of Income Tax has been answered by the High Court, and to see, in the presence of the assessee, whether in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say that material alteration in the figure of assessment is not expected, and therefore reassessment is not necessary.

ORDER on application of Secretary of State for India.

Gopi Nath Kunzru for the assessee.

Sankar Saran for the Crown.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—Today the learned Government advocate has appeared on behalf of the Crown, and states that

> the Income Tax Commissioner in whose time the order of this Court was passed evidently considered that the High Court's judgment did not have the effect of rendering assessment liable to alteration. It was, therefore, not reconsidered. In a technical sense this view was not entirely correct, but the result of such recalculation would probably have left the tax unaffected, and the practical effect of the assessment would have been nil. As to the future the matter lies with the High Court. If the High Court holds that its judgment rendered assessment liable to alteration, and will clearly indicate in what respect alteration is needed, the directions will, of course, be followed and assessable income recalculated.

The statement of the learned Government advocate shows that the Commissioner in whose time the judgment was made is no longer holding the position, and it is not clearly found under what circumstances the question of re-assessment was not taken up.

It is the duty of the Income Tax Department to take up the question of re-assessment, after a reference by the Commissioner of Income Tax has been answered by the High Court, and to see, in the presence of the assessee whether, in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say that material alteration in the figure of assessment is not expected, and therefore re-assessment is not necessary.

The learned Commissioner has left the matter in the hands of the High Court, and has asked for directions. All the directions that the High Court need give are these, that the reassessment has to be taken up, after notice to the assessee, and the figures should be reconsidered in the light of the decision of the High Court. It may be that as the result of the judgment of the High Court the actual assessment will not be affected, or will be affected adversely to the assessee himself. Whatever be the

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*Mis. Case 655 of 1930

Civil
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Basant Rai
Mukerji, J

result, the matter has to be reconsidered, and we expect that in this case also it will be reconsidered.

As the assessee has got all he wanted, his application does not call for any further orders, except as to costs. As the assessee had to come up to the High Court, and his complaint was justified, we allow him costs of the hearing of this application, assessing the amount of counsel's fee at Rs.100 to be taxed in accordance with the rules of the High Court. The Government advocate has appeared twice, and we assess his fees at Rs.100 for each occasion, namely, Rs.200 in all, subject to his certifying payment of the fees within the time allowed by the rules.

Civil
1931
July 6
Sulaiman, A. C. J.
Sen, J.

JANGI SINGH (*Plaintiff*)
versus
GUDRI SINGH AND ANOTHER (*Defendants*)*

Evidence Act, Sec. 108—Person not heard of for several years—Presumption as to death—But no presumption that he was dead at a particular time.

Under Sec. 108 of the Evidence Act, where a person has not been heard of for more than 7 years by those who are likely to hear of him, a presumption arises as to the death of the said person, but there can be no presumption that he was dead at a particular time.

Where in order to succeed in a suit it is necessary for a person to establish that a particular person who had not been heard of for a number of years, was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence either direct or circumstantial.

APPEAL against the judgment of the HON'BLE JUSTICE SIR B. J. DALAL under Section 10 of the Letters Patent.

B. Malik for the appellant.

Haribans Sahai for the respondents.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by the plaintiff and it arises out of a suit for possession of a one-third share in certain zemindari, which, at one time, belonged to one Sukhdeo Singh. Sukhdeo Singh died in 1924. Plaintiff alleged that Sukhdeo Singh left three heirs, namely, Ram Kumar Singh, Umrao Singh and Subaran Singh. Plaintiff purchased the one-third share of Ram Kumar Singh in the estate left by Sukhdeo Singh under the sale deed, dated February 11, 1927. Defendants contested the suit *inter alia* on the ground that no part of Sukhdeo Singh's estate devolved upon Ram Kumar Singh, the plaintiff's vendor, inasmuch as, one Mahadeo, brother of Sukhdeo Singh was alive at the date of the execution of the sale deed in controversy. It is not contested that Sukhdeo Singh had a brother Mahadeo. He has not been heard of for a number of years. The question is as to whether Mahadeo was dead on February 11, 1927 when Ram Kumar executed the sale deed of the one-third of his property in favour of the plaintiff. Reliance has been placed upon Section 108 of the Indian Evidence Act. That section is an authority for the proposition that where the question in issue between the parties is as to whether a particular

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*L. P. A. 58 of 1930

CIVIL
1931
JANGI SINGH
v.
GUDRI SINGH
Sen, J.

person is alive or dead and it is proved that the said person has not been heard of for a period of more than 7 years by persons who are likely to hear of him, the onus of establishing that that person is alive lies upon the person who affirms it. It follows that a presumption arises as to the death of the said person; but there can be no presumption that the said person was dead at a particular time. Where in order to succeed in a suit it is necessary for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence either direct or circumstantial. In the present case, the plaintiff has failed to prove that Mahadeo was dead on February 11, 1927. It follows therefore that no title accrued to his vendor and consequently he is not competent to maintain the present suit. We are clearly of opinion that the view taken by the court below is correct and we accordingly dismiss this appeal with costs.

Appeal dismissed

CIVIL
1931
July 17
SULAIMAN, A. C. J.
BAJPAI, J

RAM PHAL (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Legal Practitioners Act (Act XVIII of 1879), Sec. 36(1), Explanation to—Resolution of Bar Association—Person declared tout on basis of general repute—Legally admissible in evidence.

A resolution of a Bar Association passed by a majority of the members present at a meeting specially convened, declaring a certain person to be a tout by general repute is legally admissible in evidence under the Explanation to Sec. 36 of the Legal Practitioners Act and can be taken into consideration by the court. There is nothing in the language of the Explanation which would make a resolution based on general repute or hearsay evidence ineffective.

CIVIL REVISION from an order of R. H. J. JOHNSTONE ESQ., Collector and District Magistrate of Basti.

P. L. Banerji and *R. K. Malaviya* for the applicant.

Sankar Saran for the Crown.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is an application in revision from an order of the District Magistrate of Basti declaring Ram Phal applicant to be a tout.

There are precedents for the exercise of the power of superintendence by this Court when an order passed by a subordinate officer is against natural justice.

The learned advocate for the applicant urges before us that there is no legal evidence whatsoever on which the District Magistrate could have legally acted. It appears that apart from certain oral evidence which has not been relied upon by the District Magistrate there were two resolutions of the Bar Associations of Mukhtars and Vakils in the following terms:—

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*Civ. Rev. 393 of 1930

Civil

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Ram Phal v. King-Emperor

Sulaiman, A. C. J.

(1) 'That the meeting is of opinion that Ram Phal stamp vendor of the place is by general repute a tout'.

(2) 'It is resolved that Ram Phal stamp vendor of Bansi is a tout on the strength of general repute.'

The District Magistrate had power to act upon the evidence of general repute under Section 36 of the Legal Practitioners Act, as amended. The Explanation added to the section makes the passing of a resolution declaring a person to be a tout by a majority of the members present at a meeting specially convened for the purpose of an association of persons entitled to practise as legal practitioners as evidence of the general repute of such person for the purpose of that section. It cannot therefore be denied that if the resolution substantially is one declaring Ram Phal to be a tout then it was legally admissible as evidence of general repute, even though the basis of that resolution may be hearsay evidence. On the other hand, if there is no resolution declaring him to be a tout but there is a simple statement of fact that there was such evidence before the Association, then possibly it would not come under the Explanation.

There seems to be nothing in the language of the Explanation to Sec. 36 which would make a resolution based on general repute or hearsay evidence ineffective.

The language of the first resolution was somewhat ambiguous, but the second resolution undoubtedly shows that the members recorded their conclusion and declared that Ram Phal was a tout although they also indicated that their conclusion was based on the strength of general repute. We think that the words 'on the strength of general repute' merely indicate the basis of the resolution declaring him to be a tout and does not destroy its effectiveness.

If a resolution is based on general repute the court may attach less weight to it, but it cannot be said that such a resolution is legally inadmissible in evidence and cannot be taken into consideration by the court.

We are accordingly unable to interfere with the order passed in the case. The application is dismissed with costs.

Application dismissed

LAKHMI CHAND (*Defendant*)
versus
ANANDI (*Plaintiff*)*

Civil

1931

July 21

Sen, J.
Allen, J.

Tenancy Act (Local, III of 1926), Sec. 227—Family settlement—Person having the right to have and enjoy the profits of the property but cannot possess, partition or transfer—Not to be regarded as a 'co-sharer'—Suit for recovery of arrears of profits—Not cognizable by revenue court—Art. 120 of the Limitation Act applied to such a suit.

Where a person under an instrument in the nature of a family settlement has the right to have and enjoy the profits of the property without having the rights of possession, partition or transfer which are the incidents of ownership, such a person is not and cannot be deemed to be a "co-sharer" within the orbit of the Agra Tenancy Act, and a suit for profits accruing to the plaintiff under the terms of the instrument is maintainable in the

*F. A. 324 of 1929

civil court, and is not cognizable by the revenue court, and Art. 120 of the Limitation Act applied to such a suit.

FIRST APPEAL from a decree of BABU RAJ RAJESHWAR SAHAI, Subordinate Judge of Muzaffarnagar.

K. N. Katju and *Ram Nama Prasad* for the appellant.

Iqbal Ahmad and *Vishwa Mittra* for the respondent.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by the defendant, and is directed against the preliminary decree, dated June 25, 1929, passed by the Subordinate Judge of Muzaffarnagar, in a suit for profits, instituted on August 4, 1926, for recovery of arrears for the period from June 15, 1920 to July 30, 1926.

Plaintiff's claim was founded upon an instrument, dated June 5, 1915, under which the plaintiff was entitled to recover from the defendant the profits relating to the moiety share of her husband in the joint estate owned by the latter and Baldeo Sahai.

Various pleas were raised in defence but we are concerned only with two of them:—

(1) Jurisdiction (2) Limitation. These pleas did not find favour with the court below, which decreed the plaintiff's suit. The pleas have been reiterated in the grounds of appeal in this Court and have been argued by the learned advocate for the defendant.

It has been contended that the suit was, in substance, a suit for profits by a co-sharer against another co-sharer in a revenue paying mahal within the purview of Section 227 of the Agra Tenancy Act (III of 1926, Local) and that the suit was within the exclusive cognizance of the revenue court. We are clearly of opinion that Section 227 of the Agra Tenancy Act does not apply to the facts of the case. The term 'co-sharer' has not been defined in the Act. The estate of Mst. Anandi under the agreement was very peculiar and in certain respects anomalous. Although her name was mutated in the revenue records, she was not, under the terms of the agreement, entitled to either possession or partition, and had no right to transfer any portion of the property from which the profits accrued. Her rights were confined to the reception of profits from the defendant, who, as a surviving member of a joint family, remained in exclusive possession of the entire profits. Where a person under an instrument in the nature of a family settlement has the right to have and enjoy the profits of the property without having the rights of possession, partition or transfer which are the incidents of ownership, such a person is not and cannot be deemed to be a "co-sharer" within the orbit of the Agra Tenancy Act. The suit therefore was properly instituted in the civil court and was not cognizable by the court of revenue.

The claim relates to profits for five years from June 1920 to July 1926. The suit was filed on July 31, 1926. We have not been referred to any specific Article of the Indian Limitation Act as governing the claim for profits accruing to the plaintiff under the peculiar terms of the instrument dated June 5, 1915. It was held by the Privy Council in *Mohammad Riyasat Ali* v. *Husain Banu*[1] that "Article 120 should be applied unless it is clear that the suit is within some other Article". Article 120 is the general residuary Article and is applicable to all suits, not covered by a specific Article. The period of limitation prescribed under this Article is six years from the date when the right to sue accrues. The suit having been instituted within six years of the accrual of the cause of action for each of the five years when the arrears fell due, the claim is undoubtedly within time.

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[1] I. L. R. 21 Cal. 157 at 163

The appeal is without force and we dismiss it with costs.

Appeal dismissed.

CRIMINAL
1931
August 13
SULAIMAN, J

JAGANNATH (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Civil Procedure Code, Or. 21, R. 24(2)—Warrant of arrest sent to Nazir for execution—Nazir's power of delegation—Penal Code, Sec. 225B—'Lawful apprehension'—Meaning of—Warrant of arrest defective—No 'lawful apprehension'—Penal Code, Sec. 353—Warrant of arrest illegal—Whether officer executing warrant acting in discharge of duty as public servant.

There is nothing in the Civil Procedure Code which would prevent the officer to whom the warrant is issued from delegating his authority to some other subordinate officer for executing the warrant. *Dharam Chand* v. *Queen-Empress*, I. L. R. 22 Cal. 596 *followed.*

A warrant was issued by the court for arrest of a judgment-debtor in the name of the central nazir of Banda, and his office sent it to the registration clerk at Karwi (a sub-division in Banda Judgeship) *without having the nazir's endorsement on it*, and the clerk directed his peons to make the arrest, and after he had been arrested the judgment-debtor assaulted the peons and entered his house. He was prosecuted and convicted under Sec. 225B I. P. C.; *held*, that there was no proper delegation of authority which empowered the clerk to get the warrant executed by the peons under him, and consequently there was no 'lawful apprehension' within the meaning of Sec. 225B, and the conviction could not be upheld.

Where the warrant issued was illegal, the officer executing that warrant could not be considered to be acting in the discharge of his duty as public servant, and the conviction of the accused under Sec. 353 I. P. C. could not be upheld. *Queen-Empress* v. *Dalip*, I. L. R. 18 All. 246 *followed.*

CRIMINAL REVISION from an order of PANDIT KANHAIYA LAL NAGAR, Sessions Judge of Banda.

Saila Nath Mukerji for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an application in revision from a conviction under S. 225B I. P. C. The applicant was a judgment-debtor, and a warrant for his arrest was issued against him to the central nazir of the Banda Court. In the Banda judgeship there is a Karwi sub-division where there is a registration clerk, to whom all processes for service are usually sent for execution. As the accused was a resident of Karwi, the nazir sent the warrant of arrest to the registration clerk at Karwi, who issued the warrant in the name of four civil court peons. Out of these four named peons, two peons, Gokul Prasad and Mohd. Husain, went to get the service effected. They arrested the accused, but he took them to his shop on the excuse that he had paid Rs.200 out of the decretal amount and that the remaining amount was to be paid by instalments. The accused assured them that he had got a receipt about the payment of the money and would show it to them at his shop, which was only at a short distance from the place. When the accused arrived at his shop "he gave a sudden jerk to the chaprasis whereby the peons received hurt and the accused, after freeing himself, entered his house". The chaprasis then made a report to the police-station, on which the accused was prosecuted and has been convicted under S. 225-B and 353 I. P. C., but has been given only one sentence of six months and a fine of Rs.30.

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*Cr. Rev. 411 of 1931

So far as the facts go, there can be no controversy now in revision. I must accept the facts as found by the Sessions Judge.

The learned advocate for the applicant has, however, urged that the warrant of arrest had been illegally issued, and therefore the conviction is illegal.

As stated above, the warrant was issued by the court in the name of the central nazir of Banda. There is nothing in the Code of Civil Procedure which would prevent the officer to whom the warrant is issued from delegating his authority to some other subordinate officer for executing the warrant *Dharam Chand* v. *Queen-Empress*[1]. If the central nazir had made an endorsement on the back of the warrant authorising the registration clerk at Karwi to get the warrant executed, I would have no hesitation in holding that the registration clerk at Karwi would have authority to appoint peons under him to go and effect the arrest. Unfortunately the warrant does not bear any endorsement by the central nazir at all. It merely appears to have been sent by his office to the registration clerk at Karwi, apparently for execution, and it was the clerk who directed the peons to go and make the arrest. The clerk had stated that this was done in pursuance of the practice which has prevailed at Banda. Karwi is a sub-division in the Banda judgeship, and it is obvious that the central nazir at Banda cannot personally execute warrants for Karwi. The materials on the record, however, are too meagre to justify an assumption that there was a proper delegation of authority which empowered the clerk to get the warrant executed by the peons under him. The order of the District Judge has not been brought on the record, and there is a certain amount of uncertainty and doubt left on this point. I, therefore, think that it would not be just to uphold the conviction of the accused under S. 225-B. Obviously, if the warrant was defective and did not authorise the person who directed the peons to make the arrest, there would be no lawful apprehension within the meaning of S. 225-B, and accordingly no resistance or illegal obstruction to any such lawful apprehension, or escape from custody in which he was lawfully detained. I must accordingly set aside the conviction under S. 225-B.

I was inclined to hold that even if the registration clerk at Karwi was not empowered to issue the warrant to the peons, the peons were public servants acting in execution of their duty as such public servants when in pursuance of the order of the registration clerk they arrested the accused, and that when the accused pushed them, and in that way assaulted them, he would be guilty of the offence under S. 353 I. P. C., of which he has been convicted. S. 99 I. P. C. lays down that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law. If that section applied, there would be no right of private defence to the accused when he assaulted and caused hurt to the peons. I would have, therefore, thought that the accused could be properly convicted under S. 353 I. P. C.

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[1] I. L. R. 22 Cal. 596

But the learned advocate for the accused has brought to my notice the case of *Queen-Empress* v. *Dalip*[2], which is a division bench ruling. In that case it was held that where the warrant issued was illegal, the officers executing that warrant could not be considered to be acting in the discharge of their duty as such public servants, which expression also occurs in S. 332 I. P. C. As a single judge I am bound by the opinion expressed in that case. The language of S. 332 is similar to that of S. 353. I am, therefore, constrained to hold that the conviction of the accused under S. 353 cannot be upheld.

But as the lower appellate court has found that there was assault and hurt was caused to the two peons, and there can be no right of private defence, I alter the conviction under S. 353 I. P. C. to one under S. 352 I. P. C. There was only one sentence inflicted on the accused for conviction under both the sections. As the main charge falls to the ground, I must reduce the sentence, and in substitution of the sentence imposed by the Magistrate, I order that the applicant should have rigorous imprisonment for the period already undergone, and in addition pay a fine of Rupees One hundred (100). In default of the payment of the fine he should undergo simple imprisonment for three weeks.

Sentence reduced

[2] I. L. R. 18 All. 246

PRIVY COUNCIL

PREM NARAIN (*Defendant*)

versus

RAM CHARAN AND OTHERS (*Plaintiffs*)*

Civil

1931

Nov. 30

Lord Thankerton
Lord Salvesen
Sir Lancelot Sanderson
Sir George Lowndes

Civil Procedure Code, Sec. 93—Construction of—Projected suit under Sec. 92—Previous sanction of Local Government necessary—To enable Legal Remembrancer to exercise his powers.

On a true construction of Section 93 of the Code of Civil Procedure the previous sanction of the Local Government in relation to every projected suit under Section 92 of the Code is necessary to enable the Legal Remembrancer to exercise his powers. Where a suit was instituted merely with the sanction of the Legal Remembrancer and it was not shown that any sanction of the Local Government had been obtained for the institution of such suit, *held,* that the suit was incompetent and must fail. *Gulzari Lal* v. *The Collector of Etah,* 1931 A. L. J. R. 369 *relied on.*

Appeal from a decree of the High Court of Judicature at Allahabad.

E. B. Raikes, K.C. and *W. Wallach* for the appellant.

A. M. Dunne, K.C. and *S. Hyam* for the respondents.

The following judgment was delivered by

Sir Lancelot Sanderson

Sir Lancelot Sanderson—This is an appeal, by special leave, by Prem Narain, a minor, through his mother, Musammat Chameli, against a decree of the High Court of Judicature at Allahabad, dated April 12, 1927, which varied a decree of the District Judge of Aligarh dated March 15, 1924, and decreed the major part of the plaintiffs' claim.

The suit was brought in pursuance of the provisions of Section 92 of the Code of Civil Procedure, by five persons, who were alleged to have an interest in certain property which was specified in the plaint, and which was stated to be endowed property and the subject-matter of a trust created for public purposes of a charitable or religious nature.

Prem Narain, the appellant, was the first of five defendants.

The reliefs asked for in the plaint were as follows: a declaration that the property was an endowed property; that the defendants should be dismissed from the managership and trusteeship thereof; that a scheme for the management of the property should be drawn up by the Court; and that an order for the rendering of accounts by the defendants should be made.

The learned District Judge who tried the suit, dismissed it on the ground that there was no public trust.

The plaintiffs appealed to the High Court which allowed the appeal. The learned Judges held that the property, with the exception of a specified portion, was the subject of a public trust within the meaning of Section 92, and they made a decree that the defendants 1, 3 and 4 should be removed from the possession of such property. A direction was made that the case should be sent back to the District Judge for the framing of a scheme of management of the property.

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*P. C. A. 22 of 1930

The claim for accounts was disallowed. The appellant, Prem Narain, was directed to pay the plaintiffs' costs in the Appeal Court and in the lower court.

From this decree the appellant, Prem Narain, has appealed.

The learned counsel who appeared for the appellant, in the first instance relied upon the grounds, referred to in the first and second reasons of the appellant's case, which relate to the competence of the suits, and which are as follows:—

> (1) Because the plaintiffs were not entitled to bring a suit under S. 92 of the Code of Civil Procedure.
>
> (2) Because the previous sanction of the Local Government had not been obtained authorizing the Legal Remembrancer to exercise the power of the Advocate-General in respect to this suit as provided by S. 93 of the Code of Civil Procedure.

This part of the case, therefore, was argued by learned counsel on both sides, since it was obvious that if the appellant were to succeed on the above-mentioned point, it would not be necessary to consider the other questions which arose in the appeal.

It may be stated at once, that the above-mentioned point was not taken by the appellant defendant until the presentation of his case in this appeal.

It is true that the appellant defendant had pleaded that the plaintiff had no right to maintain the suit under Section 92 of the Code of Civil Procedure for certain reasons specified in the written statement.

But there is no doubt that, as already stated, the point on which reliance is now placed, was not taken in the written statement or in either of the courts in India. It was alleged by the learned counsel for the appellant defendant that it was in consequence of the decision of this Board in *Gulzari Lal* v. *The Collector of Etah*[1], which was given on March 9, 1931, that the appellant defendant has raised the above-mentioned contention.

The matter is vital to the question whether the plaintiffs had the right to bring the suit, and therefore the Board must consider and decide the point, even though it was raised in the courts in India.

The facts which are relevant to this part of the appeal are as follows:

The property, which is the subject-matter of the suit, is situated in the district of Etah, in the United Provinces.

In these provinces there is no Advocate-General who could act under Section 92 of the Code of Civil Procedure.

It appears, however, that on December 6, 1912, the Government of the United Provinces appointed the Legal Remembrancer to exercise the powers conferred on the Advocate-General by Sections 91 and 92 of the Code.

The appointment was in the following terms:—

No. 1622 VII|447.

> In exercise of the powers conferred by Section 93 of the Code of Civil Procedure, 1908, and in supersession of Notification No. 1307-V.-11|25-21, VI, dated December 9, 1884, the Lieutenant Governor has been pleased to appoint the Legal Remembrancer to Government, United Provinces of Agra and Oudh, to exercise within the limits of the United Provinces of

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[1] 1931 A. L. J. R. 369

> Agra and Oudh the powers conferred on the Advocate-General by Sections 91 and 92 of the Code of Civil Procedure.
>
> By order of the Hon'ble the Lieut.-Govr. United Provinces.
>
> S. P. O'Donnell,
> Secretary to Government United Provinces.
>
> December 6, 1912.

On February 2, 1923, the Legal Remembrancer, acting in pursuance of the above-mentioned order of the Government, granted sanction to the plaintiffs to institute the suit, in which this appeal arises.

The terms of the sanction are as follows:—

> With reference to their application, dated November 13, 1922, and acting under the powers conferred on the undersigned by Section 93, Code of Civil Procedure, and Government order No. 1622, VII-447, dated December 6, 1912, he accords sanction to the institution by them of a suit with respect to the alleged trust specified in the margin against such persons and for such relief as the nature of the case may require.
>
> (Sd.) C. M. King,
> Legal Remembrancer,
> United Provinces.

Section 93 is as follows:—

> The powers conferred by Sections 91 and 92 on the Advocate-General may, outside the Presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

The argument of the learned counsel for the appellant defendant was to the effect that the above-mentioned sanction of the Legal Remembrancer was not sufficient by itself to comply with the provisions of Section 93 of the Code of Civil Procedure: that the order of December 6, 1912, was no more than an appointment of the Legal Remembrancer to exercise the powers conferred upon the Advocate-General by Sections 91 and 92 of the Code, and that on the true construction of Section 93 the previous sanction of the Government was necessary in every suit before the Legal Remembrancer could exercise such powers: that no such sanction was obtained in this case, and therefore the suit was not maintainable by the plaintiffs. He relied upon the decision in the above-mentioned case of *Gulzari Lal* v. *The Collector of Etah* (*supra*).

The learned counsel for the respondents contended that the previous sanction of the Government was not necessary in every suit, and that if it was, such sanction was sufficiently shown by the terms of the Government's order of December 6, 1912.

In their Lordships' opinion, the actual decision in *Gulzari Lal* v. *The Collector of Etah* does not govern this appeal.

For, in the cited case, the suit was brought by the Collector, and there was express authority given by the Government of the United Provinces to the Collector of Etah to institute the suit under Section 92 of the Code.

This fact is not stated in the judgment in the cited case, although having regard to the terms of the judgment it was obviously assumed. Their Lordships have referred to the record in the cited case, and the fact was as already stated.

That part of the decision in the cited case, which dealt with the question relating to Section 93 of the Code, was to the effect that the fact that the Government had, by the order of December 6, 1912, appointed in general terms the Legal Remembrancer to exercise the powers conferred on the Advocate-General by Sections 92 and 93 of the Code, did not prevent the Government from giving an express sanction to the Collector to institute the suit in that case, that the Legal Remembrancer was not the only official who could maintain the suit, that the sanction, in fact, given to the Collector was a valid sanction, and that the suit was competent.

It is clear, therefore, that the point which now arises was not decided in that case. There are, however, passages in the judgment which support the argument of the learned counsel for the appellant defendant.

Lord Blanesburgh delivered the judgment of the Board, and when dealing with the construction of Section 93 of the Code, he said as follows:—

> The effect of that section as it seems to the Board is that no suit like the present, being one outside the Presidency towns, may be brought without the previous sanction of the Local Government, whether by the Collector or by any officer whom that Government may appoint for the purpose: so that the fact that the Legal Remembrancer is in the United Provinces invested as a rule with the duties elsewhere discharged by the Advocate-General in this behalf is no reason why for the purposes of a particular suit the Local Government may not appoint the Collector or any other officer to prosecute it. The fact that there must be a previous sanction by the Local Government to every suit makes it impossible that two suits by separate officials will ever be concurrently instituted. Accordingly no inconvenience results from this construction of the section.

Their Lordships agree with and adopt the construction put upon Section 93 in the above-mentioned case. In their Lordships' opinion Section 93 provides for two distinct matters, the appointment of an officer to exercise the powers conferred by Sections 91 and 92 on the Advocate-General, and the "previous sanction" of the local Government to the exercise of such powers: in each case both the appointment and the previous sanction of the local Government to the exercise of the powers are necessary before the provisions of Section 93 can be utilised. The Legislature, no doubt, considered that there were good reasons for imposing more stringent provisions when the powers conferred upon the Advocate-General by Sections 91 and 92 of the Code were to be exercised outside the Presidency towns not by an Advocate-General, but by a Collector or by some other officer to be appointed by the Local Government.

Section 92 provides for a suit being instituted by the Advocate-General or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General.

In the above-mentioned cited case the suit was instituted by the Collector with the sanction of the local Government. In the present case the suit was instituted by the plaintiffs having an interest in the trust and having obtained the consent in writing of the Legal Remembrancer.

It is clear, however, that, having regard to the terms of Section 93, the previous sanction of the local Government is necessary, whether the suit is instituted by a Collector or by an officer appointed by the local Government, or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer.

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For these reasons their Lordships are of opinion that the point relied upon by the appellant defendant is a good one, and that, inasmuch as the previous sanction of the local Government to the suit had not been obtained, the objection to the competence of the suit must be upheld.

The result is that the appeal must be allowed on the above-mentioned grounds, and it is not necessary to consider the other reasons in the appellant's case which have not been argued.

The point on which the appeal has been decided could have been and ought to have been raised in the courts in India, and the failure to raise it may have given rise to unnecessary proceedings and costs.

The proper order, therefore, in their Lordships' opinion, is that the appeal be allowed, that the decree of the High Court dated April 12, 1927, be set aside and the decree of the District Judge dated March 15, 1924, be restored in so far as it dismissed the suit.

The direction of the District Judge as to costs must be set aside, and the plaintiffs and the defendants must pay their own costs in both the courts in India.

The plaintiffs must pay the appellant defendant his costs of this appeal. Any costs which may have been paid in accordance with the orders of the courts in India must be returned.

For the above reasons, their Lordships have humbly advised His Majesty accordingly.

T. L. Wilson and Co.—Solicitors for the appellant.

Barrow, Rogers and Nevill—Solicitors for the respondents.

CIVIL

1931

Dec. 4

VISCOUNT DUNEDIN
LORD BLANESBURGH
SIR JOHN WALLIS
SIR GEORGE LOWNDES
SIR DINSHAH MULLA

BAGESHWARI CHARAN SINGH (*Plaintiff*)
versus
JAGARNATH KUARI AND ANOTHER (*Defendants*)*

Registration Act (XVI of 1908), Sec. 17(1)(b)—'Declare'—Meaning of—Document containing acknowledgment of title relating to immovable property within meaning of Sec. 19 Limitation Act—Whether compulsorily registerable.

A document containing an acknowledgment of title relating to immovable property within the meaning of Section 19 of the Limitation Act is not compulsorily registerable under Section 17 of the Indian Registration Act. To attract the operation of Section 17, it is essential that the document should by itself declare or create a title. There is clear distinction between a mere recital of a fact and something which in itself creates a title. *Faki* v. *Khotu*, 4 Bom. 590 *overruled*; *Sakha Ram Krishnaji* v. *Madan Krishnaji*, 5 Bom. 232, *Jiwan Ali Beg* v. *Basa Mal*, 9 All. 108 and *Baldeo Singh* v. *Udal Singh*, 43 All. 4 *approved.*

APPEAL from a decision of the High Court of Judicature at Patna.

A. M. Dunne, K.C. and *W. Wallach* for the appellant.

L. De'Gruyther, K.C. and *M. A. Jinnah* for the respondents.

The following judgment was delivered by

Viscount Dunedin

VISCOUNT DUNEDIN—This is an appeal from a decree of the High Court of Judicature at Patna, dated January 9, 1929, which affirmed a decree of the Additional Subordinate Judge of Hazaribagh, dated April 26, 1926, dismissing the plaintiff-appellant's suit.

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*P. C. A. 98 of 1930

Thakur Jadu Charan Singh, the plaintiff's grandfather, was the owner of an impartible estate known as the Dhargulli Estate, in the District of Hazaribagh. He was heavily in debt, and by an order passed under Section 2 of the Chota Nagpur Encumbered Estates Act (VI of 1876) in 1894, the management of the whole of his estate was vested in a Manager appointed under that Act. The management of the estate continued under the Act until May 15, 1909, when the estate was released and made over to him according to the provisions of the Act.

Section 12A, paras 1, 2 and 3 of the Act provide:—

> 12A—(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of Section 12, to the person who was the holder of such property when the application under Section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner—
>
> (*a*) to alienate such property, or any part thereof, in any way, or
>
> (*b*) to create any charge thereon extending beyond his lifetime.
>
> (2) If the Commissioner refuses to sanction any such alienation or charge an appeal shall lie to the Board of Revenue, whose decision shall be final.
>
> (3) Every alienation and charge made or attempted in contravention of Sub-section (1) shall be void.

In 1909 Jadu Charan Singh, without having obtained any sanction from the Commissioner, executed a deed of gift of certain lands in favour of his second wife, who is now his widow and the respondent in this appeal. She entered into possession of these lands and was in possession up to 1920, when she transferred the lands to her son, also a respondent in this appeal. Jadu Charan Singh died on February 21, 1924. His eldest son being dead, he was succeeded in the estate by his grandson, the plaintiff-appellant. The present suit was instituted by him on February 24, 1925, and sought to recover the lands which had been transferred without sanction in 1909. The only effective defence was under the Limitation Act, and this defence was found to be good by the Subordinate Judge and by the Court of Appeal, and the suit was dismissed. Both these courts held that it was a case of adverse possession and therefore fell within Article 144 of the First Schedule of the Limitation Act of 1908. In their Lordships' view, inasmuch as it has been found as a fact that after the deed of 1909 the late Thakur discontinued his possession and never resumed it, it is rather a case which falls within Section 142. The result, however, is the same if the 12 years run from 1909. But the appellant pleads that the 12 years do not run from 1909, owing to the following facts. In March 1916, the Thakur filed a petition with the Commissioner in which he related the deed of gift to his wife, expressed a doubt as to whether the deed of gift was valid, and asked the Commissioner either to declare that the deed was valid or to give his sanction to the execution of a fresh deed of gift. At the same time the wife, present respondent, filed a petition in these terms:—

> The humble petition of Thakurain Jagarnath Kuari, wife of Thakur Jado Charan Singh, proprietor of Gadi Dhurgulli, Pargana Rampore, district Hazaribagh. Most respectfully sheweth—

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BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI

Viscount Dunedin

> That in view of the petition filed by Thakur Jado Charan Singh, your petitioner begs to file the original deed of gift and prays that your Honour may be pleased to sanction the same or order a fresh grant on the same terms to be executed.

This petition was signed by herself.

Section 19 of the Limitation Act is as follows:—

> 19—(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
>
> *Explanation* 1—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

The appellant urges that this is an acknowledgment of liability in terms of the section and that therefore the period of limitation only began in 1916, and 12 years had not elapsed when the suit was raised in 1925. Both the Subordinate Judge and the Judges of the High Court disposed of this in a single sentence by simply saying they found no such acknowledgment. Their Lordships are unable to agree with this view. The petition produces the deed of gift and asks that it may be sanctioned or that a fresh grant may be ordered. This is a clear acknowledgment that unless one of the two things is done, she has no title at all, or, in other words, that she recognizes that the title is in the Thakur, her husband, and not in herself.

The Subordinate Judge, however, raised another point. He says that the acknowledgment contained in the petition, not being registered, cannot be received in evidence, and he quotes in support of the case of *Faki* v. *Khotu*[1]. The section of the Registration Act on which the question depends is Section 17(1), which is as follows:—

> The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
>
> (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

Now the case of *Faki* v. *Khotu* undoubtedly goes the whole length that the respondents desire. It was a case where limitation was pled. The judgment on page 593, after reciting the document in question, goes on thus:—

> The plaintiff wishes to use it [i.e., the document] as an admission or acknowledgment of his title to the lands, and as proof that, at the date of

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[1] I. L. R. 4 Bom. 590

> the document, the defendant's possession was not adverse to him. The document undoubtedly contains such an acknowledgment; and if it be genuine and relevant, a Court, which had to determine the question of fact, would probably consider that acknowledgment sufficient proof that the defendant's possession was really the plaintiff's possession
>
> The Assistant Judge has held that the document is inadmissible in evidence, because it is not registered; and we are of opinion that this decision is right. The plaintiff wishes to use the document as an acknowledgment of a right, title and interest in immovable property, which is admittedly of a higher value than one hundred rupees. If admitted, it will 'operate to declare' such a right, title and interest, and it thus appears to come within the terms of Section 17 of Act XX of 1866.

But the question remains whether that case was rightly decided. Their Lordships are of opinion that it was not and that it was inconsistent with a long track of decisions which are incompatible with it. The first of these will be found in the case of *Sakha Ram Krishnaji* v. *Madan Krishnaji*[2]. The question there was as to a document in the following words:—

> Our eldest brother *M* has built houses and is building new houses on property appertaining to his share To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind.

The document had not been registered, and it was objected that it could not be put in evidence in order to contradict a witness. Dealing with it West, J. said:—

> Here the document is not itself one which declares a right in immovable property, in the sense probably intended by Section 17. There 'declare' is placed along with 'create,' 'assign,' 'limit' or 'extinguish' a 'right, title or interest,' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section.

Now it is quite clear in comparing these two cases that they took diametrically opposite views as to the proper meaning of the word "declare" in the 17th section, and it is upon that point that the whole question turns. Subsequent decisions have given full effect to the view of West, J. in the *Krishnaji* case.

In the case of *Jiwan Ali Beg* v. *Basa Mal*[3] the head note accurately sets forth one of the points in the case:—

> An instrument to come within Section 17(*b*) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs.100 or upwards in immovable property.

Then in the case of *Rünganayaki Ammal* v. *Virupakshee Rao Naidu*[4] at page 102, the learned Judge in the High Court expressly cites the words

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[2] I. L. R. 5 Bom. 232

[3] I. L. R. 9 All. 108

[4] 45 Mad. L. J. 100

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of West, J. in the *Krishnaji's* case, and in the case of *Baldeo Singh* v. *Udal Singh*[5], precisely the same thing is done.

Their Lordships have no doubt that this track of decision is right. Though the word "declare" might be given a wider meaning, they are satisfied that the view originally taken by West, J. is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title. A comparison of the case of *Pranjiwandas Mehta* v. *Chan Ma Phee*[6] with that of *Subramonian* v. *Lutchman*[7] will show that, according to this distinction, a document requires registration or not. In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was therefore no necessity for registration. It is not out of place to remark that this exactly fits in with Explanation 1. If you take the case of an acknowledgment contained in a communication addressed to a third party registration is not practicable; it is scarcely conceivable that it could be required.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to set aside the decrees of both the courts below with costs, and in lieu thereof that judgment ought to be entered for the appellant. The respondents will pay the costs of the appeal.

Appeal allowed

The Solicitor, India Office—Solicitor for the appellant.
Watkins and Hunter—Solicitors for the respondents.

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[5] I. L. R. 43 All. at 4

[6] 43 I. A. 122

[7] 50 I. A. 77

CIVIL
1931
Dec. 14
VISCOUNT DUNEDIN
SIR LANCELOT SANDERSON
SIR GEORGE LOWNDES

HANS NATH AND OTHERS (*Plaintiffs*)
versus
RAGHO PRASAD SINGH (*Defendant*)*

Pre-emption—Customary right of—Suit for pre-emption—Crucial date—Date of decree—Vendee's acqusition by gift of a share in village pending suit—Whether claim defeated—Re-sale by stranger purchaser after suit—Effect of—Transfer of Property Act, Sec. 52.

In a suit for enforcement of a customary right of pre-emption, not governed by Mohammedan Law or by the Agra Pre-emption Act, the right of a co-sharer seeking pre-emption must be judged on the facts existing on the date when the decree is passed. Therefore, the vendee's acquisition by gift of a share in the village pending suit defeated the claim of the plaintiff-co-sharer to pre-emption. The doctrine of *lis pendens* as embodied in Section 52 of the Transfer of Property Act applies only to dealings with property actually in litigation. A re-sale by the stranger purchaser *after suit* will not defeat the pre-emptor.

APPEAL from a decision of the High Court of Judicature at Allahabad.

B. Dube, K.C. for the appellants.

E. B. Raikes, K.C. and *A. Majid* for the respondent.

The following judgment was delivered by

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*P. C. A. 133 of 1929

SIR GEORGE LOWNDES—The dispute in this appeal is as to the appellants' right to pre-emption in respect of a 2½|16 share in each of two villages known as Mowza Khurma and Jungle Khurma. On July 27, 1921, the shares in question were sold by one Thakur Prasad to the respondent. It is admitted that at the date of the sale the vendor and all the appellants were co-sharers in the villages, and that the respondent was not.

Two suits were instituted in the court of the Subordinate Judge of Gorakhpur on July 15 and 26, 1922, respectively by the different appellants against the vendor and the respondent, in which the right of pre-emption by village custom was asserted.

On November 2, 1922, during the pendency of these suits the respondent acquired, *ex facie* by gift, from another co-sharer a small independent fractional share in the villages. If this transfer had been made before suit raised, and had admittedly been by gift, it could not have been suggested that the custom alleged by the appellants applied.

On the execution of the transfer last referred to a third suit, No. 859 of 1922, was instituted by two of the appellants, alleging that the gift was merely colourable and that the transaction was in reality a sale to the respondent, and claiming the right of pre-emption in the fraction concerned, the value of which appears to have been in the neighbourhood of Rs.20. This suit was accordingly instituted in the Munsif's Court, but was transferred to the court of the Subordinate Judge, and all the three suits were tried together.

Issues were raised as to the custom, the gift, the preferential right of the plaintiffs, and the sale price. The Subordinate Judge held the custom to be proved on the strength of entries in the *wajib-ul-arz* of each of the two villages. He was of opinion that the alleged gift was in reality a sale for Rs.21-4-0: that the plaintiffs (the present appellants) had under the custom a preferential right over the respondent: and that the sale price in the case of the original transaction was that stated in the deed, viz., Rs.12,000. He accordingly, on April 18, 1923, made decrees for pre-emption in all the three suits upon the usual terms.

The respondents appealed in each suit. His appeal in the two suits first instituted went in the ordinary course direct to the High Court, but that in the third suit (No.859 of 1922), owing to the small value of the property, went to the District Judge, and was decided by him with commendable promptitude on October 22 of the same year. He, for the reasons stated in his judgment, disbelieved the evidence of the plaintiffs' witnesses as to the payment for the fraction, and held that the transaction was a gift, and he accordingly dismissed the suit.

The appeals in the other two suits took more than three and a half years to reach a hearing in the High Court, which their Lordships cannot but regard as unfortunate. By that time a second appeal in the other suit, which had been filed from the decree of the District Judge, was also ripe for hearing. All the three appeals came before the High Court on the same day, but that from the District Judge's decree (Suit 859 of 1922) was decided first. It met with but short shrift. The learned Judges held, no doubt quite correctly, that the finding of the lower appellate court as to the gift was a finding of fact which was binding upon them in second appeal, and that therefore the suit was rightly dismissed.

They then proceeded to consider the other two appeals, which they dealt with by one judgment. There was apparently no argument as to proof of the custom, the judgment being based upon the assumption that it was duly established. They were of opinion that the plaintiffs (the present appellants) had "entirely failed to prove that the deed of gift was in reality a deed of sale," and held, following a previous decision of their own High Court *Baldeo Misir* v. *Ram Lagan Shukul*[1], that the respondent had acquired by the gift "an indefeasible right as a co-sharer in the village before the first court's decree," and that this defeated the appellants' claim. They accordingly set aside the decrees passed by the trial Judge, and dismissed these suits also. A consolidated appeal in all the three suits now comes before the Board by special leave.

The limits within which effect should be given to a customary right of pre-emption, such as the appellants assert in the present case, have been the subject of constant discussion in the courts of the Province of Agra. Such claims appear to be of great frequency, and a Special Bench of the High Court at Allahabad seems to have been constituted to deal with them in order to ensure uniformity of decision. In 1922 it was thought desirable to legislate, and the Agra Pre-emption Act XI of 1922 was passed, Sections 19 and 20 of which dealt with questions similar to those which have been debated in the present appeal, but it was held in several cases that no change had been made in the law as previously interpreted by the High Court, and in accordance with which the decision under appeal was given. The Act of 1922 was eventually amended by Act IX of 1929, Section 5 of which enacts that a right of pre-emption cannot be defeated by a gift subsequent to suit. The question in issue between the parties in these appeals therefore can hardly arise in the case of future transactions. It is common ground that the present case falls to be decided upon the law as it stood before the passing of Act XI of 1922, and their Lordships think that if there was a current of decision in the Allahabad High Court against the contention of the appellants, as the judgment of the appellate court would seem to indicate, it should not now be disturbed, if not manifestly wrong.

When a sale has taken place to a stranger there are three possible views as to the rights of a co-sharer, viz., (1) that an indefeasible right of pre-emption arises by the sale itself, and that no change in the status or relations of the parties after the sale can affect the question between them; or (2) that the criterion must be the position of the parties when the right is formally asserted by the institution of a suit; or (3) that the validity of the claim must be judged on the facts existing on the date when a decree has to be passed.

The first view, for which theoretically a good deal could be said, has been definitely discarded in the Allahabad court. So it has been held in several cases that where between the dates of what may be called for convenience the pre-emption sale and the institution of the suit, the pre-emptor has lost his status as a co-sharer by the partition of the village,

[1] I. L. R. 45 All. 709

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Janki Prasad v. *Ishav Dar*[2] or the stranger-purchaser has re-sold to another co-sharer, *Sehr Mal* v. *Hukam Singh*[3], or has become himself a co-sharer by an undisputed purchase or by a gift, *Ram Hit Singh* v. *Narain Rai*[4] the right of pre-emption is lost.

Counsel for the appellants does not dispute the correctness of any of these decisions; his contention is that the second view is the right one: in the judgment under appeal it was the third view that prevailed.

There are no doubt expressions here and there in the decided cases which suggest that the date of the institution of the suit is the crucial date, *Saliq-un-Nissa* v. *Mati Ahmad*[5], *Rohan Singh* v. *Bhau Lal*[6], and there is a definite body of authority that a re-sale by the stranger-purchaser *after suit* will not defeat the pre-emptor, *Ghasitey* v. *Gobind Das*[7], *Kehar Singh* v. *Jahangir Singh*[8], but these decisions may all, their Lordships think, be ascribed to the operation of the doctrine of *lis pendens* as embodied in Section 52 of the Transfer of Property Act, 1882, and not to any special aspect of the law of pre-emption.

Apart from these cases the *cursus curiœ* is, their Lordships think, clearly against the contention of the appellants. It was held as long ago as 1899 by Strachey, C. J. and Banerji, J. that a partitoin of the village effected after suit filed, but before decree, deprived the pre-emptor of his right: *Ram Gopal* v. *Piari Lal*[9]. Following this decision and quoting from the judgment of the learned Chief Justice at p. 444, a case almost precisely similar to the one now before their Lordships was decided in January, 1920, by Tudball and Rafiq, JJ., who held that the vendee's acquisition by gift of a share in the village pending suit defeated the claim of the plaintiff co-sharer to pre-emption: *Bihari Lal* v. *Mohan Singh*[10]. It is not suggested that either of these decisions has been dissented from in principle in the Allahabad court; on the contrary, the doctrine that the plaintiff's preferential right must be in existence at the date of the decree has been treated as the settled law of the province: *Baldeo Misir* v. *Ram Lagan Shukul* (*supra*): *Qudrat-un-nissa* v. *Abdul Rashid*[11], *Ram Saran Das* v. *Bhagwat Prasad*[12].

This being the state of the authorities in the light of which the present appeals came before the Board, it only remains to consider whether the view taken by the Allahabad High Court, that the decisive date is that of the decree, is one that can reasonably be supported.

The argument for the appellants which would make the filing of the suit the fact which crystallizes the rights of the parties is mainly based upon the maxim "*pendente lite nihil innovetur.*" So far as the principle of this maxim finds expression in Section 52 of the Transfer of Property Act, it undoubtedly applies, and due effect has been given to it in cases where the defence relied upon the re-sale to a co-sharer pending suit: *see* the instances cited above. But no authority has been brought to their Lordships' notice which would give a wider application to the maxim than this, or would suggest a general doctrine of the law that nothing occurring between the date of the institution of the suit and the decree could alter the relations existing between the parties. The maxim has been cited and the doctrine considered in many cases, *Ravji Narayan* v. *Krishnaji Lakshman*[13] and cases there cited; *Manual Fruval* v. *Sanagapalli*[14], *Krishnappa* v. *Bahiru*[15], *Brahannayaki* v. *Krishna*[16], *Byramji* v. *Chunilal*[17], before the passing of the Transfer of Property Act, but it has never, so far as their Lordships can discover, been applied except in cases which would now come under Section 52 of that Act. Its application in England is discussed in Storey's Equity Jurisprudence, § 405-6, where the cases are collected, but the learned author seems to regard the maxim as applicable only to "a purchase made of property actually in litigation": *see* also *Bellamy* v. *Sabine*[18].

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[2] I. L. R. 21 All. 374

[3] I. L. R. 20 All. 100

[4] I. L. R. 26 All. 389

[5] 25 All., 418

[6] 31 All. 530

[7] I. L. R. 30 All. 467

[8] I. L. R. 47 All. 625

[9] I. L. R. 20 All. 441

[10] 42 All. 268

[11] 48 All. 616

[12] 51 All. 411

It has also been brought to their Lordships' notice that the courts of neighbouring provinces have dissented from the Allahabad decisions on various points and various grounds, but in the view their Lordships have taken of this appeal, they think that no useful purpose would be served by an examination of these cases. They are satisfied that the decision of the High Court now under appeal is in accordance with a consensus of judicial opinion in the Agra Province, which they think should not now be disturbed. It is stated by Sir John Edge, in delivering the judgment of the Board in *Digambar Singh* v. *Ahmad Said Khan*[19] that "in all cases the object (of a custom of pre-emption) is as far as is possible to prevent strangers to a village from becoming sharers in the village." If this object would not be attained by a decree in favour of the plaintiff-pre-emptor, it may not unreasonably be held that such a decree should not be passed. In the present case it is not now contested that the respondent was at the time when the appellants' suits stood for adjudication a co-sharer in the villages, and no decree which might have been passed in their favour could deprive him of his status as such. If the acquisition by him of a share after the pre-emption also but before the suit was instituted would be effective to defeat the appellants' claim, as it is admitted that it would, their Lordships think it difficult to see why the same reasoning should not be applicable in the case of a share acquired at any time before the adjudication of the suit.

For these reasons their Lordships are of opinion that these consolidated appeals fail and that the decrees passed by the High Court must be affirmed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondent.

Appeal dismissed

Hy. S. L. Polak—Solicitor for the appellants.
Hardcastle Sanders and Co.—Solicitors for the respondent.

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[13] 11 Bom. H. C. R: 139
[14] 7 Mad. H. C. R. 104
[15] 8 Bom. H. C. R. 55
[16] I. L. R. 9 Mad. 92
[17] I. L. R. 27 Bom. 266
[18] 1 De Gex & J. 566
[19] 42 I. A. at 18

Civil

1931

Dec. 15

Viscount Dunedin

Sir Lancelot Sanderson

Sir George Lowndes

FAQIR CHAND AND OTHERS (*Defendants*)
versus
AZIZ AHMAD KHAN AND OTHERS (*Plaintiffs*)*

Transfer of Property Act, Sec. 82—Mortgage of properties A, B and C—Property A subject to prior incumbrance jointly with properties X, Y and Z—Value of property A for contribution purposes—How to be determined.

To arrive at the value for contribution purposes, within the meaning of Section 82 of the Transfer of Property Act, of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior incumbrances upon such properties must be ascertained and deducted. Where properties *A*, *B* and *C* are all made security for one mortgage, if property *A* is subject to a prior incumbrance jointly with properties *X*, *Y* and Z, the rateable share to be attributed to *A* under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. To take into consideration only the total amount of the prior incumbrance to which *A* was liable, irrespective of the question whether that liability was to be shared by X, Y and Z or not, would be quite erroneous.

APPEAL from a decree of the High Court of Judicature at Allahabad.

A. M. Dunne, K.C. and *J. M. Parikh* for the appellants.

The other side was not represented.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—This appeal is concerned with a tangle of mortgages made over a number of years by one Jamil ul Rahman. He owned or had interests in a variety of immovable properties which were scattered over the different transactions. Some have been brought to sale by one mortgagee or another; some have been redeemed by puisne mortgagees for the protection of their own interests, and subsequently transferred to other parties subject to the rights of prior incumbrances; in some cases arrangements have been made as to the contribution due by the purchaser of this or that property; but no final settlement as between all the parties concerned has ever been come to either in or out of court.

The mortgage with which the present proceedings are directly concerned was dated September 23, 1899. It was the sixth in the series in order of date and comprised ten different properties, eight of which were also included in one or other of prior or subsequent mortgages.

In 1911 the mortgagee under this deed sued upon his mortgage. A preliminary decree in the usual form was made on September 20, 1912, and a final decree for sale on May 16, 1914.

Thereupon one Chotey Lal, the first defendant in the suit, a puisne mortgagee in respect of one of the properties which had been ordered to be sold, known as Nagla, satisfied the decree by a payment of Rs.20,000 odd, and by a deed of July 15, 1920, transferred the rights which he had thereby acquired to the first respondent and the predecessor in title of the other respondents.

Chotey Lal's object was apparently to free Nagla from further liability, and having regard to similar arrangements which he had made with other parties who were also incumbrancers of Nagla, to provide for the realisation of the moneys due under the decree from two other properties known as Shadipur and Inayetpur.

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*P. C. A. 21 of 1930

In pursuance of the terms of this deed the respondents 1 to 8 on April 25, 1922, instituted the suit out of which this appeal has arisen. They impleaded thirty-six defendants as persons having an interest in the mortgaged properties, and prayed that in default of payment of the sum of Rs.26,972-8-0 with further interest, the amount claimed as due under the decree transferred to them by Chotey Lal, the Shadipur and Inayetpur properties should be sold. In the alternative they prayed for an account and contribution.

Nine different statements of defence were filed by different sets of defendants, but this appeal is concerned only with two of them, viz., that of the appellants Nos. 1-4, who are interested in Shadipur, and that of appellant No. 5, who is interested in Inayetpur.

The trial Judge held that the plaintiff-respondents' claim to realise their dues from Shadipur and Inayetpur only was not maintainable. This claim was abandoned in the Court of Appeal and may therefore be disregarded.

On the alternative claim for contribution, which he thought must necessarily involve a detailed examination of all liabilities affecting each of the properties, he held that the plaintiffs had failed to bring all the parties concerned on the record, and had also failed to put before him materials sufficient to enable him to work out the account. He accordingly dismissed the suit, his decree being dated November 13, 1923.

The plaintiffs appealed to the High Court at Allahabad, the learned Judges of which disagreed with the trial Judge as to the basis upon which the contribution fell to be assessed. They were of opinion that "the learned Judge of the court below was wrong in believing that it was incumbent on him to find out, in the case of each prior mortgage, what were the properties mortgaged along with any of the items mortgaged under the sixth transaction, what were the values of those properties, who were the owners of those properties, and so on." They therefore set aside the decree of the trial Judge, and remanded the suit to be disposed of by him in accordance with the remarks contained in their judgment. He was also directed to bring on the record any parties whose presence before him he should still find to be necessary.

Of the parties who defended the appeal in the High Court, only the present appellants have come up to His Majesty in Council to support the decree of the trial Judge. The respondents have not appeared.

The right to contribution in this case is governed by Section 82 of the Transfer of Property Act, 1882. A new section has now been substituted by an amending Act (XX of 1929), but it is not necessary for their Lordships to refer to the changes which have been affected by it.

The first paragraph of the section in question is the material one. It is in the following terms:—

> Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the

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Sir George Lowndes

mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior "incumbrances" upon such properties must be ascertained and deducted. Their Lordships are in agreement with the High Court that "incumbrance" is a term of wider connotation than "mortgage," but they are unable to follow the learned Judges in the argument they base upon this proposition. Where properties *A*, *B* and *C* are all made security for one mortgage, if property *A* is subject to a prior incumbrance jointly with properties *X*, *Y* and *Z*, their Lordships think that the rateable share to be attributed to *A* under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. In the view taken by the High Court all that would be necessary in such a case would be to see what was the total amount of the prior incumbrance to which *A* was liable, irrespective of the question whether that liability was to be shared by *X*, *Y* and *Z*. Their Lordships are unable to adopt this view of the meaning of Section 82. It would no doubt greatly simplify the enquiry in such a case as the present, but simplification would only be attained by a sacrifice of what they regard as the principle involved.

The view taken by the trial Judge upon this part of the case was, in their Lordships' opinion, the right one, and as it does not appear to have been contended in the High Court that, upon this basis, there were sufficient materials before the Court to work out the necessary account, their Lordships think that the suit was rightly dismissed. If it had been merely a question of non-joinder of parties their Lordships would, having regard to the provisions of Order 1, Rule 9, of the Civil Procedure Code, have agreed with the learned Judges of the High Court that the defect could be remedied in the way pointed out by them.

Their Lordships have not found it necessary to deal with a question of limitation which was discussed at considerable length in the High Court, and the finding upon which has been contested by the appellants' counsel before the Board. The question is one of considerable complexity, and they think it undesirable to make any pronouncement upon it in an *ex parte* appeal.

For the reasons given their Lordships think that the appeal should be allowed; that the decree of the High Court should be set aside, and that of the trial Judge, dated November 13, 1923, restored. They will humbly advise His Majesty accordingly. The respondents 1 to 8 must pay the costs of the appellants both in the High Court and before this Board.

Appeal allowed

Douglas, Grant and Dold—Solicitors for the appellants.

CIVIL

1931

Dec. 15

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN WALLIS

RAJKUMAR SEN CHOWDHURY AND OTHERS (*Defendants*)

versus

RAM SUNDAR SHAHA AND OTHERS* (*Plaintiffs*)

Executant—Of document—To understand nature of transaction—Details may be left to his lawyer—Legal Practitioner—Professional misconduct—Unnecessarily protracted examination and cross-examination of witnesses—Gross abuse of process of court.

It is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer.

Unnecessarily protracted examination and cross-examination of witnesses on commission is a gross abuse of the process of the court and it would be within the powers of the High Court to direct an enquiry with a view to disciplinary action in flagrant cases of this description.

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal.

L. De'Gruyther, K.C. and *B. Dube, K.C.* for the appellants.

A. M. Dunne, K.C. and *J. M. Parikh* for the respondents.

This appeal arose out of a suit for specific performance of a contract alleged to have been made by one Kali Narain and the particular question in the case was as to whether Kali Narain was of unsound mind for the purpose of making a contract within the meaning of Section 12 of the Contract Act, as being at the time he made it incapable of understanding it and of forming a rational judgment as to its effect upon his interests.

The judgment discusses the oral evidence adduced by the parties and affirms the decree of the High Court which had held that the contract was perfectly enforcible. The following extracts from the judgment being of general importance are reproduced:—

Sir John Wallis

SIR JOHN WALLIS—"Disputes about the dispositions and contracts of people of advanced age and failing powers are always difficult cases to decide, and the difficulty is greatly increased when, as in the present case, the record has swollen to enormous size owing to the way in which the examination of the witnesses on commission was protracted, assuredly not in the interests of the parties. A scandalous instance of this abuse is to be found, as observed by the learned Judges of the High Court, in the examination of Ananda Roy, the principal witness for the plaintiffs, which takes up two hundred and twenty-six pages of the record, and contains twelve hundred and fifty questions and answers, most of which, as admitted at the trial by the vakils on both sides, were quite irrelevant to the suit.

In another appeal with an enormous record from the same High Court it was recently stated that the cross-examination on commission of a purdanashin lady lasted for a hundred days. In their Lordships' opinion it is imperative that an abuse of this kind, which enormously increases the costs of litigation without any corresponding benefit to the parties, should be checked, and it would appear to be clearly within the powers of the

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*P. C. A. 89 of 1929

High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of the appeals".

"Witnesses have been asked if Kali Narain could have understood all the terms of the *bainapatra,* but that was unnecesasry. It was enough if he knew he was selling his property on terms approved by his protector Ananda by a document prepared by the estate lawyer. In India, as here, it is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer."

Watkins and Hunter—Solicitors for the appellants.

Stanley, Johnson and Allen—Solicitors for the respondents.

CIVIL
1931
RAJKUMAR SEN CHOWDHURY
v.
RAM SUNDAR SHAHA
Sir John Wallis

MOHAMMAD EJAZ HUSAIN AND ANOTHER (*Plaintiffs*)
versus
MOHAMMAD IFTIKHAR HUSAIN AND OTHERS (*Defendants*)*

CIVIL
1931
Dec. 15
VISCOUNT DUNEDIN
SIR LANCELOT SANDERSON
SIR GEORGE LOWNDES

Mohammedan Law—De facto *guardian—Powers of—Mother of minor sons—No authority to enter into an agreement of reference to arbitration so as to make award binding upon minors as to their share in immovable property—No power to enter into an arrangement whereby minors' share in property is affected.*

Under the Mohammedan Law, the mother, as a *de facto* guardian of her minor sons, has no authority to enter into an agreement of reference to arbitration on behalf of her minor sons so as to make the award binding upon them as to their share in the immovable property of their father, nor has she power or authority to enter into an arrangement whereby the minors' share in the immovable property of their father would be affected, and she cannot be clothed with the necessary authority by calling the transaction a family arrangement. *Imambandi* v. *Mutsaddi,* 45 I. A. 73 *referred to. Mohsnuddin Ahmed* v. *K. Ahmed,* 47 Cal. 713 *approved.*

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

E. B. Raikes, K.C. and *A. P. Pennell* for the appellants.

S. Hyam and *J. M. Pringle* for the respondents.

The following judgment was delivered by

Sir Lancelot Sanderson

SIR LANCELOT SANDERSON—This is an appeal by the plaintiffs in the suit against a judgment and two decrees of the Chief Court of Oudh, dated October 18, 1928, which reversed the decree of the Subordinate Judge dated January 17, 1928, as amended by his order dated March 18, 1928.

The suit was brought by Mohammad Ejaz Husain and his sister Khaliq-un-nisa against their full and half-brothers and sisters, their mother Faiyaz-un-nisa and Hamid-un-nisa, the wife of Amir Hasan, the defendant No. 4.

The relationship between the parties to the suit appears from the pedigree which was attached to the judgment of the Chief Court, and which is as follows:—

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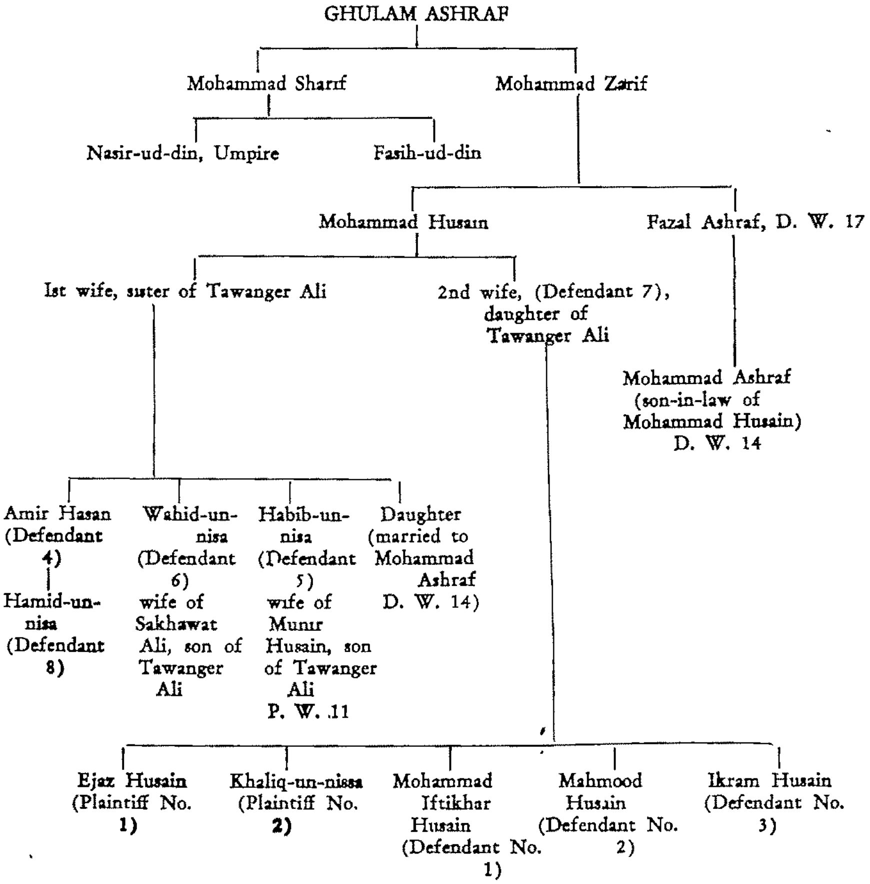
*P. C. A. 34 of 1930

CIVIL

1931

EJAZ HUSAIN *v.* IFTIKHAR HUSAIN

Sir Lancelot Sanderson


GHULAM ASHRAF
Mohammad Sharif
Mohammad Zarif
Nasir-ud-din, Umpire
Fasih-ud-din
Mohammad Husain
Fazal Ashraf, D. W. 17
1st wife, sister of Tawanger Ali
2nd wife, (Defendant 7), daughter of Tawanger Ali
Mohammad Ashraf (son-in-law of Mohammad Husain) D. W. 14
Amir Hasan (Defendant 4)
Hamid-un-nisa (Defendant 8)
Wahid-un-nisa (Defendant 6) wife of Sakhawat Ali, son of Tawanger Ali
Habib-un-nisa (Defendant 5) wife of Munir Husain, son of Tawanger Ali P. W. 11
Daughter (married to Mohammad Ashraf D. W. 14)
Ejaz Husain (Plaintiff No. 1)
Khaliq-un-nissa (Plaintiff No. 2)
Mohammad Iftikhar Husain (Defendant No. 1)
Mahmood Husain (Defendant No. 2)
Ikram Husain (Defendant No. 3)

The suit was brought for a declaration that an agreement dated March 25, 1912, and an award dated April 2, 1912, were null and void and inoperative and for a partition of certain properties alleged to have been the properties of the plaintiffs' father, Mohammad Husain.

The learned Subordinate Judge, who tried the suit, made a decree in the plaintiffs' favour: this decree was subsequently amended on an application for review, and it was thereby directed that the plaintiffs should get from the defendant No. 4 (i.e., Amir Hasan) a 21|104th share, first, out of the sum of Rs.25,526, being the capitalised value of a factory, and, secondly, a declaration of their rights to that extent out of the property No. 10 of the plaint list A, in so far as it was left:—

> after meeting claims of the original owner and the acquisition by the Improvement Trust, and also out of the property No. 20 of the list, which is a family graveyard. Possession over the share-out of the property No. 10 can be obtained only after redemption of the mortgage assigned to the defendant 4 (*vide* Exhibit 11), the trust compensation money being taken to have satisfied *pro rata* a part of this mortgage debt.
>
> Plaintiffs shall further get interest on the amount under the first head at the rate of Rs.12 per cent per annum from March 4, 1912, to the date of realisation. Costs on parties. A preliminary decree for partition to be prepared in those terms.

From this decree both Amir Hasan, defendant No. 4, and the plaintiffs appealed to the Chief Court of Oudh.

The learned Judges of the Chief Court allowed the appeal of Amir Hasan and dismissed the appeal of the plaintiffs. The result was that the plaintiffs' suit was dismissed, the Chief Court directing that the parties should bear their own costs in both courts.

These are the decrees from which the plaintiffs have appealed to His Majesty in Council.

Amir Hasan has died since the decree of the Chief Court was made, and his representatives are now on the record, and they are the only respondents contesting this appeal.

The material facts are as follows:—

Mohammad Husain, the father of the plaintiffs and of the defendants Nos. 1 to 6, died on March 4, 1912.

On March 25, 1912, an agreement of reference to arbitration was executed by Amir Hasan (the fourth defendant), his two sisters (defendants Nos. 5 and 6), and Faiyaz-un-nisa (defendant No. 7), who was the surviving widow of Mohammad Husain, and the mother of the plaintiffs and the defendants Nos. 1, 2 and 3.

The plaintiffs and the defendants Nos. 1, 2 and 3 were minors at the date of the agreement, and their mother purported to execute the agreement for herself in person and as guardian in the capacity "of the real mother" on behalf of the plaintiffs and her other minor children. By the said agreement all matters in dispute were referred to two arbitrators and an umpire, who were named in the said agreement.

One of the issues raised at the trial was as follows:—

> (1) Did Mohammad Husain constitute the defendant No. 7 as guardian of the person and property of plaintiffs as well as of defendants Nos. 1 to 3. If so, with what effect?

This issue was answered in the negative by the learned Subordinate Judge, and his decision in this respect was approved by the Chief Court.

It has not been argued before the Board that these findings were wrong, and the appeal must therefore be decided upon the assumption that Faiyaz-un-nisa was not appointed by Mohammad Husain guardian of the person and property of the plaintiffs.

Further, it is to be noted that at the date of the said agreement Faiyaz-un-nisa had not been appointed guardian of the person and property of her minor children by the court.

On April 3, 1912, the arbitrators, with the concurrence of the umpire, made their award in writing. They decided:—

> (1) That the properties acquired by the deceased in the name of his wife, Faiyaz-un-nisa, defendant No. 7, belonged to her as her separate properties and that she was entitled to those properties; (2) that the properties acquired by the deceased in the name of Amir Hasan, defendant No. 4, were his separate properties and that he was entitled to them: (3) that the factory known as the Victor Ice and Flour Mills, situate at Bagh Sherjang, City Lucknow, was given to Amir Hasan by the deceased during his lifetime and the same belonged to him, and (4) that the remaining properties should be distributed among the several heirs according to their legal shares under the Mohammedan Law.

The award was carried out and acted upon until filing of this suit.

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On July 18, 1912, Faiyaz-un-nisa filed an application in the court of the District Judge of Lucknow under Section 10 of the Guardians and Wards Act (VIII of 1890), praying for a certificate of guardianship of the person and property of her minor children, including the plaintiffs.

On September 18, 1912, the certificate was issued.

The plaintiff, Mohammad Ejaz, attained his majority on October 21, 1923.

The plaintiff, Khaliq-un-nisa, attained her majority on October 8, 1925.

The suit was instituted on October 20, 1926, just within three years from the date on which the first plaintiff attained his majority.

In the suit many issues were raised, but it is not necessary to refer to them all. Both the courts in India held that the properties acquired by Mohammad Husain in the names of Faiyaz-un-nisa and Amir Hasan belonged to the two last-mentioned persons respectively, and on these matters they agreed with the decision of the arbitrators. No question arises in this appeal with respect to these properties.

It is material, however, to note that at the time of the arbitration the interest of Faiyaz-un-nisa and that of her minor children were not identical with respect to the properties standing in her name, for if the arbitrators had come to the conclusion that Faiyaz-un-nisa was holding these properties *benami* for her husband, as alleged, the minor children would have been entitled to their respective shares therein.

Both courts in India decided the issue as to the factory known as the Victor Ice and Flour Mills in the plaintiffs' favour. Disagreeing with the award in this respect, they held that the alleged oral gift of the factory by Mohammad Husain to Amir Hasan had not been established. The concurrent findings in respect of this issue have not been disputed in this appeal. It must therefore be taken for the purposes of this appeal that the said factory was part of the estate of Mohammad Husain at the date of his death and that, subject to the question hereinafter to be considered, the plaintiffs, as two of his heirs, are entitled to their respective shares in the said factory.

There is no dispute as to the shares to which the plaintiffs are entitled in the properties of their father, viz., 14|104ths in respect of the first plaintiff, and 7|104ths in respect of his sister, the second plaintiff.

The main issue raised in the court of the Subordinate Judge was whether Faiyaz-un-nisa, acting on behalf of her minor children, the plaintiffs, was competent to refer to arbitration the matter of the division of the assets of Mohammad Husain and questions connected therewith, and consequently whether the plaintiffs were bound by the award.

The Subordinate Judge decided this issue in favour of the plaintiffs, on the ground that Faiyaz-un-nisa, the mother of the plaintiffs, had no authority to refer, so as to bind the plaintiffs.

We are of opinion that otherwise the award did not appear to be perverse, unfair or influenced by any corruption or misconduct of the arbitrators.

The learned Judges of the Chief Court agreed with the conclusion of the Subordinate Judge on this issue and held that the agreement to refer to arbitration executed by Faiyaz-un-nisa on behalf of her minor children could not be considered binding on them and that the award, if looked at from that point of view, must be held to be an inoperative document.

The learned Judge of the Chief Court, however, were of opinion that the scheme of distribution promulgated in the award, and which the learned Subordinate Judge had found to be in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators, and which had been followed without any objection whatever for a long period extending over fourteen years, could well be recognised as a family settlement, and they stated that they were extremely reluctant to disturb the arrangement arrived at so far back as April, 1912.

Their Lordships appreciate the reluctance felt by the learned Judges, in view of the time which had elapsed since the arbitration and award. But the plaintiffs, on the death of their father, became entitled to their respective shares in his estate, and in view of the findings of both courts in India it must now be taken that the above-mentioned Ice and Flour Factory was part of the immovable property of Mohammad Husain, in which the plaintiffs were entitled to share, and yet by the award it was allotted to Amir Hasan as being his own property. The award in this respect, when carried out, amounted to an alienation of the plaintiffs' shares in that property, to which being infants they could not consent, and unless Faiyaz-un-nisa, their mother, had authority to act on their behalf and was competent to enter into the alleged arrangement by which the said alienation was affected, the infant plaintiffs' shares in the said property could not be affected.

The learned Judges held that Faiyaz-un-nisa, although she was at the time of the agreement the "de facto" guardian of the plaintiffs, who were then minors, had no power to deal with their property, and consequently that she had no authority to enter on their behalf into the agreement to refer the disputes to arbitration, which, if acted upon, would necessarily affect the immovable property of the infant plaintiffs.

If Faiyaz-un-nisa was not competent to deal with the immovable property of the plaintiffs, by referring the disputes relating to the distribution of their father's estate to arbitration, and if the award made on such arbitration was not binding on the plaintiffs, it is difficult to see how Faiyaz-un-nisa could be competent to effectuate that distribution and to make the provisions of the award binding upon the infant plaintiffs merely by calling that which was contained in the agreement and the award a family arrangement.

Their Lordships are of opinion that if Faiyaz-un-nisa was not competent to enter into the agreement of reference so as to bind the plaintiffs, who were minors at the time, with respect to their share in the immovable property of their father, it must follow that she was equally incompetent to agree to the disposal of the infant plaintiffs' share in any part of the immovable property of their father by adopting the award and by calling the transaction a family arrangement.

It is therefore necessary to consider the question whether Faiyaz-un-nisa had authority to enter into the agreement of reference on behalf of the plaintiffs who were minors at the time.

It has already been stated that Faiyaz-un-nisa was not appointed guardian of the person and property of the minor children by Mohammad

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Husain, and that at the date of the agreement of reference she had not been appointed guardian by the court.

At the time, therefore, of the agreement to refer she was not the legal guardian of her infant children, but merely the custodian of them. The provisions and principles of the Mahomedan law which govern this matter were stated in the judgment of Mr. Ameer Ali when delivering the decision of this Board in *Imambandi* v. *Mutsaddi*[1]. At page 83 the following passage is to be found:—

> It is perfectly clear that under the Mohammedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term 'de facto guardian' that has been applied to these persons is misleading; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous, and the judgment of the Board in *Mata Din* v. *Ahmed Ali* (L. R. 39 I. A. 49) clearly indicated it.

At pages 84 and 85 there are other material passages, which are as follows:—

> As already observed, in the absence of the father, under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the judge as the representative of the Sovereign: Baillie's Digest (ed. 1875), p. 689; Hamilton's Hedaya, vol. 4, bk. 52, c. 7, p. 555. No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may 'sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss,' dealings with his immovable property are subjected to strict conditions: Baillie's Digest, p. 687.
>
> When the mother is the father's executrix, or is appointed by the judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant.

Mr. Ameer Ali then referred to certain exceptions provided for the protection of a minor child who has no "*de jure*" guardian, which were classified under three heads: it is clear that the present case does not fall within any of the stated exceptions.

The decision in the above-mentioned case was acted upon by Teunon and Beachcroft, JJ. in *Mohsiuddin Ahmed* v. *K. Ahmed*[2], the head note of which is as follows:—

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[1] 45 I. A. 73

[2] I. L. R. 47 Cal. 713

The mother, as the *de facto* guardian of minors, is not competent, under the Mahomedan law, to enter on their behalf into an agreement to refer to arbitration any dispute, even which will necessarily, if acted upon, involve dealings with the immovable properties of the minors.

Imambandi v. *Mutsaddi* referred to.

Adopting the principles of Mohammedan law as stated by this Board in *Imambandi* v. *Mutsaddi,* their Lordships have no doubt that the courts in India were right in holding that Faiyaz-un-nisa had no authority to enter into the agreement of reference on behalf of the plaintiffs, who were minors at the time, so as to make the award binding upon them as to their share in the immovable property of their father.

They are also of opinion that Faiyaz-un-nisa had no power or authority to enter into an arrangement whereby the plaintiffs' share in the immovable property of their father would be affected, in view of the fact that at the time of the said agreement she was not their legal guardian, and she cannot be clothed with the necessary authority by calling the transaction a family arrangement.

Their Lordships' attention was drawn by learned counsel for the respondents to several reported cases: in their opinion it is not necessary to deal with them in detail. It is sufficient to say that none of them covered the point which is now under consideration.

Reliance was placed by the learned counsel for the respondents upon the fact that on September 18, 1912, Faiyaz-un-nisa was appointed by the court guardian of the person and property of the minors, including the plaintiffs, and that therefore it should be taken that the court, by appointing Faiyaz-un-nisa guardian, must have approved the arrangement evidenced by the agreement of reference and the award. There is, however, no evidence that the District Judge was made aware of the said agreement. Indeed, it was admitted that if an application had been made to him before the agreement to refer was executed, and if he had been informed that the interest of the mother with regard to some of the properties was not identical with that of the minors, as was the fact, the Judge would in the ordinary course have appointed some person, other than the mother, as guardian of the minors. It is obvious that the District Judge did not consider the question which is now before their Lordships, and the mere fact that the court subsequently found the mother a fit person to act for the minors would not validate the arrangement, which in its inception was invalid.

A further point was raised by the learned counsel for the respondents, viz., that the plaintiff Ejaz Husain could not maintain the suit because he had ratified the alleged family arrangement as to part of the estate allotted to him by the award.

It appears that certain mortgage deeds had been executed in favour of Mohammad Husain and these were included in the shares awarded to the plaintiff and his brothers. A suit on the mortgages was instituted on October 13, 1922, by Iftikhar Husain after attaining majority, and his three brothers, of whom Ejaz Husain was one, as minors, under the guardianship of their mother.

A preliminary decree was obtained on October 11, 1923, and an application was made for a decree absolute on September 22, 1924, and the decree was made absolute on November 1, 1924—Ejaz Husain was of age when the application for decree absolute was made, and signed it as a major.

Their Lordships do not consider that this is sufficient to prevent Ejaz Husain from maintaining the present suit. Proceedings in the mortgage suit had been begun when he was a minor, and when the time came for application for a decree absolute the mother had no longer any authority to act for him, as he had attained majority, and Ejaz being a party to the suit his signature to the application was necessary to bring the proceedings to a conclusion in the interest of all concerned.

The learned counsel for the plaintiffs contended that they were entitled to an account of and a share in all the profits made by Amir Hasan in respect of the Ice and Flour Factory.

Their Lordships are unable to accept this contention.

It appears that Amir Hasan managed the business of the factory in his father's lifetime and continued so to do after his death. The old factory has gone, most of the machinery being worn out, and modern factories were erected by him in its place.

These and other facts stated by the learned Subordinate Judge, which need not be mentioned in detail, are sufficient to show that this is not a case for mesne profits. The rights of the plaintiffs in this respect are fully met by the allowance of interest at the rate of 12 per cent per annum made by the Subordinate Judge. It is worthy of note that the plaintiff-appellants in their case did not ask for mesne profits, but submitted that the decree of the learned Subordinate Judge should be restored, and that Rs.25,000, the amount fixed by the Chief Court, should be substituted for Rs.25,526, which was the sum decreed by the learned Subordinate Judge as the capitalised value of the factory.

For the above-mentioned reasons their Lordships are of opinion that the appeal must be allowed, the decrees of the Chief Court dated October 18, 1928, must be set aside, and the decree of the Subordinate Judge dated January 17, 1928, as amended by the order of March 8, 1928, be restored, but that the sum of Rs.25,000 be substituted for the sum of Rs.25,526 mentioned in the said decree of the Subordinate Judge.

The respondents, the heirs of the deceased respondent, Sheikh Amir Hasan, must pay the costs of the plaintiffs of this appeal, and of the appeals to the Chief Court. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed

J. E. Lambert—Solicitor for the appellants.

Barrow, Rogers and Neville—Solicitors for the respondents.

HIGH COURT

Civil
1931
July 1
Mukerji, J.
Allen, J.

RADHA BALLAB AND ANOTHER (*Plaintiffs*)
versus
DEOKI NANDAN AND OTHERS (*Defendants*)*

Evidence Act, Sec. 68, Proviso to—Interpretation of—Suit for sale on a mortgage—A defendant denies that an alleged executant executed the mortgage—One marginal witness to be produced.

If any of the defendants to a suit denies that any of the alleged executants executed the mortgage deed, the plaintiff must produce one of the marginal witnesses to prove the document.

Where the execution of the bond as a simple bond by the defendants was proved, and the plaintiffs' evidence showed that no consideration beyond Rs.50 had passed, *held*, that the defendants were not precluded from urging that no consideration passed. *Makund* v. *Bahori Lal*, I. L. R. 3 All. 824 and *Mohd. Sharif* v. *Mohd. Moazzum Ali*, A. I. R. 1923 All. 214 *followed*.

SECOND APPEAL from a decree of BABU GANGA PRASAD VERMA, Additional Subordinate Judge of Muttra, confirming a decree of MAULVI MANZOOR AHMAD KHAN, Munsif of Mahaban.

N. P. Asthana for the appellants.

K. Verma and *Gopi Nath Kunzru* for the respondents.

The judgment of the Court was delivered by

MUKERJI, J.—This appeal is the plaintiffs' and arises out of a suit filed by them for recovery of money by sale of certain property said to have been mortgaged on foot of a mortgage bond dated December 29, 1921 alleged to have been executed by the first three defendants to the suit. The fourth defendant was the son of one of the executants and the fifth defendant was an attaching creditor of the other defendants. *Mukerji, J.*

Two of the defendants, namely, defendant No. 3 and the attaching creditor defendant No. 5, alone contested the suit. They denied the execution of the bond and the payment of the consideration and the defendant No. 3 further said that the defendant No. 1 who was a friend of one of the plaintiffs had got the bond brought about for some motive unknown to the defendant.

The plaintiffs adduced evidence by examining one of themselves and the scribe of the bond, but they did not examine any marginal witness. The courts below came to the conclusion that the bond in suit was not proved as a mortgage bond because the provisions of S. 68 of the Indian Evidence Act had not been complied with, by calling one of the marginal witnesses. In this Court it has been contended that under the proviso added to S. 68 by the Amending Act of 1926 it was not necessary for the plaintiffs to produce an attesting witness, inasmuch as the deed was a registered one and none of the executants of the deed had denied its execution.

We are of opinion that this is not a proper reading of the proviso to S. 68. If any of the defendants to a suit denies that any of the alleged

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*S. A. 301 of 1929

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executants executed the deed, the plaintiff must produce one of the marginal witnesses to prove the document. This was not done and therefore the plaintiffs failed to prove the bond as a mortgage bond.

The courts below found that the execution of the bond as a simple bond by the first three defendants had been proved. But they also found that payment of any consideration money beyond a sum of Rs.50 was not established. The learned counsel for the appellants contended that the execution of the bond having been proved, it was for the defendants to prove that the consideration was not paid. This may be a correct proposition of law, as to which we express no opinion. The fact however remains that the plaintiffs did adduce evidence and their evidence showed that no consideration beyond the sum of Rs.50 had passed. In the circumstances, the defendants are not precluded from urging that no consideration passed. This is in accordance with at least two cases decided in this Court, *Makund* v. *Bahori Lal*[1] and *Mohammad Sharif* v. *Mohammad Moazzum Ali*[2].

The appeal fails and it is hereby dismissed with costs.

Appeal dismissed

[ED., A. L. J.—The defence of defendant No. 3 appears from the following paragraph of his written statement—"The real fact of the case is that Radha Ballabh, plaintiff No. 1, and Deoki Nandan, defendant No. 1, the brother of the contesting defendant, were on very social terms. Hence Deoki Nandan executed the mortgage-deed in question through some policy and *caused the contesting defendant to make his signature thereon.* The contesting defendant never took any loan from the plaintiff."]

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[1] I. L. R. 3 All. 824

[2] A. I. R. 1923 All 214

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July 21
SEN, J.
ALLEN, J.

ANANDI (*Defendant*)
versus
LAKHMI CHAND (*Plaintiff*)*

Hindu Law—Widow—Right of maintenance—Unchastity of widow—Instrument executed by two brothers (members of a joint family)—On the death of either, widow of deceased to have profits of half the property for her life—Right to profits not liable to forfeiture—On subsequent unchastity.

The right to maintenance of a Hindu widow, belonging to a joint family, is conditional upon continued chastity, and this right is not affected by the fact that the widow has obtained a decree declaring her right to maintenance or that there has been an agreement between the widow and the male co-parceners to pay her a certain amount by way of maintenance. *Vishnu Shambog* v. *Manjama*, I. L. R. 9 Bom. 108, *Daulat Kauri* v. *Meghu Tewari*, I. L. R. 15 All. 382 and *Sathyabhama* v. *Kesavacharya*, 29 I. C. 1915, 397 *followed.*

The plaintiff respondent and *B* (the husband of the defendant) were brothers and were members of a joint Hindu family. They had no male issue. Shortly before the death of *B*, they jointly executed a document, whereby they declared that they were the members of a joint Hindu family, but agreed that on the death of either of them without leaving male issue, the widow of the deceased should have the full share of the profits of half the property upon the same footing as that of a widow of a separated Hindu, *held*, that the defendant derived under the document a special estate equivalent to the estate of a Hindu widow, and it was not liable to forfeiture upon the ground of subsequent unchastity, because under the document the widow's right to profits was to continue for her whole lifetime, unhampered by any restrictions.

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*F. A. 341 of 1930

FIRST APPEAL from a decree of P. L. GOVIL ESQ., Subordinate Judge of Muzaffarnagar.

P. L. Banerji, K. N. Malaviya and *Kumuda Prasad* for the appellant.

Iqbal Ahmad and *Vishwa Mittra* for the respondent.

This appeal arose out of a suit instituted by the plaintiff-respondent for a declaration that the right to profits conferred upon the defendant under the document dated June 5, 1915 was forfeited because she had become unchaste.

The plaintiff-respondent and Baldeo Sahai (the husband of the defendant) were brothers and were members of a joint Hindu family. They had no male issue. Shortly before the death of Baldeo Sahai, they jointly executed the document dated June 5, 1915, whereby they declared that they were the members of a joint Hindu family, but agreed that on the death of either of them without leaving male issue, the widow of the deceased should have and enjoy for her life the full share of the profits of a moiety of the joint property like the widow of a sonless and separated Hindu. This document dated June 5, 1915 was construed by their Lordships of the Privy Council in *Lakhmi Chand* v. *Anandi,* 24 A. L. J. R. 609, and their Lordships held that the transaction embodied in the document was a valid one and was binding on the surviving brother, and the widow of the deceased obtained an interest for life in the moiety share of her husband.

The present suit for declaration was decreed by the learned Subordinate Judge of Muzaffarnagar on the finding that the defendant had become unchaste, and therefore forfeited her rights under the document dated June 5, 1915. On appeal the High Court held that the charge of unchastity against the defendant was false. In view of this finding, it was not necessary to go into the question, viz., were the profits of the estate of her husband granted to the defendant by way of maintenance to a widow belonging to a joint Hindu family (which she was liable to lose if she became unchaste) or was a special estate granted to her under the document dated June 5, 1915, which was unfettered by any condition and was not liable to forfeiture, but as the point was argued at great length before their Lordships, they indicated their opinion on the matter. The relevant passages from the judgment are reproduced below:—

SEN, J.—The right to maintenance of a Hindu widow, belonging to a joint family, is conditional upon continued chastity. This right is not affected by the fact that the widow has obtained a decree declaring her right to maintenance or that there has been an agreement between the widow and the male co-parceners to pay her a certain amount by way of maintenance. In *Vishnu Shambhog* v. *Manjama*[1] it was held that "a decree obtained by a Hindu widow declaring her right to maintenance was liable to be set aside or suspended on proof of subsequent unchastity given by her husband's relatives either in suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right." This case was followed by Burkitt, J. in *Daulat Kauri* v. *Meghu Tewari*[2]. The relevant texts of Hindu Law have

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[1] I. L. R. 9 Bom. 108.

[2] I. L. R. 15 All. 382

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been set out and discussed by Ayling and Sheshagiri Aiyer, JJ. in *Sathyabhama* v. *Kesavacharya*[8]. This case is an authority for the proposition that "the rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance applies even where that right is secured to her by an agreement in writing."

It may be observed here that Mst. Anandi was no party to the agreement dated July 5, 1915. The learned Subordinate Judge has held that this agreement is in the nature of a family settlement under which profits were agreed to be paid to Mst. Anandi in lieu of maintenance and that she was liable to forfeit her right by reason of her subsequent unchastity. We are of opinion that the nature and scope of the agreement have been misconstrued.

We have a translation of the agreement at page 175 of the paper book in First Appeal No. 360 of 1930. The translation is not very accurate, more especially that of Paragraph 9. We would prefer to adopt the translation set out in the judgment of the Privy Council in *Lakshmi Chand* v. *Anandi*[1]. The material terms of the agreement are to be found in paragraphs 3, 6, 7, 8 and 9. There are no indications in this document that the estate which was intended to be granted to the widow was in lieu of maintenance. The document does not say so. The entire profits of the moiety share in the joint family property are to go to the widow for her whole lifetime and no clause is to be found in the document, providing for the defeasance of the estate upon the happening of subsequent unchastity. Where a transaction of the nature of a family arrangement has been arrived at by the agreement of two co-parceners, who constituted the joint family, whereby a benefit has been secured to a third person, it is not permissible to only one of the co-parceners, upon the demise of the other, to impose any restriction or condition in derogation of the original grant. Where the instrument, creating the family arrangement, does not provide either directly or by necessary implication that the right to profits should cease upon the subsequent unchastity of the grantee, it would be opposed to all canons of construction to import such a condition into the text. The nature and character of the estate, conferred upon Mst. Anandi, have been considered by their Lordships of the Privy Council in 24 A. L. J. R. 609 at 615, and according to this view, Mst. Anandi is entitled to "have and enjoy for her life an interest in moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate; and that the interest which she obtained by the mutual agreement of Baldeo Sahay and Lachmi Chand should continue for her benefit, notwithstanding the birth, if it should happen of 'male issue' to Lachmi Chand". The transaction in question was clearly not a maintenance-grant *simpliciter* but was something more. Although she was not entitled to actual possession of the property and had no right to transfer the same or to claim a partition thereof, her rights extended to the full share of the profits of half the property upon the same footing as that of a widow of a separated Hindu. It resembles a widow's estate in certain particulars though it was divergent in other respects. The widow's right to the profits was to continue for her whole lifetime, unhampered by any restrictions. The nature of the estate was therefore anomalous.

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[8] I. L. R. 39 Mad. 658

[1] 24 A. L. J. R. 609 at 611

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Anandi v. Lakhmi Chand

Sen, J.

It may be further observed that in prescribing the course of devolution, the executants of the instrument do not follow the course of inheritance prescribed by the Hindu law but depart from it in many respects, which need not be enumerated.

If it be held that Mst. Anandi derived under this document the estate of a Hindu widow or something equivalent to the estate of a Hindu widow she could not be divested of this estate by reason of subsequent unchastity. We are, however, of opinion that the estate carved out to Mst. Anandi was one of a special nature and it was not liable to divestment upon the ground of subsequent unchastity, because the instrument creating the right did not provide for this contingency.

The result is that we allow the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed

HAMID HASAN AND OTHERS (*Applicants*)
versus
KING-EMPEROR *through* SYED HUSAIN, MUKHTAR
(*Opposite party*)*

Criminal

1931

Oct. 7

Niamatullah, J.

Criminal Procedure Code, Sec. 107(2)—Interpretation of—Person informed against not within local limits of Magistrate's jurisdiction—When proceedings initiated—Whether Magistrate has jurisdiction—Issuing a summons under Sec. 114—Part of such proceedings.

An application was presented before the Joint Magistrate of Ghazipur for action being taken against the present applicants under Sec. 107 Cr. P. C., who were in Jaunpur when the application was filed and process issued under Sec. 114. They appeared in obedience to the summons served upon them, when an order under Sec. 112 was read over to them. They took objection to the jurisdiction of the Magistrate to take proceedings under Sec. 107 Cr. P. C. against them; *held,* that the objection was well-founded, as the present applicants were not within the local limits of the magistrate's jurisdiction when proceedings under Sec. 107 were initiated, and issuing a summons under Sec. 114 was part of such proceedings.

CRIMINAL REVISION from an order of E. Moss Esq., District Magistrate of Ghazipur.

S. M. Husain and *K. Masud Hasan* for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an application for revision of an order of the District Magistrate of Ghazipur purporting to be one on appeal from an order of the Joint Magistrate of that district passed in proceedings, under Sec. 107 Criminal Procedure Code, pending before him against the present applicants, who are residents of Jaunpur and took objection to the jurisdiction of the Joint Magistrate taking proceedings under the aforesaid section. The objection was overruled. They moved the District Magistrate who dismissed "the appeal". No appeal lay to the District Magistrate from an interlocutory order of the kind passed by the

*Cr. Rev. 356 of 1931

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KING-EMPEROR

Niamat-ullah, J.

Joint Magistrate and the proceedings before the District Magistrate should be regarded as those in revision under Section 435 Criminal Procedure Code and I treat them as such. The revision to this Court is in no way affected by error of procedure, if any, in moving the District Magistrate.

The proceedings under Section 107 Criminal Procedure Code were initiated by an application presented before the Joint Magistrate by one Hakim Syed Husain, a Mukhtar practising in the Criminal Courts at Ghazipur, complaining that the present applicants were likely to commit a breach of the peace. It appears that the parties were interested in a certain waqf as to which a civil suit had been instituted by the present applicants. Certain allegations made by them in the plaint were considered by Hakim Syed Husain to be defamatory. Accordingly the latter instituted criminal proceedings before a Magistrate in the Ghazipur district for prosecution of the present applicants for an offence under Section 500 I. P. C. The applicants, being accused in the aforesaid case, had to come from Jaunpur to Ghazipur on the dates fixed for hearing. The Hakim's application for action being taken against them under Section 107 Criminal Procedure Code, which was made during the pendency of the defamation case, alleged that the present applicants intimidated him when they came to Ghazipur for the defamation case threatening to institute some case against the complainant, presumably false, in some court in the Jaunpur district and when he (the complainant) would go to that place for such case he would be molested. The complaint is not clearly worded and placing a construction most favourable to the complainant it amounts to an allegation that the applicants are likely to commit a breach of the peace in Ghazipur and Jaunpur and that the occasion on which a breach of the peace in Ghazipur was apprehended would be the visit of the applicants to that place for purposes of the defamation case. Assuming this allegation to be true the question is whether the Joint Magistrate of Ghazipur has jurisdiction to take proceedings under Section 107 Criminal Procedure Code against the applicants who are residents of Jaunpur but have to visit Ghazipur for the purposes of the defamation case.

The answer to the question formulated above turns on the right interpretation of Section 107(2) Criminal Procedure Code which provides that no proceedings under that section can be taken unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction. The contention raised by the applicants is that they are residents of Jaunpur and go to Ghazipur only for the purposes of the defamation case and the Joint Magistrate has no jurisdiction to proceed against them. Section 107(2) makes no reference to the residence of the persons proceeded against; all that it provides is that if the such persons "are" not within the jurisdiction of the Magistrate, his jurisdiction to take proceedings under Sec. 107 is ousted. A person may be within the limits of a Magistrate's jurisdiction and yet may not have residence within such limits. At the same time to hold that a person 'is' within the local limits of a Magistrate's jurisdiction only because he is present in court when the Magistrate draws up his order under Section 112 Cr. P. C., having appeared in obedience to a summons issued by the Magistrate, is to make the section nugatory. Section 114 of the same Code empowers the Magistrate to

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issue a summons to a person against whom he decides to take proceedings under Section 107, Sub-section (2) of which is imperative that "no proceedings shall be taken unless the person informed against is within the local limits of the Magistrate's jurisdiction". Issuing a summons under Section 114 is part of such proceedings and it is clear that if the person informed against is not within the local limits of the Magistrate's jurisdiction when the proceedings are initiated, he has no jurisdiction.

The record shows that the applicants were in Jaunpur when the complaint was filed and process issued. They appeared in obedience to the summons served upon them in Jaunpur when the order under Section 112 Cr. P. C. was read out to them. As already stated they took objection to the jurisdiction of the Magistrate to take proceedings under Section 107 Cr. P. C. against them.

In the view I take of the question involved in this revision it must succeed. It is accordingly allowed and the proceedings so far as they were taken by the joint magistrate are quashed.

Application allowed

CRIMINAL
1931
Oct. 28
PULLAN, J.

MANNI LAL (*Applicant*)
versus
KING-EMPEROR (*Opposite party*)*

Penal Code, Sec. 405—Criminal breach of trust—Failure to produce an electric meter on a particular date—Whether amounts to—Evidence of dishonesty necessary.

A person on whose premises a meter is installed by the electric company is responsible for it, and if at any time he is unable to produce the meter, the price of it could be deducted from his deposit with the company; but the mere failure to produce the meter on any particular date does not of itself constitute criminal breach of trust under Sec. 405 Penal Code. The words of Section 405 do not embrace the case of a man who has taken an article on hire ad fails to produce it. There must be some evidence that he acted dishonestly.

CRIMINAL REVISION from an order of L. V. ARDAGH ESQ., Sessions Judge of Jhansi.

N. C. Vaish for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Pullan, J.

PULLAN, J.—This is an application in revision from an order of the Sessions Judge of Jhansi, upholding the conviction of one Manni Lal for an offence under S. 406 I. P. C. This Manni Lal owns a flour mill in Jhansi, and for the purposes of his mill took electric current from the Jhansi Electric Supply Co. The accounts produced by the Company show that he used electric current to the amount of 5·54 units in the month of February, 1931. On March 26, 1931, he addressed a letter to the Company saying that two of the Company's servants had removed his meter on March 24, saying that they would either return it or instal another on the following day, and that they had not done so. The Company made an enquiry and satisfied themselves that their servants had not removed the

*Cr. Rev. 501 of 1931

meter, and they initiated a prosecution for criminal breach of trust. It appears that at that time some consumers in Jhansi had hit upon a means of tampering with the reading of their meter, and several prosecutions had been instituted. It is suggested in this case that the accused had been tampering with his meter, and fearing discovery, had destroyed the meter, and falsely reported that the meter had been removed. This substantially is the story believed by the Magistrate and the Judge, and the applicant has been sentenced to four months' rigorous imprisonment for an offence under S. 406 I. P. C. and to pay a fine of Rs.50. It is clear from the judgments of both courts that in the Company's books there is considerable confusion as to the number of the meter supplied to this mill. But the courts have held as a fact that it was meter No. 77, and that this meter is now missing. They have also held as a fact that the servants of the company, one of whom has subsequently been dismissed, did not remove the meter. Thus sitting as a court of revision I have to accept the findings of fact that the meter No. 77 was installed in the mill of the accused, that it is not there now, and that the servants of the Electric Co. did not remove the meter. But even when these facts are conceded, it does not appear to me that an offence under S. 406 I. P. C. has been established. The accused was no doubt responsible for the meter. He had given a deposit with the Company of Rs.75, and if at any time he was unable to produce the meter, the price of it could be deducted from his deposit. But the mere failure of the accused to produce the meter on any particular date does not of itself constitute an offence of criminal breach of trust. In order that this offence must be fairly established, it must be proved that the accused dishonestly misappropriated or converted to his own use the property entrusted to him, or dishonestly used or disposed of that property "in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust." I do not see how the words of this Section embrace the case of a man who has taken an article on hire and fails to produce it. There must be some evidence that he acted dishonestly, and I cannot consider that the proved facts in this case show dishonesty. There is certainly no proof as to what happened to the meter, and I cannot conclude that the accused made any profit out of it. He may have sold it: he may have destroyed it; and somebody else may have stolen it. He is certainly responsible to the Company for the price of the meter, but his criminal liability appears to me to depend on the strange findings of the Magistrate that the accused deliberately destroyed this meter to do away with the evidence against himself. There is not the slightest evidence either that the accused tampered with his meter or that there was any prospect of a prosecution being instituted against him for so doing. The finding of the Magistrate that the motive for the crime is clearly dishonest is a finding based on a presumption without any evidence, and as such is contrary to law. The Judge mentions the previous prosecutions but he nowhere states that the motive of the accused was to destroy proof of his own guilt. In fact the Judge appears to think that the mere failure to produce the meter is sufficient to lead to a presumption of criminal breach of trust. He has not touched upon the point of law at all. In my opinion the conviction is illegal, and

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Pullan, J.

no offence under S. 406 is established against the accused. I accordingly allow this revision, set aside the conviction and sentence and direct that the fine, if paid, shall be refunded. It will be open to the Company no doubt to realise the value of the meter from the deposit which they hold in the name of the accused.

CIVIL
1931
Nov. 13
MUKERJI, J.
BENNET, J.

PARBHOO DAYAL (*Plaintiff*)
versus
DWARKA PRASAD AND ANOTHER (*Defendants*)*

Tort—Joint tort-feasors—Suit for damages—Decree—Executed against one alone —Decree satisfied—When suit for contribution lies against co-tort-feasors.

> Where a person obtains a decree against joint tort-feasors, and executes the decree against one of them alone, who is compelled to pay the whole damages, he has no right of contribution from the others, if they committed the act of tort knowing that what they were doing was nothing but a clear case of tort. *Merryweather* v. *Nixan,* 8 T. R. 186, *Takira* v. *Tasadduq Husain,* I. L. R. 19 All. 462 *relied on.*
>
> No distinction can properly be drawn, in principle, between a case where a joint liability has been liquidated without a suit, and where a joint liability has been established by a suit and the judgment has been liquidated by one of the parties. *Ram Prashad* v. *Arja Nand,* 10 All. W. N. 161 *not followed.*

CIVIL REVISION from an order of J. K. DAR ESQ., Judge of Small Cause Court, Allahabad.

Ambika Prasad for the applicant.

Gopi Nath Kunzru, R. K. Malaviya, Panna Lal Khatri and *Lalta Prasad Gupta* for the opposite parties.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is a revision against a decree of a Small Cause Court at the instance of the plaintiff, who has lost his suit.

The facts that have been found by the court below are these. The plaintiff and the defendants, who are two in number, without the least semblance of right, removed the materials of a building in a certain village. The building belonged, in part to one Basityar Khan. Basityar Khan brought a suit, being No. 29 of 1927, against the present parties to recover his own share of the value of the materials. That suit was decreed. The decree was executed against the plaintiff to the present litigation, namely, Parbhudayal and Parbhudayal satisfied that decree. Thereupon, Parbhudayal brought the suit, out of which this revision has arisen, to recover a certain sum of money said to be due to him from the defendants, by way of contribution.

The learned Judge of the Small Cause Court dismissed the suit. He held:

> The plaintiff had no interest or share in the beams which he had removed and that he was conscious of his wrongful act, and that as such this suit for contribution does not lie.

It has been argued before us that although the parties to the present suit were joint tort-feasors in the true sense of the expression, yet the plaintiff was entitled to succeed simply because there was a decree made in favour of Basityar Khan jointly against the parties to the present litigation. Reliance has been placed on a dictum of Lord Watson in *Palmer* v. *Wick*[1]. His Lordship is reported to have said at page 332:

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*Civ. Rev. 436 of 1930

> But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present—the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable in solidum to the pursuer, and that *inter se* each is liable only prorata, or, in other words, for an equal share with the rest.

Lord Halsbury thought that if the case had to be decided under the law of England he could not depart from the principle laid down in *Merryweather* v. *Nixan*[2]. It seems to us that the case of *Palmer* v. *Wick* was decided on the basis of Scotch law which we are not bound to administer in India.

Speaking for ourselves, we do not see any distinction that can properly be drawn, in principle, between a case where a joint liability has been liquidated without a suit and where a joint liability has been established by a suit, and the judgment has been liquidated by one of the parties. There is undoubtedly a distinction between cases where the tort-feasors are aware of the fact that they were acting purely in tort and without any semblance of right in themselves, and cases where an act of trespass or other action in tort is committed more or less innocently and in good faith with a semblance in one's rights, although those rights may not actually exist.

No case has been cited to us where it may have been held distinctly that, as between persons who are conscious tort-feasors, in the sense that when they committed the act of tort knowing that what they were doing was nothing but a clear case of tort, a right of contribution existed. In our opinion, the authority of *Merryweather* v. *Nixan* still holds good so far as this country is concerned.

The learned counsel for the applicant has relied on the case of *Ram Prasad* v. *Arja Nand*[3]. It was the decision by a learned single Judge of this Court, Mahmood, J. The decision was based on the ground that a decree had been passed against all the parties to the suit and that was enough ground for the plaintiff, a joint tort-feasor, succeeding in a suit for contribution against his co-tort-feasor. We are not prepared to accept the correctness of this decision.

In *Fakira* v. *Tasadduq Husain*[4] a decree for costs had been made against two defendants, who opposed unnecessarily the claim of a rightful plaintiff to a certain property. The decree for costs was a joint one against the defendants. The plaintiff paid off those costs and sued to recover from his co-defendants a share of it. Sir John Edge, C. J. and Blair, J., remarked as follows:

> Apparently the plaintiff and defendants here were wrong-doers. They were holding on to property to which the plaintiff in the former suit was entitled, and to which they (or either or any of them) were not entitled. Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit which was independent of, and separate from, and inconsistent with, the title set up by the other de-

[1] 1894 A. C. 318

[2] 8 T. R. 186=16 R. R. 810

[3] 10 All. W. N. 161

[4] I. L. R. 19 All. 462

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Mukerji, J.

> fendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other; and there was no equity between these persons, whose cases were antagonistic to each other.

It will be noticed that the mere fact that a decree had been made jointly for costs against two persons was not held to be a sufficient ground for decreeing the plaintiff's case. Although the facts of the case of *Faqira* v. *Tasadduq Husain* are different from the facts of the case before us, the former does lay down the true principle on which the contribution may be claimed. There must be either a contract, express or implied, by which it may be said that the defendant agreed to compensate the plaintiff in certain events, or that there should be an equity between the parties which would induce the courts to grant the plaintiff a relief from the burden he has undergone, by discharging the decree or a debt payable by the parties. The mere fact that three persons agreed to commit an act of tort cannot be regarded as a valid agreement much less as a valid contract on which a suit can be based by a joint tort-feasor against his co-tort-feasor. We may take it that when the plaintiff and the defendants in this case agreed to deprive Basityar Khan of the materials of the house that they agreed to indemnify one another from the consequence of the act. But if there was an implied agreement to that effect, it was an agreement which was immoral and cannot be countenanced in a court of law.

Several other cases were cited before us, but we do not think that there is any case which bears directly on the point before us. Some of the cases have drawn the distinction to which we have already alluded and which undoubtedly exists between the cases of torts of different kinds.

In this particular case there is nothing in favour of the plaintiff which could induce us to grant him any relief. In the result, we dismiss the application with costs.

Application dismissed

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1931

Nov. 13

MUKERJI, J

NIAMAT-ULLAH, J

THE EAST INDIAN RAILWAY AND ANOTHER (*Defendants*)
versus
NARAIN DAS GANGA SARAN (*Plaintiff*)*

Railway—Risk Note H—'Misconduct'—Meaning of—Bale weighing 9½ mds. consigned—Lock on platform side opened and bale removed at some intervening station—Whether 'misconduct' to be inferred.

'Misconduct' need not be wilful, and means bad management, or mismanagement, or culpable neglect of an official in regard to his office. *Secretary of State for India in Council* v. *Bhagwan Das*, 25 A. L. J. R. 549 *relied on; Secretary of State* v. *Allah Ditta*, A. I. R. 1930 Lah. 120, *Bengal Nagpur Railway Co. Ltd.* v. *Hukum Chand*, A. I. R. 1930 Pat. 559 *considered.*

Where a bale weighing 9½ maunds consigned under Risk Note H was found missing at the destination and the lower court came to the conclusion "that while the train was standing at some intervening station, on the platform side, some man managed to wrench off the ring and open the lock of the wagon and removed the bale" *held*, that there seemed to be no escape from the conclusion that the bale was removed owing to either

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*S. A. 1585 of 1928

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deliberate misconduct of the railway servants in the shape of standing by or helping in the theft, or at any rate in so neglecting the wagon that it was possible for several men to arrive at the place to 'wrench off the ring' and to remove a heavy load like the bale in question. The neglect, in the latter case, was culpable and the whole affair was mismanaged.

SECOND APPEAL from a decree of MAULVI ALI AUSAT, Additional District Judge of Aligarh, modifying a decree of MAULVI ZAMIRUL ISLAM KHAN, Munsif of Hathras.

U. S. Bajpai for the appellants.

Panna Lal for the respondent.

The following judgment was delivered by

Mukerji, J.

MUKERJI, J.—The question to be determined in this appeal is whether in the circumstances found by the court below, it may be properly said that misconduct on the part of the railway administration or its servants can be fairly inferred.

The plaintiff-respondents, who are a firm, consigned, for being sent to Hathras, a bale of dhotis weighing 9½ maunds. The bale was handed over to the East Indian Railway administration at Howrah. The bale never reached its destination and it was found missing when the train arrived. As required by the risk-note H, under which the bale was consigned, the railway administration gave evidence as to how the bale had been dealt with, in the course of its transit. The learned Judge found that the wagon in which the goods were placed was secured on one side by a lock described as 'Ellis patent lock' and was secured on the other side by an ordinary lock. The Ellis patent lock is very secure, and it was found that it was used on that side of the wagon which did not appear on the station side. It was found that one of the rings to which the other lock was attached was broken, and the bale was missing. On the evidence the learned Judge came to the conclusion as follows:—

> The truth seems to be that while the train was standing at some intervening station, on the platform side, some man managed to wrench off the ring and open the lock and removed the bale. It is difficult to imagine that one man could remove from the wagon a bale weighing 9½ maunds as the railway receipt shows.

As I have stated, the question is whether from this fact we are prepared to draw the inference that there was misconduct on the part of some servant of the railway administration.

Murray in his dictionary gives two meanings of the word "misconduct". The primary meaning is "bad management", "mis-management" and "malfeasance or culpable neglect of an official in regard to his office." The second meaning is "adultery" with which we are not concerned. Giving this usual meaning to the word "misconduct" there seems to be no escape from the conclusion that the bale was removed owing either to deliberate misconduct of the railway servants, in the shape of standing by or helping in the theft or at any rate in so neglecting the wagon that it was possible for several men to arrive at the place to "wrench off the ring" and to remove a heavy load like the bale in question. The neglect, in the latter case, is surely culpable and the whole affair is mismanaged. I am, therefore, prepared to hold that the lower appellate court was right in decreeing the claim against the appellants.

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In *Secretary of State* v. *Allah Ditta, Mohammad Amin*[1] an opinion has been expressed that misconduct involves some degree of moral obliquity. In the result, however, the learned Judges found that where a goods wagon had been unnecessarily detained for thirty hours, there was misconduct on the part of the servants of the railway and this is in keeping with the meaning to be found in Murray's English Dictionary.

A few other cases have also been cited. Some of these interpret the words "wilful neglect". These cases are, in my opinion, irrelevant, because we are not concerned with that expression. In *Bengal Nagpur Railway Company Ltd.* v. *Hukum Chand Hardat Rai*[2] the word "misconduct" was interpreted as being equal to wilful neglect, or failure of duty towards the consignor. I am prepared to accept the second meaning. Misconduct need not be wilful, if Murray be right in interpreting it as bad management, or mismanagement, or culpable neglect of an official in regard to his office. The word "wilful" is not there and I would not use it in explaining the word "misconduct".

In *The Secretary of State for India in Council* v. *Bhagwan Das*[3] the word "misconduct" was considered, and it was held that "a railway servant, who is placed as a kind of guardian over the goods of the public in transit, is guilty of misconduct if he allows a trespasser to obtain access to such goods". This is in general agreement with the meaning of the word "misconduct" to be found in Murray's English Dictionary.

In the result I would dismiss the appeal with costs.

Niamatullah, J.

NIAMATULLAH, J.—I concur.

BY THE COURT—The appeal is dismissed with costs.

Appeal dismissed

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[1] A. I. R. 1930 Lah 120
[2] A. I. R. 1930 Pat. 559
[3] 25 A. L. J. R. 549

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1931
Nov. 19
PULLAN, J.
NIAMATULLAH, J.

SHRI CHAND (*minor*) THROUGH LARAITI (*Defendant*)
versus
BANSIDHAR AND OTHERS (*Plaintiffs*)*

Civil Procedure Code, Or. 22, R. 4—Plaintiffs were owners of a firm—But suit brought in the names of individual owners—Interest of each not specified in plaint—Suit decreed—Second Appeal—One respondent dies—Legal representatives not brought on record within time—Appeal abates as against all respondents.

Plaintiffs jointly owned a firm but the suit for recovery of money was brought in the names of individual owners, and the interest of each was not specified in the plaint. The lower appellate court passed a decree in favour of all the plaintiffs jointly, and the record was silent as regards their right *inter se*. The defendant filed a second appeal. One of the plaintiff-respondents died during pendency of appeal and his legal representatives were not brought on record within limitation. *Held,* that the appeal abated as against all the respondents. *Ram Dei Misrain* v. *Jurawan Misir,* 1930 A. L. J. R. 857 *relied on.*

SECOND APPEAL from a decree of BABU HARGOBIND BAJEL, District Judge of Mainpuri, modifying a decree of MAULVI ZAMIRUL ISLAM KHAN, Munsif of Shikohabad.

N. P. Asthana for the appellant.

*S. A. 1406 of 1928

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SHRI CHAND v. BANSIDHAR

Niamatullah, J.

G. *Agarwala* for the respondents.

The judgment of the Court was delivered by

NIAMATULLAH, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that it has abated. One of the palintiff-respondents, namely, Bansidhar, died during the pendency of the appeal; and his legal representatives were not brought on the record within limitation. It is not disputed that as against Bansidhar the appeal has abated. The question is whether it has also abated, or cannot otherwise proceed, as against the other respondents.

The suit which has given rise to this appeal was brought by Lala Bansidhar deceased and two others claiming to be the owners of a firm styled Bansidhar Umedilal. The claim was for recovery of a certain sum of money due from the defendant's father in respect of money dealings between the parties and purchase of cloth by the defendant's father from the plaintiffs. The court of first instance decreed the suit in part. The lower appellate court on appeal by the plaintiffs modified the decree of the first court to some extent. The defendant has preferred this second appeal.

The plaintiffs owned the firm Bansidhar Umedilal but the suit has been brought not in the name of the firm but in the names of individual owners thereof. The learned counsel for the appellant referred to O. 30, R. 4, Civil Procedure Code, in support of his contention that where a suit is brought in the name of a firm, the death of one of the partners and the legal representatives of the deceased not being brought on the record does not result in the abatement of the suit either against the firm as a whole or against the deceased defendant. This argument presupposes that the suit which has given rise to this appeal was brought in the name of the firm. It was, however, as the heading of the plaint shows, brought by the plaintiffs for themselves and on their own behalf, without any reference to the firm. It is true the body of the plaint discloses the existence of a firm styled Bansidhar Umedilal. This fact, however, would not convert the suit into one brought in the name of the firm. The contention based on the provisions of O. 30, R. 4 C. P. C. must, therefore, fail.

The three plaintiffs jointly owned the firm Bansidhar Umedilal. The interest of each is not specified in the plaint. No question having arisen in that connection, the record of the present case is absolutely silent as regards the right of the plaintiffs *inter se*. The decree of the lower appellate court being in favour of all the three plaintiffs jointly, any interference with that decree on appeal cannot fail to affect the interests not only of the surviving respondents but also of the legal representatives of Bansidhar. The appeal cannot proceed without the legal representatives of Bansidhar being impleaded as respondents. This, as already stated, has become impossible, in view of Bansidhar having died more than three months ago and his legal representatives not having been brought on the record. We are clearly of opinion that the rule laid down in *Ram Dei Misrain* v. *Jurawan Misir*[1] is applicable; and the result of the absence of the legal representatives of Bansidhar from the array of parties is fatal to the appeal. The preliminary objection prevails, and the appeal is dismissed with costs.

Appeal dismissed

[1] 1930 A. L. J. R. 857

Civil

1931

Dec. 4

Sulaiman, J

Niamat-ullah, J.

PADARATH TEWARI (*Defendant*)
versus
DULHIN TAPESHA KUERI (*Plaintiff*)*

Civil Procedure Code, Sec. 104(b)—Civil suit—Defendant ordered to produce a lady in court for internal medical examination—Lady not produced—Defendant ordered to be arrested and detained in civil prison—Order ultra vires.

In a civil suit one of the points for decision was whether a lady had ever given birth to a child. On the plaintiff's application the learned judge ordered the defendant to produce her in court 'so that she may be required to undergo medical examination'. As she was not produced on the date fixed, the learned judge concluded that the defendant was responsible for her non-appearance and ordered that the defendant who was present in court 'be arrested atonce and detained in the civil prison'. A commissioner, who was appointed for the purpose, produced the lady in court. The learned judge examined the lady and noted that she was willing to submit herself to medical examination by a lady doctor. The medical examination of the lady took place at the Zenana Hospital; *held*, (1) that the learned judge did not profess to act on the assumption that the defendant was in contempt, and his order for the arrest and detention of the defendant in the civil prison was *ultra vires*, (2) that the circumstances in which she was brought to court and detained showed that her consent was wrung out of her because of the fear under which she was placed; and an internal examination of a lady, if not voluntarily submitted to by her, would amount to assault.

First Appeal from an order of Babu Shiva Harakh Lal, Additional Subordinate Judge of Ballia.

A. P. Pandey for the appellant.

Shiva Prasad Sinha for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

Sulaiman, J.—This is an appeal from a most startling order for the arrest and detention in the civil prison of the defendants. A preliminary objection is taken that no appeal lies from the order. In our opinion this objection has no force whatsoever. Under Section 104(*b*) C. P. C. an appeal is expressly provided from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree. Even if there had been no provision for an appeal, we would have felt compelled to interfere in revision because there has been a gross travesty of justice in this case. Even a cursory reference to the order-sheet would show that for some reason not easily intelligible the Subordinate Judge proceeded in a very high-handed manner which would in no way do credit to any judicial officer of experience.

The most astonishing thing is that the Subordinate Judge himself was fully conscious that there were no express provisions in the Civil Procedure Code which justified the course of action which he took upon himself to pursue. In order to usurp most sweeping powers of arresting the defendants and sending them to jail he took shelter behind the remark:

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*F. A. F. O. 25 of 1931

> The Civil Procedure Code is not exhaustive and it cannot be said to lay down a procedure for every emergency on account of which the power of the court has been left unfettered to chalk out a procedure not provided for in order to do justice.

If the learned Subordinate Judge imagines that the supposed inherent power makes him the absolute master of the situation so as to enable him to pass any arbitrary orders which he thinks fit against any party to the suit, the sooner he is disillusioned of this false notion the better for him. The provisions for the issue of the warrants of arrests are to be found in the four corners of the Civil Procedure Code. There is also power to get parties arrested or punished when proper proceedings for contempt of court have been taken in an authorised manner. But it is preposterous to suggest that a court has power to arrest any person or to send him to jail forthwith without any proper trial in a legal proceeding.

In a civil suit for declaration pending before the court below it was in issue whether the plantiff No. 1 was the daughter of defendant No. 1 born of defendant No. 4, but there was no specific issue that the defendant No. 4 had never given birth to any child at all. On an application of the plaintiffs filed on January 5, 1931, unsupported by any affidavit, the court ordered that the vakil for the defendant No. 4 should produce her on January 16, 1931, 'so that she may be sent to doctor for medical examination as to whether any issue was born to her". The other defendants were asked to be present so that they 'might watch *the examination* by the doctor'. The learned Subordinate Judge up to that date had no materials before him to show that the defendant No. 4 was agreeable to submit herself to medical examination. He did not even take the trouble to ascertain this before passing the order. This order was repeated on January 15 and the defendants Nos. 1 and 3 were ordered to produce her in court on January 21, 'so that she may be required to undergo medical examination'. The learned Subordinate Judge even now did not pause to enquire whether she was herself willing to submit herself to medical examination. On January 21, the parties filed conflicting affidavits but there was yet no suggestion that the defendant No. 4 was herself willing to be internally examined. The learned Subordinate Judge concluded that the defendants Nos. 1 to 3 were responsible for her non-appearance and ordered that they 'be arrested and detained in the civil prison'. Defendant No. 3 was present in court and he was ordered to be arrested at once. No proceedings for any contempt of court were drawn up against these defendants. Warrants for the arrest of the defendants Nos. 1 and 2 were issued on the same day and the process servers were ordered to bring defendant No. 4 to Court. The process servers returned the warrants unexecuted as they found the house of defendants Nos. 1 and 4 locked up.

Finding that his arbitrary orders proved futile, the learned Subordinate Judge ordered a vakil to 'go as a commissioner, break open the door or lock, if necessary, and let the pairokar of the plaintiffs and defendant No. 4 bring Mst. Bhagjogna in his company to court'. The order proceeded

> if the pairokar points her out to be in the house of any other person the commissioner shall request the other person to let her into his custody and

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> if that man refuses, the commissioner shall after due notice of keeping purdah enter his house and break open the door or lock if necessary in order *to take her into his custody.*

This is an instance of authority running riot. The learned Subordinate Judge should have realised that he would be making himself liable to damages for illegal arrest, if a lady defendant was taken into custody and brought to court against her will or by force.

The defendant lady was brought to court by the commissioner 'after some trouble and opposition'. She was ordered 'to remain in court pending order for medical examination'. The defendant No. 3 was ordered to be released in order to present himself before the court 'so that the proceedings of the medical examination of the lady may take place *in his seeing*'. The other parties were also ordered to be present at the time of the medical examination of the lady. Up to the time of the passing of this order it did not strike the learned Subordinate Judge that the lady's wishes should be consulted. The poor lady appears to keep purdah and was brought to court in a palki. The learned Subordinate Judge examined her later and noted that 'she is willing to submit herself to medical examination by a lady doctor'. As Indian pardahnashin women are generally reluctant to undergo an internal examination, the peculiar circumstances in which she had been brought to court and was detained there might justify the comment of the counsel for the defendants that she must have been too frightened and nervous, and her consent was wrung out of her because of the fear under which she was placed. The Subordinate Judge should appreciate that an internal medical examination of a lady, if not voluntarily submitted to by her, would amount to assault and battery. The medical examination of the defendant lady took place at the Zenana Hospital. Subsequent proceedings were stayed by an order of the High Court passed on an application for transfer. When the application for transfer came up for final disposal the junior counsel engaged stated that he had no instructions and the senior counsel sent an illness slip praying that the case be postponed. Unfortunately for him the case was heard ex-parte and the application was dismissed on the onesided report of the Subordinate Judge. If all the facts had been brought to the notice of the learned Judge, he might have come to the conclusion that the learned Subordinate Judge was not in a fit judicial mood to try the civil suit.

It seems to us that the whole procedure adopted by the Subordinate Judge was illegal from beginning to end, and it is regrettable that any experienced judicial officer should stoop to adopt such a course of action. Courts of justice have not only to do justice but should also inspire confidence in the public mind as to their fairness. Such a high-handed conduct on the part of a judicial officer is bound to bring courts into discredit and shake the confidence of the people in the purity of the administration of justice.

The learned Subordinate Judge did not profess to act on the assumption that they were in contempt nor did he take any proper legal proceedings against them for contempt. In the circumstances he had absolutely no jurisdiction to get the defendants arrested or sent to the

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Sulaiman, J.

civil prison. His order was utterly *ultra-vires* and without authority. We accordingly allow this appeal and set aside the order of January 21, 1931 and direct the plaintiffs, at whose instance the order was passed, should pay the costs of the defendants in both the courts.

Appeal allowed

CRIMINAL

1931

Dec. 8

BENNET, J.

MAHADEO PANDEY AND OTHERS
versus
KING-EMPEROR THROUGH JOGANAND PANDE*

Penal Code, Sec. 336—Conviction under—Throwing bricks into another's house from enmity—"Any act"—Meaning of.

Where it was found that the accused had thrown bricks into the house of the complainant from enmity, *held,* that the act was one which would endanger the personal safety of the complainant when he was inside the house and of any other person who might be inside, and the accused committed an offence under Sec. 336 I. P. C. The accused could also be convicted of the offence of assault under Sec. 351 Penal Code, as the throwing of brickbats by the accused would be a gesture which would cause the complainant to apprehend that criminal force was about to be used against him. *Gaya Prasad* v. *King-Emperor,* 1929 A. L. J. R. 175 and *Babu Ram* v. *Emperor,* 23 A. L. J. R. 356 *referred to.* The general words "any act" used in Sec. 336 Penal Code are not limited to the meaning of "any legal act".

CRIMINAL REFERENCE made by P. L. RASTOGI ESQ., Sessions Judge of Ghazipur.

A. P. Pandey for the applicants.

Kumuda Prasad for the opposite party.

The following judgment was delivered by

Bennet, J.

BENNET, J.—This is a reference by the learned Sessions Judge of Ghazipur recommending that the conviction of the three applicants under Section 336 I. P. C. and sentence of fines of Rs.30 each should be set aside. The learned Sessions Judge is under the impression that the acts found would not amount to the offence mentioned in Section 336 I. P. C. He does not consider whether they would amount to an offence under any other section. He does not definitely state an opinion as to whether he considered that the finding of fact of the Magistrate was correct or not. The circumstances of the case are that Joganand Pandey, complainant, made a report on March 8, at 8-30 a. m. that the four accused persons about 9-30 p. m. including the three applicants had thrown bricks into his house from enmity, the several bricks had been thrown in, and that he had gone out of his house and had seen the accused standing with bricks in their hands outside his house, and that the accused had raised their hands to throw bricks. The complainant shouted, and three witnesses came up and saw the accused and the accused ran away. The names of the witnesses were given in the first information report, and these three witnesses gave evidence before the magistrate, and it is not shown or alleged that these witnesses had any personal enmity against the accused. There was no undue delay in the first information report, as distance from the thana was six miles, and it was not likely that the complainant would go at night to make this report. The police prosecuted the case. The defence was that there was enmity between the complainant and the accused. This of course is admitted, and such enmity may either be a cause of a false case or a motive for the act alleged. About the prosecution witnesses the plea merely is that they were disciples and friends of the complainant, and therefore gave evidence. Five defence witnesses were produced, but they proved nothing of weight for the defence. The magistrate wrote a long and careful judgment and convicted the accused, giving to one the benefit of the doubt as he was a young boy. The only grounds which the learned Sessions Judge mentions in favour of the defence are that the three accused are old men, two of them being 60 and one 52. The learned counsel for the defence produced in this Court one of these men who stated that he was an ordinary cultivator, and he certainly did not appear to be physically unfit to throw a brick. The Sessions Judge further stated that the three prosecution witnesses were casual witnesses, but he did not explain what he meant by this statement, and they are not casual in the sense that they come from a distance as they reside near the house of the complainant. No other reason is given for doubting the correctness of the prosecution story, and I see no reason to upset the finding of the magistrate on the facts. I therefore consider that the facts found by the magistrate are correct.

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*Cr. Ref. 641 of 1931

The next question is what is the correct law on the subject. The learned Sessions Judge referred to two rulings. In *Gaya Prasad* v. *K. E.*[1] there was a case where a Pujari left his temple at midnight and threw bricks into it in the hope that the Hindus believing that the bricks came from the Mohammedan quarter would get enraged, and there would be a Hindu Moslem riot, and it was found that no body was hit. Under these circumstances a learned single Judge of this Court held that the applicant could not be convicted under Section 336 I. P. C., because his act was neither rash nor negligent but deliberate, and Section 153 I. P. C. did not apply, because it could not be said that his act was illegal. The learned Sessions Judge fails to notice that the facts of that case are entirely different, because in that case the accused had thrown bricks into his own temple, whereas in the present case the accused threw bricks into the house of another person who did not consent to that operation. Further there was no suggestion that the act was done in order to create a riot, so Section 153 I. P. C. need not be considered. The second ruling referred to by the learned Sessions Judge is that reported in *Babu Ram* v. *Emperor*[2]. In that case when communal riots were taking place in different parts of the town the applicant, a brother of a licence-holder, took a gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house. It was held that this would not amount to an offence under Section 19 (*f*) of the Arms Act. There was a reference also to a conviction of the applicant under Section 336 of the Indian Penal Code on a finding that he threw brick-bats and fired shots at passers-by. This Court held that that conviction was on an insufficient and improper charge and that if the finding was correct the acts would amount to attempted murder or an attempt

[1] 1929 A. L. J. R. 175

[2] 23 A. L. J. R. 356

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to cause grievous hurt with a deadly weapon. I do not think that this ruling applied in any way whatever to the facts found in the present case. Section 336 states "that whoever does any act either rashly or negligently as to endanger human life or the personal safety of others" shall be guilty of an offence under that section. Learned counsel argued that "any act" must be limited to the meaning of "any legal act" and that the section would not apply to an illegal act. I do not see any authority in the rulings quoted for this limitation of the perfectly general words "any act". In the present case the throwing of bricks into the house of the complainant was an act which would endanger the personal safety of the complainant when he was inside and of any other person who might be inside. I do not see anything in the section which indicates that the facts found would not constitute an offence under this section. The learned Sessions Judge was certainly wrong when he states that if any body had been hit in the house it would furnish grounds only for a civil action. I may point out that the facts found would also amount to the offence of assault under Section 351 I. P. C., as the throwing of the brick-bats by the accused would be a gesture which would cause the complainant to apprehend that criminal force was about to be used against him, that is, if the bricks hit him, criminal force would be used against him. I consider that there is no reason whatever to set this conviction aside on legal grounds and I have already found that the facts were sufficiently proved. The sentence is not excessive. For these reasons I refuse this reference. Let the papers be returned to the Sessions Judge.

Reference refused

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1931

Dec. 17

SULAIMAN, J.
YOUNG, J.

LACHMAN DAS (*Applicant*)
versus
LAKSHMI NARAIN AND OTHERS (*Opposite party*)*

Insolvency—Receiver—Decree directing receiver to pay costs—Executable personally against him—Receiver's right to be re-imbursed from insolvent's estate.

Where the decree dismissing the receiver's appeal directed him to pay the costs of the respondent, without stating that the costs should be paid out of the insolvent's estate, the costs were executable personally against the receiver, though he had ceased to hold the office at the time of execution. If he wanted to safeguard his personal interest he should have obtained an indemnity from the creditor or other person in whose interest he was litigating. It was however open to the receiver or his heirs to apply to the insolvency court for an order that he may be re-imbursed out of the insolvent's estate. *Re. Suresh Chander Gooyee,* 23 C. W. N. 431 and *Balakrishna Menon* v. *Uma,* I. L. R. 52 Mad. 263 *relied on.*

EXECUTION FIRST APPEAL from a decree of BABU MAKHAN LAL, Subordinate Judge of Moradabad.

B. Malik for the appellant.

N. C. Vaish and *P. M. L. Verma* for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This case has been referred to a Division Bench because of an important point of law involved in it. Ganeshi Lal was the receiver of the estate of an insolvent Jagpal Saran. He brought a suit against one Mst. Bhagwati for a declaration that a will in her favour was not genuine and the property devised by the testator passed to the insolvent and not to her. The suit was dismissed with costs, the order being that 'the plaintiff do pay Rs.323-12-0 to the defendant as costs.' An application for executing the decree for costs against Ganeshi Lal personally was dismissed by the execution court on January 12, 1924. The receiver had in the meantime appealed to the High Court and on February 14, 1927 the High Court dismissed the appeal. The order for costs as entered in the decree was in the following words:

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*E. F. A. 270 of 1930

> And it is further ordered that the appellant aforesaid do pay to the respondent No. 1 aforesaid a sum of Rs.481-11-0 only the amount of the costs incurred by the latter in this court, and it is further ordered that the costs incurred in the lower court be paid as awarded by the said court.

The defendant decree-holder executed the decree of the High Court for costs against Ganeshi Lal personally. The application was resisted on the ground of *res judicata* on account of the previous dismissal of a similar application, and the non-liability of the receiver in his personal capacity. The court below has dismissed the application holding that the decree could not be executed personally against Ganeshi Lal.

There is no force in the plea of *res judicata*. The previous application was for the execution of the decree of the first court against Ganeshi Lal. That application was dismissed. The present application is for the execution of the decree of the High Court which was passed subsequent to that order and which directed the payment of the costs afresh. The previous order of the Subordinate Judge cannot therefore operate as *res judicata* when the question is as regards the interpretation of the High Court's decree. We accordingly overrule this plea.

The court below is of opinion that inasmuch as Ganeshi Lal was litigating not in his personal capacity but in that of the receiver of the estate, he could not be made liable for the costs personally. It seems to think that the decree in favour of the defendant for costs can be executed only as against the assets of the insolvent if any.

The order passed against Ganeshi Lal was not an order passed by the insolvency court, whose orders for costs against the receiver ordinarily imply that they are to be paid out of the assets in his hands. The order for costs was passed by the civil court in a suit brought by the receiver against the defendant-respondent. It was like an ordinary action between two litigants, and there is no reason why the successful defendant should suffer if the insolvent has no assets at all. The order directed that Ganeshi Lal should pay the costs to the defendant respondent and in the absence of anything to show that the costs would be recovered only from the assets of the insolvent, Ganeshi Lal was liable to the defendant to pay her costs. Of course, it would be open to Ganeshi Lal or his heirs to apply to the insolvency court for an order that he may be reimbursed out of the estate of the insolvent. If Ganeshi Lal were still continuing as the receiver it might possibly have been open to him to recoup himself out of the estate without even obtaining a previous order from the insolvency court.

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Lachman Das
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Lakshmi Narain

Sulaiman, J.

It was pointed out by the Calcutta High Court in the case of *Re. Suresh Chander Gooyee*[1] that

> if the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the court would make generally would be that he has to pay the respondent's costs and he will have the right of indemnity given him by the previous order of the court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for the costs should not be directed to be limited to the assets in the hands of the official assignee when the respondent is not in any way in default for which he may be partially mulcted in costs.

This case was followed by the Madras High Court in *Balakrishna Menon* v. *Uma*[2] in which it was held that 'where a decree dismissing the Official Receiver's appeal directed him to pay the costs of the respondents, without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the receiver, though he had ceased to hold office at the time of execution'. The learned Judges pointed out that in the absence of an express order to the contrary the receiver was personally liable to the opposite party who succeeds in the action, though the receiver may have a right to be reimbursed out of the insolvent's estate.

We think that the principle expounded in this case is sound. There seems to be no justification why the successful defendant should lose her costs if the insolvent has no assets. It was the duty of the receiver to ask the court to confine the execution of the decree to the assets of the insolvent, if that had been the real intention. If he wanted to safeguard his personal interest he should have obtained an indemnity from the creditor or other person in whose interest he was starting the litigation. In the absence of any express direction in the decree, it must be held that the receiver was in the first instance personally liable for the costs.

We accordingly allow this appeal with costs and setting aside the order of the court below, allow the decree-holder's application for the execution of the decree for costs against Lala Ganeshi Lal personally. As Lala Ganeshi Lal is dead, the decree will be executable against the assets of the deceased in the hands of the heirs if any.

Appeal allowed

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[1] 23 C. W. N. 431

[2] I. L. R. 52 Mad. 263

Civil

1931

Dec. 3

Mears, C. J.
Sen, J.

CHOKHEY LAL and another (*Plaintiffs*)
versus
SRI KISHEN and another (*Defendants*)*

Civil Procedure Code, Or. 38, R. 5—Notice issued under—Defendant shows cause why he should not furnish security—Court's order accepting defendant's contention falls within Or. 38, R. 6(2)—And appeal lies under Or. 43(1)(q).

On the application of the plaintiff under Or. 38, R. 5 the court passed the order—"the defendant will be ordered to appear and furnish security for Rs.23,000 or show cause why it should not be furnished. The property in the list (filed with the plaintiff's application) will be conditionally attached pending such showing of cause". The defendant appeared in court and showed cause why he should not furnish security, and the court

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*F. A. F. O. 87 of 1931

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cancelled the conditional order of attachment; *held,* that the order of the court accepting the contention of the defendant is an order which falls within Or. 38, R. 6(2), and is appealable under Or. 43(1)(*q*) C. P. C.

First Appeal from an order of F. C. M. Cruickshank Esq., Subordinate Judge of Naini Tal.

Iqbal Ahmad and *G. S. Pathak* for the appellants.

M. N. Kaul (with him *K. N. Katju*) for the respondents.

The judgment of the Court was delivered by

Sen, J.

Sen, J.—On April 16, 1931 Lala Chokhey Lal and Lala Murli Dhar instituted a suit for recovery of Rs.23,254-2-0 on foot of two promissory notes, dated January 10, 1929 and March 10, 1930 executed by Sri Kishan and Bhan Deo in their favour. On the same day they made an application which purported to be under Order 38, Rule 5 of the Code of Civil Procedure. The learned Subordinate Judge passed the following order on the application:—

> The defendant will be ordered to appear and furnish security for Rs.23,000 or show cause why it should not be furnished. The property in the list will be conditionally attached pending such showing of cause.

It appears that the application of the plaintiffs was accompanied by a list of property possessed by the defendants. In answer to the notice issued to the defendants the latter appeared in court and showed cause. The court held that it was not established that the defendants had done anything which came within the purview of Order 38, Rule 5 C. P. C. and the result was that the court cancelled the conditional order of attachment and dismissed the plaintiffs' application with costs. Plaintiffs appeal to this Court from this order. A preliminary objection has been taken to the hearing of the appeal on the ground that no appeal lies under O. 43, C. P. C. Where in response to a notice issued to the defendant under O. 38, R. 5 C. P. C. the defendant appears in court and shows cause why no order for furnishing security should be passed against him and why no order should be passed directing the attachment of his property, the order of the court accepting the contention of the defendant is an order which falls within O. 38, R. 6(2) C. P. C. From such an order an appeal lies under O. 43(1)(Q) C. P. C. We therefore hold that an appeal lies to this Court and we reject the preliminary objection.

On the merits, we are clearly of opinion that the appeal is without any substance. The plaintiffs, in order to succeed, had to establish that the defendants, with intent to obstruct or delay the execution of any decree that might be passed against them, were about to dispose of the whole or any part of the property or about to remove the whole or any part of the property from the local limits of the jurisdiction of the court. We have examined the affidavit of Lala Murli Dhar dated April 16, 1931. There is nothing in this affidavit to show that the defendants with intent to obstruct or delay the execution of any decree which might ultimately be passed against them were about to do one of the two things mentioned in Sub-rule 1 of Rule 5 of O. 38 C. P. C. We are therefore of opinion that the application is incompetent. We accordingly affirm the order of the court below and dismiss this appeal with costs. The record should be sent to the lower court with the intimation that this Court hopes that the case will be proceeded with and disposed of at the earliest possible moment.

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Dec. 17

SULAIMAN, A. C. J. YOUNG, J.

ASIA BIBI (*Decree-holder*)
versus
MALIK AZIR AHMED AND OTHERS (*Judgment-debtors*)*

Civil Procedure Code, Or. 21, R. 16, Proviso to—Applicability of—Decree under Or. 34, R. 6 against heirs of mortgagor—A judgment-debtor dies—Decree-holder inherits an interest in his estate—Whether right to execute decree extinguished.

The proviso to Or. 21, R. 16 applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case it is obvious that the person who acquires a decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors, and there is complete merger. In such an event, the execution cannot proceed against the latter.

Where the decree-holder, who had obtained a decree under Or. 34, R. 6 against the heirs of the mortgagors, was entitled to recover the whole amount against the estate of the mortgagor in the hands of his heirs, including the decree-holder's husband, and the subsequent death of her husband only made her inherit a part of the share which the deceased had got in the assets of the original mortgagor, *held*, that inasmuch as this inheritance did not make her jointly and personally liable for the payment of the whole decree which she held, her right to execute the decree was not extinguished simply because she became an heir to one of the heirs of the original judgment-debtor. But inasmuch as part of the assets of the original judgment-debtor became vested in her by operation of law, she was bound to give credit for a proportionate amount of the decree, and accordingly the amount had to be reduced *pro tanto*. *Banarsi Das* v. *Maharani Kuer*, I. L. R. 5 All. 27 *referred to.*

The substitution of the expression "for the payment of money", for the words "for money" in the proviso in the new Code was intended to emphasize that the proviso was confined to cases of personal decrees. The proviso cannot apply to a case where the decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors. In such a case at no time the decree can be said to have been transferred to a person who is one of two or more persons against whom a decree for the payment of money exists. *Panachand Pomaji Marwari* v. *Sundrabai*, I. L. R. 31 Bom. 308, *Sadagopal Aiyengar* v. *Sellamal*, 72 I. C. 861 and *V. E. S. Subramanin Chetty* v. *Kasi Chetty*, 1927 A. I. R. Mad. 937 *referred to.*

EXECUTION FIRST APPEAL from a decree of BABU MAHESHWAR PRASAD, Subordinate Judge of Allahabad.

P. L. Banerji and *Mushtaq Ahmad* for the appellant.

Haribans Sahai and *Sri Narain Sahai* for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is a decree-holder's appeal arising out of an execution proceeding. In 1901 Bhawani Prasad and others obtained a decree for sale on the basis of a mortgage deed against one Fakir Bux. The mortgaged properties were put up for sale from time to time, but they proved insufficient to pay the whole decretal amount. Faqir Bux died during the pendency of these proceedings. In 1918 the decree-holders obtained a decree for money for the balance of the amount under Order 34, Rule 6 against the heirs of Faqir Bux. The form of this decree was slightly defective, and we shall discuss it later. This decree was transferred in 1925 to Mst. Asia Bibi, the wife of Abdul Rauf, one of the heirs of Faqir Bux. It is not now disputed that Asia Bibi was not a benamidar for her husband, but had purchased this decree in her own right. She put the decree in execution against the heirs of Faqir Bux, including her husband Abdul Rauf. During the pendency of the execution proceedings Abdul Rauf died in 1929, and she became one of his six heirs. The respondent-judgment debtors then objected that owing to a merger, her right to execute the decree had become extinguished. It may also be mentioned that Mst. Asia Bibi applied for an amendment of her previous application for execution by the addition of some more properties after the death of Abdul Rauf. She had, however, made all the heirs of Faqir Bux parties to her application, except one Hasina Bibi, who was alleged by her to have been the mistress of Faqir Bux, and not his legally wedded wife. She, however, did not implead the other heirs of Abdul Rauf, but offered to reduce the amount of her decree to the extent of the share of Abdul Rauf in the assets of Faqir Bux.

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*E. F. A. 318 of 1930

The learned Subordinate Judge has dismissed her application for amendment on the ground that the matter was discretionary with the court and it was not proper that the amendment should be allowed at such a late stage. He further held that under Order 21, Rule 16 the right of the decree-holder to execute the decree against the other judgment-debtors had become extinguished and her remedy was only by way of a separate suit for contribution. He also thought that such a suit would be the proper proceeding for the determination of the question whether Mst. Hasina Bibi was or was not one of the heirs of Faqir Bux.

No doubt the applicant could not as of right claim an amendment of the application for execution by the addition of fresh properties, but it cannot be doubted that her right to apply for execution was alive in 1929 when she filed the application. She might have got this application dismissed and filed a fresh application including the additional properties as well. In these circumstances, we think that the discretion would have been exercised more properly by allowing the amendment, subject to any orders as to costs which the court thought fit to make. There was no necessity to compel her to file a fresh application. In this connection it may be pointed out that the learned Subordinate Judge was under a misapprehension in thinking that two of the heirs of Faqir Bux, namely, Mst. Saidunnissa and Wajidunnissa, had not been impleaded previously and were sought to be brought on the record by means of this application for amendment. As a matter of fact, their names had been on the record all along, and they were only mentioned because the additional properties were in their possession. There was, therefore, no question of adding new parties to the execution proceedings against whom the execution might have become time-barred.

We also see no defect in the other heirs of Abdul Rauf not being brought on the record, when the decree-holder was prepared to give credit for the entire liability of Abdul Rauf.

The principal question for consideration is whether the right to execute the decree has become extinguished by virtue of the provisions of Order 21, Rule 16. The question whether the remedy of a decree-holder who acquires a part of the property of a judgment-debtor is by execution under Section 47 C. P. C. or by a separate suit for contribution is really a matter of procedure, and not of any substantive law. Nor do we think that any question of equity, apart from mere convenience, is involved. Where the rights of a decree-holder and the liability of a judgment-debtor become united in one and the same person, there would obviously be merger. But the doctrine of complete merger involves the essential condition of the co-extensiveness of such rights and liabilities.

The proviso to Order 21, Rule 16 is in the following words:—

> Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

That proviso applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case it is obvious that the person who acquires a decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors. In such an event, the execution cannot proceed against the latter. The provision does not apply to the converse case where the joint and personal liability of one or two or more judgment-debtors is not fastened on the decree-holder, but the latter acquires either by private treaty or operation of law a share in the estate of one of the judgment-debtors. In such an event there is no co-extensiveness of rights and liabilities, and there can be no merger.

The court below has relied in support of its judgment on certain observations contained in the judgment in the case of *Banarsi Das* v. *Maharani Kuer*[1]. The passages quoted, if taken in their widest scope, might be considered to support this contention. But this question did not at all arise in that case, and the observations could at the most be treated as *obiter dicta*. In that case one of several joint judgment-debtors had acquired only a partial interest in the decree, and it was accordingly held that there had been no extinguishment of the right to execute it. Thus, it was a case where the decree had been transferred to one of the judgment-debtors, and also where the whole decree had not been transferred. The present case is just the converse.

Mst. Asia Bibi was the decree-holder entitled to recover the whole amount against the estate of Faqir Bux in the hands of his heirs, including her husband Abdul Rauf. When the decree was transferred to her she had no concern in the eye of the law with any of the judgment-debtors. The subsequent death of Abdul Rauf only made her inherit a part of the share which Abdul Rauf had got in the assets of Faqir Bux. This inheritance did not make her jointly and personally liable for the payment of the whole decree which she held. We are accordingly of opinion that her right to execute the decree was not extinguished simply because she became an heir to one of the heirs of the original judgment-debtor. But inasmuch as part of the assets of the original judgment-debtor became vested in her by operation of law, she was bound to give credit for a proportionate amount of the decree, and accordingly the amount had to be reduced *pro tanto*.

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[1] I. L. R. 5 All. 27

There is another aspect of the case which also might strengthen the position of the appellant. The decree under Order 34, Rule 6 was passed, not against Faqir Bux, the original mortgagor but against his heirs. In the application for the preparation of the decree the prayer was for a decree against the assets of the deceased Faqir Bux in the hands of his heirs, which were specified. The court ordered that the application be allowed with costs and a personal decree be passed as prayed. The decree was, however, drawn up on a printed form which is generally applicable to original mortgagors who are alive, and did not in the operative portion of it expressly state that the amount was to be realised out of the assets in their hands. It may further be mentioned that later on, on September 6, 1929, the execution court directed that the decree should be executed by the sale of the entire assets of Faqir Bux, and not of shares in the hands of his individual heirs.

If the decree were to be treated as a decree against the assets of Faqir Bux in the hands of his heirs, then it would be obvious that these heirs were not jointly and personally liable to pay the amount. Their liability would be limited to the extent of the assets, if any, which they received. The case would then be analogous to a mortgage decree for sale of mortgaged property in which no personal liability was involved. The substitution of the expression "for the payment of money," for the words "for money" in the proviso in the new Code was intended to emphasise that the proviso was confined to cases of personal decrees. This proviso would, therefore, not apply to cases of personal decrees. We, however, do not consider it necessary to decide whether the form in which the decree was actually prepared, even though wrong, was one of a personal decree against the heirs of Faqir Bux.

There was a second death, namely, that of Abdul Rauf, and even if there had been a personal decree against Abdul Rauf, that personal liability has not devolved on his wife, Mst. Asia Bibi. Therefore Mst. Asia Bibi can execute her decree in spite of the fact that she has become an heir to the estate of Abdul Rauf, and will take her legal share in it, subject to any liability which had previously existed.

On the question whether the proviso can at all apply to a decree against an estate as distinct from a decree against the persons of the judgment-debtors there has been a conflict of opinion between the Bombay and the Madras High Courts. In the case of *Panachand Pomaji Marwari* v. *Sundrabai*[2] the Bombay High Court, in a case which arose under the corresponding Section 232 of the old Code, held that the proviso applied only where in the decree there was a distinct order upon the defendants personally to pay the money. In the case of *Sadagopal Aiyengar* v. *Sellammal*[3] the Madras High Court appears to have doubted the Bombay ruling. But according to the facts as stated in the reported judgment, the decree in that case was one for the payment of money against the first defendant and three others, and the first defendant was directed by the decree to pay the amount out of his family property. It was thought that this

[2] I. L. R. 31 Bom. 308

[3] 72 I. C. 861

direction did not make the decree any the less a decree for the payment of the money against him. If the decree was primarily one for payment of money against the 4 defendants, the judgment was perfectly correct. The case of (98 I. C. 260) is a single judge's decision, which certainly supports the respondents. In that case the decree had been assigned in 1919, and later on the assignee of the decree became one of the heirs of the defendant No. 1. The objection of the other defendants that the decree had ceased to be executable was allowed, and the observations made in *Banarsi Das's* case were relied upon. But this case appears to have been distinguished by a Division Bench of the same High Court in the case of *V. E. S. Subramanin Chetty* v. *Kasi Chetty*[4]. The judgment does not make it quite clear on what basis the single Judge's decision was really distinguished. We have already pointed out that there too the assignee of the decree-holder had become an heir to the estate of one of the defendants long after the assignment in his favour. The fact, however, remains that a Division Bench of the same High Court came to the conclusion that where the plaintiff had obtained a money decree against his father, who had also a grandson, and the father died during the attachment of his property, the plaintiff becoming one of his heirs, he was nevertheless entitled to execute the decree against the half share of the house in the occupation of the grandson. The fact that the decree-holder had become entitled to a half share in the property of the judgment-debtor which had been attached did not, in the opinion of the learned Judges, make the proviso applicable to that case.

We are clearly of opinion that the proviso cannot apply to a case where the decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors. In such a case at no time the decree can be said to have been transferred to a person who is one of two or more persons against whom a decree for the payment of money exists.

The omission of Hasina Bibi, in this case, assuming that she was one of the heirs of Faqir Bux would not be fatal to the application. The utmost that could happen would be that her interest in the estate would have to be excluded and the decree-holder would have to submit to a further reduction in the amount of the decree on the basis of Hasina Bibi also being one of the heirs. The question whether she was one of the heirs can be raised by one of the objectors, if they want to get the amount of the decree reduced. The original judgment-debtor was a Mohammedan, and the devolution of shares would admittedly be according to the Mohammedan Law.

We accordingly allow this appeal, direct that the application for execution be amended as asked for and the objections of the judgment-debtors disallowed to that extent, and send the case back to the court below for disposal in the light of the observations made by us. The order dated September 6, 1929 is not hereby cancelled. If the objectors wish to raise any objections as regards the saleability of the new items of property, they will be at liberty to do so.

As the court below considered that the amendment of the application for execution by the addition of some new property was sought at a late stage, we think that the parties should bear their own costs of the proceedings in the court below subsequent to November 18, 1929. The appellant will have the costs of this appeal from the respondents.

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[4] 1927 A. I. R. Mad. 937

Appeal allowed

Civil
1931
Nov. 30
Banerji, J.
King, J.

AMBIKA PRASAD (*Applicant*)
versus
DEVI DAYAL AND OTHERS (*Opposite parties*)*

Civil Procedure Code, Sec. 109 (a)—Order granting an application for review of judgment—Not a 'final' order appealable to Privy Council.

An order made on an application for review of judgment that the appeal be re-heard in the light of new and additional evidence in the shape of a deed of gift, does not finally dispose of the dispute between the parties but reopens the decree that was passed originally by the court, and therefore the order for review is not a final order within the meaning of Sec. 109 (*a*) C. P. C. which is appealable. *Ram Chand* v. *Goverdhan Das*, 18 A. L. J. R. 591 *relied on.*

Application for leave to appeal to His Majesty in Council.

B. E. O'Conor and *Ram Nama Prasad* for the applicant.

S. N. Verma for the opposite parties.

This was an application for leave to appeal to Privy Council from an order of the High Court granting an application for review of judgment in F. A. 395 of 1918.

The suit out of which F. A. 395 of 1918 arose was brought by the plaintiffs claiming the immovable properties left by one Nand Lal, whose next reversioners or their transferees the plaintiffs professed to be after the death of Nand Lal's widow Mst. Rukmani Kuar and daughter Mst. Sitala Kuar, the latter of whom admittedly died on December 16, 1906. The trial court dismissed the suit and held that plaintiffs were excluded by the next reversioner Bhawani Charan who was alive on December 16, 1906, the date of Mst. Sitala Kuar's death, and on appeal to the High Court, the trial court's decision was confirmed on June 15, 1921.

On October 18, 1926 the plaintiffs filed in the High Court an application for review of judgment on the ground that they had discovered a new piece of evidence, viz., a deed of gift dated April 22, 1893 executed by Gur Sahai, the father of Bhawani Charan, which conclusively established the death of Bhawani Charan prior to the date of the execution of the deed and therefore also prior to December 16, 1906, the date of Mst. Sitala's death. This application was allowed by the High Court on February 27, 1929 and the appeal ordered to be reheard in the light of this additional evidence.

The judgment of the Court was delivered by

Banerji, J.

Banerji, J.—This is an application for leave to appeal to His Majesty in Council against an order of this Court granting an application for review. In paragraph 11 of the petition it is averred that so far as the review application was concerned the case had been finally decided and that

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*P. C. A. 25 of 1929

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Banerji, J.

paragraph goes on to say that the matter raises important and substantial points of law of general importance and that the case was a fit case for us to certify to His Majesty in Council.

The learned counsel for the petitioner has submitted that the application was for a certificate under Section 109(*a*) or in the alternative under Section 109(*c*) of the Civil Procedure Code. The valuation of the property involved in the case is over Rs.10,000. The learned counsel submits that Section 109(*a*) provides that an appeal shall lie to His Majesty from any decree or final order passed in appeal by a High Court, and that so far as the parties in this case are concerned, the order granting a review has set aside a final decree and that this court, having granted an application for review has passed an order that is final between the parties. We have come to the conclusion that this contention of the learned counsel cannot be accepted. An order can only be called a "final" order if it finally disposes of the rights of the parties. But granting of an application for review does not finally dispose of the dispute between the parties. Reference may be made to the case of *Ram Chand* v. *Goverdhan Das*[1] where their Lordships of the Privy Council in a case where stay had been refused by the appellate court, held that the order refusing stay was not such an order as would be appealable to their Lordships. It is unnecessary to refer to various other cases on the point.

The order passed by us granting a review really does not finally dispose of any case but reopens the decree that was passed originally by the court and we therefore are of opinion that an order for review is not a final order which is appealable. We may also mention, S. 109(*a*) lays down that the final order which is appealable is a final order "passed on appeal" and does not say that any order finally or otherwise passed in exercise of the appellate jurisdiction of the court is appealable.

The next point which has been contended for by the appellants is that we should certify under the provisions of Clause (*c*) of S. 109 of the Civil Procedure Code that this case is a fit case for appeal to His Majesty.

It is contended that the principle upon which a court should act in certifying in review matters, is that where an appeal is permitted under Order 47, R. 7 of the Civil Procedure Code, there should be an appeal to His Majesty in Council, as no appeal is provided for by the Code against an order of the High Court.

It was argued that in this case, if an appeal was permissible under Order 47, R. 7, the applicant could have objected that the application for review was barred by limitation and that this Court exercised its discretion wrongly in extending time to the applicants. Reliance is placed on the case of *Jagmohan Singh* v. *Sheomangal Singh*[2]. We have examined this case and the reason that was given for rejecting that application was that even if it was a case in which an appeal was allowed, the provisions of Order 47, R. 7 did not give a right of appeal in that particular case. It is not possible to hold that this case is an authority for the proposition that when a right of appeal is given by Order 47, R. 7, a case can be said to be a fit case for certification for appeal to His Majesty in Council. The learned counsel strenuously contended that the exercise of discretion in this particular instance was wrong and if the matter went up to their Lordships

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[1] 18 A. L. J. R. 591

[2] 19 I. C. 332

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of the Privy Council, there would be an end to the litigation. The learned advocate for the respondent urges that even if leave is granted, in the event of their Lordships of the Privy Council agreeing with the view taken by us on the question of the exercise of discretion, the litigation will still continue. It can hardly be said that any substantial question of law has to be decided in the case. Moreover, the admission of additional evidence is subject to the decision of the court whether the document presented now was or was not admissible. Further there were a number of issues in the case which would have to be decided even if the court held upon a consideration of the additional evidence now to be tendered that the plaintiff had a *locus standi* to sue. In these circumstances, we are of opinion that this case is not a fit case in which we should certify it to be appealable to His Majesty in Council. The application is dismissed with costs.

Application dismissed

Civil
1931
Dec. 8
Mears, C. J.
Sen, J.

NIAZ AHMED (*Applicant*)
versus
PHUL KUNWAR (*Opposite party*)*

Civil Procedure Code, Or. 34, R. 6—Decree under—Against mortgagor who has obtained an order of discharge by insolvency court—Whether can be passed.

The mortgagor was adjudicated an insolvent with reference to debts provable in insolvency. In the suit for sale by the mortgagee, the mortgaged property was sold in execution of the mortgage decree after the order of discharge. As the net proceeds of the sale were found insufficient to pay the amount due, the mortgagee applied for a decree under Or. 34, R. 6; *held,* (1) that the debt due to a secured creditor is not provable in insolvency and the order of discharge cannot affect his rights, (2) that the order of discharge cannot take away the statutory right of the decree-holder under Or. 34, R. 6, which materialised after the order of discharge.

Civil Revision from an order of Babu Makhan Lal, Subordinate Judge of Moradabad.

M. H. Faruqi for the applicant.

K. N. Katju and *Banke Behari* for the opposite party.

The judgment of the Court was delivered by

Sen, J.

Sen, J.—On August 22, 1917, one Sirajuddin took a lease of certain zemindari property from Rani Phul Kunwar. A *patta* and a *qabuliat* were executed in evidence of this transaction and the lessee agreed to pay to the lessor Rs.2,500 in certain instalments. On the same date, Niaz Ahmed stood surety for the lessee and executed a surety bond in favour of Rani Phul Kunwar, whereby he agreed to pay her Rs.2,500 together with interest at a certain rate in case of default on the part of the lessee and hypothecated his immovable property in her favour.

The lessee did not pay the stipulated instalments and a right of suit accrued to Rani Phul Kunwar against the lessee and his surety. In 1924, the surety applied to the Bombay High Court, to be declared an insolvent. It is said that notice of this application was issued to Rani Phul Kunwar.

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*Civ. Rev. 551 of 1930

We do not know why this notice was given. A copy of this notice is not on the record and we do not know its contents.

Niaz Ahmed was duly adjudicated an insolvent.

Later on, he applied for his discharge. Notice of his application was given to his creditors and presumably to Rani Phul Kunwar who was misdescribed as the "wife of H. H. Maharajah Ranjit Singh". Rani Phul Kunwar was not the *wife* but the *widow* of Rai Bahadur Chaudhry Ranjit Singh.

The insolvent was duly discharged by the Bombay High Court on August 17, 1926.

Rani Phul Kunwar sued on her mortgage and obtained a decree for principal and interest by the sale of the mortgaged property. The decree was passed for a sum of Rs.4,643-9-0. A final decree was obtained against the mortgagor and in execution of this decree his property was sold for Rs.479.

Rani Phul Kunwar applied for a decree over under O. 34, R. 6 of the Code of Civil Procedure. Her application was resisted by the mortgagor on the ground that the order of discharge by the Bombay High Court in the exercise of its insolvency jurisdiction completely absolved him from all debts due from him until the date of his discharge and that the order of discharge operated as *res judicata*. This plea was overruled by the Subordinate Judge of Moradabad and a decree for the balance due on the mortgage after sale of the property was passed in favour of Rani Phul Kunwar.

Niaz Ahmad has applied to this Court for a revision of this order under Section 115 C. P. C. Where a simple money decree has been passed under O. 34, R. 6 C. P. C. the remedy of the defendant is to file an appeal. Where another remedy exists by statute, an application for revision under Section 115 C. P. C. is not competent.

Rani Phul Kunwar being a secured creditor, the debt due to her was not provable in bankruptcy. Under Section 17 of the Presidency Towns Insolvency Act, the order of adjudication does not affect the power of any secured creditor to realise or otherwise deal with his security as he would have been entitled to, independently of that section.

The order of discharge has no more effect upon the right of the secured creditor than the order of adjudication. Under Section 45 (2) "an order of discharge shall release the insolvent from all debts provable in insolvency." The debt due to a secured creditor is not a debt provable in insolvency. The order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract.

There is no difference in this respect between the Provincial and the Presidency Towns Insolvency Acts. Where a mortgagor has been adjudicated an insolvent with reference to certain debts which were provable in insolvency the order of adjudication and the order of discharge do not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency.

The mortgagee was entitled to a decree over under Order 34, Rule 6 of the Code of Civil Procedure, if on the date of his application "the ba-

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Sen, J.

lance was legally recoverable from the defendant otherwise than out of the property sold."

The mortgaged property was sold in execution of Rani Phul Kunwar's decree after the order of discharge. The right to a decree under Order 34, Rule 6 C. P. C. did not accrue till after the sale of the property. The right to a personal decree was not time-barred on the date of the presentation of the application. The order of discharge cannot take away the statutory right of the decree-holder which materialised long after the order of discharge. We hold that the decree was rightly passed. Our attention has been drawn to Section 128 of the Indian Contract Act. This section is irrelevant. We dismiss the application with costs.

Application dismissed

CIVIL
1931
Dec. 21
PULLAN, J.
NIAMATULLAH, J.

SHANTI LAL (*Applicant*)
versus
RAM GOPAL (*Opposite party*)*

Civil Procedure Code, Sec. 144—Suit for dissolution of partnership in two factories—Defendant in possession—Suit decreed—Decree included appointment of receiver—By agreement each party agreed to manage one factory—Decree set aside on appeal as no valid partnership existed—Defendant dies—His son entitled to possession of factory placed under plaintiff's management.

A suit for dissolution of partnership in two factories was decreed and the decree included the direction that a receiver be appointed, but the parties came before the court and agreed that one factory be managed by defendant and the other by plaintiff. On appeal by defendant, the High Court set aside the decree holding that there was no valid partnership. Defendant having died, his adopted son applied for restitution under Sec. 144 C. P. C. seeking *inter alia* to be put in possession of the factory which was under the agreement placed under plaintiff's management. *Held*, that as the defendant was in possession when the suit was brought, he could recover possession by restitution, and as there was no proof that his possession terminated with his death, his son was entitled to represent him after his death and to recover possession and profits, if any, accruing from the factory during plaintiff's management.

Mewa Ram v. *Ram Gopal*, I. L. R. 48 All. 735 *mentioned.*

FIRST APPEAL from a decree of BABU PREO NATH GHOSE, First Additional Subordinate Judge of Moradabad.

Panna Lal for the appellant.

S. K. Dar and *Janki Prasad Singhal* for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an appeal from an order of the first Additional Subordinate Judge of Moradabad passed on an application for restitution under Section 144, C. P. C. The plaintiff in the suit was Seth Ram Gopal. He sued for dissolution of a partnership in two ginning factories: one at Saharanpur and the other at Chandausi, and for partition of its assets. The suit was defended on the ground that the partnership was illegal owing to the fact that there were more than 20 shareholders in the factory from the very beginning. There were two other suits, also brought

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*F. A. 554 of 1927

Niamat-ullah, J.

by Seth Ram Gopal, for dissolution of partnership in respect of two other factories at Chandausi. In each case the principal defendant was Rai Bahadur Mewa Ram. All the three suits were decreed by the Subordinate Judge of Moradabad, but we are concerned only with the suit dealing with the factory at Saharanpur and the old ginning factory at Chandausi.

In this case the decree of the Subordinate Judge included the direction that a receiver should be appointed. This order was passed on August 10, 1922. On August 23, 1922, the parties came before the court and agreed that the defendant No. 1, R. B. Mewa Ram, should be appointed manager of the factory at Saharanpur and the plaintiff Seth Ram Gopal of the Old Ginning factory at Chandausi. Clearly this agreement was entered into by the parties in order to avoid the appointment of an outside person as a receiver. Against the decree an appeal was preferred by the defendant and was allowed by a Bench of this Court on May 31, 1926. The two Judges who heard this appeal disagreed, and the point of law on which they disagreed was referred to a third Judge. The decision as stated in the head note of the report in *Mewa Ram* v. *Ram Gopal*[1] is as follows:—

> When an association formed for the purposes of gain is unregistered, although under the law it ought to have been registered, and the business of the association has been going on for some years, none of its members can sue in a court of law for partition of the existing assets.

On this finding the appeal was allowed and the suit was dismissed. The defendant, R. B. Mewa Ram, had in the meantime died. On November 11, 1926 his adopted son, Lala Shanti Ram, made a petition for restitution under S. 144, C. P. C. He sought *inter alia* to be put into possession of the old Ginning Factory at Chandausi, which under the agreement of August 23, 1922 had been given over to Seth Ram Gopal for management. This is the sole question which is now before us in appeal.

The Additional Subordinate Judge gave on this point the following decision:—

> Section 144 merely lays down a procedure. The person who seeks its aid must show that he has a substantive right to be restored to possession. Had Mewa Ram been alive, he might have had the right to be restored to possession, but his right to possession as a manager did not devolve upon Shanti Lal by right of succession of survivorship.

He accordingly dismissed the application in so far as it sought possession of the old Ginning Factory at Chandausi and the profits. We do not consider that the view taken by the learned Additional Subordinate Judge on this question is correct. The relevant portion of S. 144 runs as follows:—

> Where a decree is reversed, the court of first instance shall, on the application of any party entitled to benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been reversed.

The decree directed the appointment of a receiver. In pursuance of that order the parties came to an agreement that one factory should be managed by Mewa Ram and the other by Ram Gopal. The High Court's

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[1] I. L. R. 48 All. 735

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order sets aside the decree on the ground that the plaintiff could not bring such a suit, thereby setting aside the whole proceedings from the beginning. The only course which could be followed in law for any party whose possession had been interfered with on account of that decree was to apply for restitution under S. 144. Possession of the factory, when the suit was brought, was with R. B. Mewa Ram, and the Additional Subordinate Judge appears to concede that had R. B. Mewa Ram been alive, he might have got back possession by way of restitution. But here the court appears to be in error in supposing that this right would have accrued to R. B. Mewa Ram as manager of the property. No doubt, the word 'manager' was used in the agreement between the parties on August 23, 1922, and no doubt, also R. B. Mewa Ram defended the original suit saying that he was a partner in the Company and the manager of the factory; but the order of this High Court was that there was no partnership, and we must accept that order as meaning that the possession of R. B. Mewa Ram when the suit was brought was not that of a manager of a partnership concern. We need not say what title R. B. Mewa Ram possessed. It is sufficient if we say that he was a party in possession. We are of opinion that not only can such a person recover possession by restitution but, where there is no proof that his possession terminated with his death, his son is entitled to represent him after his death. Mr. Dar for the respondent has argued that there is nothing to show that had Mewa Ram died his son would have succeeded to the management. It may be so; but this waives the question, for we are bound to hold that there was no management as there was no valid partnership of the concern. In our opinion, the applicant was entitled to restitution by possession of the old factory in addition to the other reliefs already decreed. He is also entitled to the profits, if any, accruing from the factory during the period of management by the plaintiff. The lower court has not given a decision as to the amount of profits. We accordingly remand the case under O. 41, R. 23, I. P. C., for disposal of the other questions arising between the parties on the merits. The appellant will get his costs of this appeal in this Court. Future costs will abide the result.

Case remanded

CIVIL
1932
Jan. 4
SULAIMAN, J.
YOUNG, J.

KRIPA RAM (*Defendant*)
versus
KUNWAR BAHADUR (*Plaintiff*)*

Limitation Act, Art. 36—Applicability of—Suit for compensation—By attaching creditor—Against person who misappropriates attached goods.

A suit for compensation by an attaching creditor against a person who dishonestly removes the attached goods, sells the same and misappropriates the sale proceeds, is governed by Art. 36 of the Limitation Act, and not by Arts. 48 and 49, which apply to cases where the plaintiff has a right to possession of the goods.

FIRST APPEAL from an order of P. C. PLOWDEN ESQ., District Judge of Bareilly.

G. S. Pathak for the appellant.

P. M. L. Verma for the respondent.

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*F. A. F. O. 63 of 1931

The judgment of the Court was delivered by

SULAIMAN, J.—This is a defendant's appeal from an order of remand. The plaintiff alleged that he had brought a suit against Sewa Ram and got certain sugar and treacle belonging to his debtor attached before judgment. The present defendant, Kirpa Ram, filed an objection to the attachment of the sugar and treacle claiming them as his own property, but his objection was dismissed in April 1926; and the plaintiff's suit was decreed. Thereupon the present defendant filed a suit for a declaration of his title to the properties attached; but that suit failed. According to the plaintiff, the defendant obtained a stay order during the pendency of his declaratory suit, and in collusion with the custodian of the property, who had been appointed by the court, and the judgment-debtor, he dishonestly removed the sugar, sold the same and misappropriated the sale proceeds. This misappropriation was alleged to have taken place in May or June 1926. The plaintiff filed a complaint in the criminal court on July 27, 1926, which however proved infructuous. He then filed his suit on July 29, 1929, July 27 and 28 being holidays.

The claim was resisted on merits, as well as on the ground of limitation and absence of cause of action. The trial court, without going into the facts, dismissed the suit on the plea of limitation alone, holding that Article 49 of the Limitation Act applied and the claim was more than three years after the misappropriation.

On appeal the lower appellate court has come to the conclusion that neither Article 48 nor 49, nor even Article 36 of the Limitation Act applies, but that the residuary Article 120 applies and the claim was within time. It has accordingly sent the case back to the trial court for decision on the remaining issues.

It is well settled that the residuary Article 120 cannot be applied where there is any other special article applicable to the facts of the case. If, therefore, the suit falls under any of the other articles, this omnibus article would be inapplicable.

As observed by their Lordships of the Privy Council in the case of *L. P. E. Pugh* v. *Ashutosh Sen*[1], Articles 48 and 49 are intended to apply to suits for recovery of specific movable property or for compensation for the same. Article 48 is more special, whereas Article 49 is more general. Article 48 is confined to cases where the movable property has been lost or acquired by theft or dishonest misappropriation or conversion, and for compensation for wrongfully taking or detaining the same. Article 49 applies to other specific movable properties or for compensation for wrongfully taking or injuring or wrongfully detaining the same. If we had to look to nothing but the first column in Article 48, the present case, being one of dishonest misappropriation or conversion, might be thought to fall under it. But in the last column it provides that time begins to run from the date when the person having the right to the possession of the property first learns in whose possession it is. The article is accordingly intended to apply to cases where the plaintiff having the right to the possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. In the present case the plaintiff was a mere attaching creditor and had no right to the possession of the property itself. His

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[1] 1929 A. L. J. R. 170

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BAHADUR

Sulaiman, J.

only remedy was to put it up for sale after the decree had been obtained and realise his decretal amount, although he might himself have purchased the property in lieu of it. It, therefore, seems to us that Article 48 cannot apply to the facts of the present case. Article 49 is a more general article and applies to other cases of specific movable property being wrongfully taken, injured or detained. The difference between Articles 48 and 49 is that while the former refers to cases where the property has been lost, acquired by theft or dishonest misappropriation or conversion, the latter applies to other cases of wrongfully taking, injuring or detaining movable property. No clear authority directly in point either way has been brought to our notice. But we think that having regard to its language Article 49 also is intended to apply to cases where the plaintiff had a right to possession of the movable property which was wrongfully taken from him, injured or wrongfully detained. The plaintiff's remedy is to sue for the recovery of the specific movable property or in the alternative for its compensation for wrongfully taking, injuring or wrongfully detaining. In such a case the period begins to run from the time when the property was wrongfully taken, injured or the defendants' possession became unlawful. In the present case, the plaintiff was a mere attaching creditor. He had no right to possession of the goods. His right was confined to get the goods sold through the court and realise his decretal money out of the sale proceeds. His attachment took precedence over any private transfer made by the judgment-debtor pending the same. But this right did not entitle the plaintiff to take possession of the goods direct. Article 49 accordingly is not applicable.

Article 36 is a more general article. It is applicable to suits for compensation for any malfeasance, misfeasance, or non-feasance independent of contract. It refers to action which may be on account of the commission of some act which is in itself unlawful, or being the improper performance of some lawful act, or the omission of some act which a person by law is bound to do. It is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere. It, therefore, follows that as neither Article 48 nor Article 49 applies, Article 36 must apply. Accordingly, the residuary Article 120 cannot apply. But Article 36 gives only two years' time to the plaintiff. The suit was brought more than three years after the day when the property was wrongfully taken. The claim is obviously barred by time.

Even if we assume in favour of the plaintiff that owing to a fraudulent act of the defendant he was prevented from knowing the fact of the misappropriation of the goods, and therefore the knowledge of his right to sue for compensation was withheld from him by the defendant, and that he can get the benefit of the provision of S. 18 of the Limitation Act, the claim in hopelessly beyond time. He admitted that he came to know of the misappropriation on July 27, 1926 and the period of two years would begin to run from that day. The suit was filed on July 29, 1929 and was therefore beyond time.

We are accordingly of opinion that the plaintiff's claim would fail on the ground of limitation. We allow the appeal and setting aside the order of the court below restore the decree of the first court dismissing the suit with costs.

Appeal allowed

CIVIL

1932

Jan. 6

PULLAN, J.
NIAMAT-ULLAH, J.

BHAGWANTI (*Plaintiff*)
versus
DHANWANI AND OTHERS (*Defendants*)*

Court Fees Act (VII of 1870), Sec. 5—Chief Inspector of Stamps—Whether an officer whose duty it is to see that the fee is paid under Chapter II.

The Chief Inspector of Stamps is an officer whose duty it is to see that the fee is paid under Chapter II Court Fees Act, and the decision of the Taxing Officer on a difference of opinion between the Chief Inspector of Stamps and the suitor is final decision.

FIRST APPEAL from the decision of the Additional Subordinate Judge of Benares.

A. P. Bagchi for the appellant.

K. Verma for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—The Taxing Officer has reported a deficiency in the court fee in this appeal of Rs.333-8-0 corresponding to a similar deficiency in the plaint in the suit and counsel for the appellant takes exception to this report. While he admits that under Sec. 5 of the Court Fees Act the decision of the Taxing Officer is final, he takes exception to the manner in which the matter was brought to the notice of the Taxing Officer. The report as to deficiency was made by the Chief Inspector of Stamps. Under the High Court Rules Chapter III, Rule 10 the person who reports to this High Court on the deficiency or otherwise of stamps is the Stamp Reporter. These words have now been explained by a recent amendment, which adds after the words "Stamps Reporter" the words "or any other officer specially appointed in this behalf." The appellant's counsel contends that prior to that amendment the words "Stamp Reporter" stood alone and did not include the Chief Inspector of Stamps, consequently no objection made by the Chief Inspector of Stamps has any validity and the decision passed by the Taxing Officer on a difference of opinion between the Chief Inspector of Stamps and the appellant is not final as laid down by Section 5 of the Court Fees Act. But the Court Fees Act takes no cognizance of the Stamp Reporter or the Chief Inspector of Stamps. It merely states "in case of difference of opinion with the officer whose duty it is to see that any fees are paid, and any suitor or attorney". In our opinion the Chief Inspector of Stamps is an officer whose duty it is to see that the fee is paid under this chapter, and the decision of the Taxing Officer on a difference of opinion between the Chief Inspector of Stamps and the suitor is final decision.

The decision being final, we may either dismiss this appeal or allow time to the appellant to make good the deficiency. We are prepared to allow time. The learned counsel asks for three months time and we allow him three months in which to make good the deficiency of Rs.667 pointed out by the Taxing Officer.

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*Stamp Report in F. A. 448 of 1928

PRIVY COUNCIL

GHULAM MOHAMMAD (*Plaintiff*)
versus
GHULAM HUSAIN AND OTHERS (*Defendants*)*

Civil

1931

Dec. 14

LORD THANKERTON
LORD SALVESEN
SIR LANCELOT SANDERSON
SIR GEORGE LOWNDES

Limitation Act (IX of 1908), Sec. 123—Applicability of—Suit against an executor or administrator or some person legally charged with duty of distributing the estate—Mohammedan Law—Inheritance—Surrender of their rights in exchange for annuities—By widow and daughters of deceased Mohammedan—Their interests enure for benefit of other heirs irrespective of their rights inter se—*Mohammedan Law—Will—In favour of one of heirs of testator—Invalid—Unless consented to by other heirs after death of testator—Consent of minor heirs to be given after attaining majority—Consent by guardian not valid.*

Article 123 of the Indian Limitation Act only applies to a suit brought against an executor or administrator or some person legally charged with the duty of distributing the estate. *Nurdin Najbudin* v. *Bu Umrao,* 45 Bom. 519, *Rustam Khan* v. *Jani,* 51 All. 101 *approved. Maung Tun Tha* v. *Ma Thit,* 44 I. A. 42 *explained.*

The widow and daughters of a deceased Mohammedan having surrendered their rights in exchange for annuities which were charged upon the whole estate, their interests in the entire property enured for the benefit of the other heirs irrespective of their rights *inter se,* and the whole estate, subject to the annuities so charged and the debts, became divisible between the remaining heirs, the sons of the deceased.

Under the Mohammedan Law a will made in favour of one of the heirs of the testator, is invalid unless consented to by the other heirs after the death of the testator. If the other heirs are at the time of the death of the testator minors, consent must be given by them after their attaining majority. A consent by their guardian on their behalf during their minority is invalid.

APPEAL from a decision of the High Court of Judicature at Allahabad.

B. Dube, K.C. for the appellant.

L. De'Gruyther, K.C. and *A. Majid* for the respondents.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—One Khadim Husain, a Mohammedan governed by the law of the Hanafi school, died on August 21, 1901. Two days before his death he made a will in the following terms:—

> I, Shaikh Khadim Husain, son of Munshi Aman Ullah, deceased, resident, *jagirdar* and *taaluqadar* of Ganeshpur, district Basti, declare as follows:—
>
> I own and possess movable and immovable property of every description (such as) houses, groves, etc., in the district of Basti, Gorakhpur and Fyzabad, and it is in my possession and enjoyment as a proprietor without the participation of anyone else. The immovable property consists of three kinds of property: One is that which is meant for maintenance of disciples and female slaves (under a Will, dated November 25, 1866, my father, Maulvi Shaikh Aman Ullah, deceased, gave (this property) to me alone). This property which he had, under a Will, dated June 13, 1837, got from his father for maintenance of the disciples and the female

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*P. C. A. 75 of 1929

slaves as proprietor, is the *panchmi* share in the entire *taaluqa* of Ganeshpur. My father, having included a *panchmi* share in his self-acquired property to that property, conferred it on me as proprietor under the said Will. Accordingly, after the death of my father, I, the executant, entered in possession and occupation thereof under the said Will. The second kind of the immovable property is that which has devolved upon me from my deceased father and the other persons; the third is that which I, the executant, myself have acquired. I have two sons, Shaikh Ghulam Husain and Shaikh Ghulam Muhammad, minors, three daughters, Musammat Roshan-un-nisa, Musammat Khair-un-nisa and Musammat Mumtaz-un-nisa, and one wife, Musammat Amna Bibi, who is now alive. As there is no certainty of life, I, the executant, also think it proper to make a will in conformity with the custom of my family in order that no dispute may arise in future among my heirs. My elder son, Ghulam Husain, minor, shall remain in proprietary possession of the *panchmi* share in *taaluqa* Ganeshpur, together with the *panchmi* property acquired by my deceased father given to me under the Will, dated November 5, 1866, for maintenance of the disciples and the female slaves in accordance with the conditions laid down in the Will made by my father and a one-fifth share acquired by me, the executant; Shaikh Ghulam Husain aforesaid, should, from the income thereof, maintain the disciples and the female slaves, who are alive now, or in future those who may be increased in their generations. (Paper torn). The disciples and the female slaves have no proprietary right in the said property. They are entitled to food and clothing only. If any of them disobey or refuse to render service or take up service at another place, then Shaikh Ghulam Husain aforesaid is empowered to discontinue his maintenance. Both my sons, Shaikh Ghulam Husain aforesaid and Sheikh Ghulam Muhammad aforesaid, who is born now, shall after me be the owners in possession of all the property which I have, by right of inheritance, received from my deceased father, Maulvi Shaikh Aman-ullah, and the other persons, and which I have myself acquired and out of which property four-fifth share has been saved. So long as they live jointly, they shall appropriate the profits jointly, and after separation they should divide the profits of the said property in half and half. Both the sons should, out of the profits of the same property, pay Rs.600 a year to their mother, Musammat Amna Bibi, and Rs.300 a year to each of my daughters, namely, Musammat Roshan-un-nisa, Khair-un-nisa, and Mumtaz-un-nisa, after their marriage, generation after generation. The said Musammats have no proprietary power in the property. If Shaikh Ghulam Husain and Shaikh Ghulam Muhammad fail to pay the fixed amount to the said Musammats, the latter are empowered to recover their annual amount by bringing a suit. When both the brothers become separate, they should, out of the profits of the property in their respective possession, continue to make payment to my wife and daughters. Both my sons are still minors. God forbid, if I die before they attain majority, their mother, Musammat Amna Bibi, shall be their guardian during their minority. After attaining majority my both sons shall themselves be the owners in possession and abide by the conditions of the Will and make management. This Will shall come into force after me, the executant. As long as I am alive, no one has power to cause interference. Both the sons shall be the owners of the movable property and the houses in half and half.

In line 15 the word *milkiatan* written above the line is correct.

Hence I have executed these few presents by way of a Will in order that it may serve as evidence. Dated August 19, 1901.

Signature of Shaikh Khadim Husain.

(The Will executed by me is correct, in autograph).

The principal question in this appeal is as to the construction of the will so far as regards what is referred to therein as the "*panchmi*" property. The appellant, the younger of the two sons of the testator, sued to establish his right, under the events which had happened since his father's death, to a moiety of this property. The first respondent denied his brother's right to any share at all, though it is not clear how far he claimed the property for himself. The trial Judge decided in favour of the appellant, but gave him a quarter share only. Both parties appealed to the High Court (their appeals being numbered respectively 132 and 164 of 1925), with the result that the suit was dismissed. These appeals were heard jointly with two other appeals in suits instituted by one of the daughters of Khadim Husain, but in which no appeal has been taken to His Majesty in Council, and with which, therefore, the Board are not concerned. The other respondents are alienees from the first respondent and have taken no part in the proceedings.

It is not disputed that under the Hanafi law, if the effect of the will was to confer a beneficial interest in the *panchmi* property upon the first respondent, it was invalid unless consented to by the other heirs after the testator's death. The first question, therefore, is whether this was the true effect of the will. The trial Judge held that it was: the High Court, on the other hand, took the view that the first respondent was a mere trustee with no beneficial interest in the property.

The decision no doubt concerns directly only the will of Khadim Husain, but the references by the testator to the will of his father Aman Ullah, and the trend of the arguments in the case, make it necessary to consider the terms of his will also, and this in turn brings in the will of Kadir Baksh, the grandfather of Khadim Husain, under which the *panchmi* property originated.

The will of Kadir Baksh is dated June 13, 1837. He in effect divided his estate into five shares, bequeathing one-fifth to each of his four sons, and setting aside the remaining fifth "for the expenses of the male and female slaves and the other defendants, etc., who are at present in addition to the sons and who may survive hereafter." This share he made over to his youngest son, Aman Ullah. The slaves and dependants were to remain in his control; they were to get from him their necessary expenses for food and clothing, but were not to be in possession of the land, and if they were disobedient they were to get nothing. It is admitted by counsel for the first respondent that this bequest was, as, indeed, the terms of the will show, confined to slaves and dependants living at the testator's death. It is also clear, their Lordships think, that they took no interest in the *corpus* of the share, and that the will made no express disposition of it as such.

The will of Aman Ullah followed much the same lines. It is dated September 25, 1866. It recites the will of Kadir Baksh, and after referring to the one-fifth made over to him (Aman Ullah) for the maintenance of the slaves and dependants, continues, "Under the terms of the will executed by the ancestor and admitted by his heirs, two-fifths of the whole of the *taaluqa* (meaning evidently the one-fifth for the slaves and his own personal one-fifth) was settled to be my own share and property, of which

I am in possession and occupation by virtue of private partition." He goes on to state that he also has four sons who are "heirs and owners of my estate and property," and that following the ways of his ancestor, he has made "a will regarding, and division of, my estate." He then makes over to Khadim Husain, his eldest son, "the one-fifth share which my ancestor has given to me for the maintenance of the dependant slave boys and girls, as well as one-fifth of all my self-acquired villages (subject to all the conditions laid down in the will of my ancestor, dated June 13, 1837), together with the slave boys and girls that are alive at present and that may be born hereafter." He repeats that the slaves are to be entitled to maintenance only; that they are to have "no concern with the possession of the lands"; and that if disobedient they will forfeit their rights. The balance of his estate he divides equally among his sons.

It appears that some years before the date of this will there had been litigation between the brothers, Miran Baksh the second son of Kadir Baksh, suing for partition, and claiming that the *panchmi* share was divisible with the rest of the property left by his father. The principal Sadar Amir of Gorakhpur, by a judgment dated August 28, 1860, held against the plaintiff's claim in respect of the *panchmi* villages, and gave him a decree for partition of his share only in the other property. The issues raised the question directly whether Kadir Baksh's will established that the *panchmi* villages "solely belonged to the contesting defendant," i.e., Aman Ullah and their Lordships think that the decision must be regarded as having answered this question in the affirmative. They have very little doubt that Aman Ullah's will was based upon this decision, and that he regarded himself as the owner of the *panchmi* villages, subject only to the obligation of maintaining the slaves.

The construction of Kadir Baksh's will was again raised in 1898, after the death of the last of the slaves, the claimant on this second occasion being Karamat Bibi, a daughter of Zahur Uddin, the eldest son of Kadir Baksh. Aman Ullah was then dead, and Khadim Baksh was the principal defendant to the suit. The case went up to the High Court on second appeal, the sole question for decision being the construction of the will with reference to the *panchmi* share. The learned Judges, by their judgment dated August 8, 1901, held that there was a gift of this share to Aman Ullah, "but a gift burdened for the time being with the necessity of making provision, suitable and lifelong, for the slaves and slave girls who might survive the testator." They thought that the assignment of the share "was as regards time unconditional," and they accordingly affirmed the dismissal of the suit which the District Judge had decreed. It will be observed that this decision was in substantial accord with that of the Sadar Amir in 1860.

Turning now to the will of Khadim Husain, with which the present appeal is more directly concerned, their Lordships note that it was made very shortly after the decision of the High Court above referred to, and they think that its terms must have been influenced by that decision. The testator begins by stating that he is "in possession and enjoyment as a proprietor without the participation of anyone else," of immovable properties which include both the original and increased *panchmi* shares. He affirms that these shares were conferred upon him "as proprietor" under his father's will and that he had been in possession and occupation of them since his father's death. He then proceeds to declare that the first respondent "shall remain in proprietary possession of the *panchmi* share in the *taaluqa,* Ganeshpur together with the *panchmi* property acquired by my deceased father given to me under his will."

Apart from any question of a *wakf* which has been put forward for the first time on the argument of this appeal, and with which their Lordships will presently deal, they think that Aman Ullah took under the will of his father Kadir Baksh a beneficial interest in the original *panchmi* share, subject to the maintenance of the slaves during their lives. The slaves clearly took no interest in the *corpus* of the share, or in the surplus income as the life interests dropped out, and the only reasonable construction of the will would seem to be that arrived at by the High Court in 1901, which as between the parties to that suit was clearly *res judicata.*

Whether Khadim Husain took a similar interest under Aman Ullah's will may be more doubtful, but reading the will as a whole in the light of the surrounding circumstances, their Lordships think that the intention of Aman Ullah was to pass on to his son the same quality of interest in the now increased *panchmi* share as that which he himself had taken under his father's will. The exact date of Aman Ullah's death seems to be uncertain. It was probably not long after the date of his will, and must in any event have occurred before July, 1871, as is shown by the proceedings in a suit which went up to the High Court in 1872. Khadim Husain was therefore in possession of the villages for at least 30 years, and their Lordships have no doubt that he regarded himself as the owner, subject only to the maintenance, at his discretion, of the slaves. The only persons interested to deny his proprietorship would be the other heirs of Aman Ullah, who seem to have taken no steps to assert a claim, and they are not parties to or in any way represented in the present litigation.

Khadim Husain's will, in their Lordships' opinion, clearly purported to pass on to the first respondent a proprietory interest in the *panchmi* property, now again increased by the addition of one-fifth of the other estate of the testator, subject to similar obligations. The learned Judges of the High Court would attach little, if any, weight to the references in the will to "proprietorship" and "proprietory" rights. Their Lordships are unable to take this view of the expressions employed by the testator. They regard them as used in their ordinary acceptance, and as intended to make it clear that the first respondent was to be the owner of the villages, subject to provision for the slaves. The latter were to be maintained out of the income only and were to have no proprietory interest in the property: whatever surplus income there might be and the reversionary interest in the *corpus* was to go to the first respondent.

Their Lordships take no exception to the view of the High Court that there was a trust for the slaves. They think that this is probably a more correct way of looking at the bequest than to refer to it as an onerous gift: it would, they think, clearly come within the definition of a trust under the Indian Trusts Act, 1882, by which the will of Khadim Husain would be governed. But in the view their Lordships take, the learned Judges were wrong in thinking that the proprietorship conferred upon the first respondent by the will was a bare trusteeship accompanied by no interest of a beneficial nature.

In their Lordships' opinion, therefore, the will of Khadim Husain did purport to confer a beneficial interest in a part of his estate upon the first respondent, who was one of his heirs, and it would seem to follow that (apart from any question of consent by the appellant) the will was invalid under the Mohammedan law.

But it has been contended before the Board that the setting apart of the *panchmi* share under each of the three wills, to which reference has been made, was in reality the creation of a *wakf*, and that so considered it must be presumed that there was a dedication of the whole interest of the testator in each case to charitable purposes, leaving nothing to which the devisee could be beneficially entitled, his position being that merely of the *mutwalli* or manager of the charity.

No case of *wakf* was made by the first respondent in his defence to the suit, nor was it suggested in his memorandum of appeal to the High Court, and there is no trace of such a contention having been raised in the judgments. No one of the three wills purports to create a *wakf*, nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of *wakf* was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the *Wakf* Validating Act, VI of 1913, and it is therefore unnecessary to consider the effect of Act XXXII of 1930, which purports to give retrospective effect to the Act of 1913. The argument which has been addressed to their Lordships on this point is in reality only an attempt to reopen the controversy which was finally settled by decision of this Board nearly forty years ago: see *Sheikh Mahomed Ahsanulla* v. *Amarch and Kundu*[1]; *Abdul Gufur* v. *Nizamudin*[2]; *Abdul Fata Mahomed Ishak* v. *Russumoy Dhur Chowdhry*[3]. Under these circumstances their Lordships think it sufficient to say that the contentions of the first respondent on this part of the case must necessarily fail.

Unless therefore the appellant can be shown to have consented to the terms of his father's will it cannot be binding upon him.

At the time of Khadim Husain's death both the first respondent and the appellant were minors. The former attained his majority in 1915 and the latter in 1919. Before the trial Judge an attempt was made to prove that the appellant upon attaining majority consented to the terms of the will. It was held that his consent was not proved. The High Court makes no reference to this contention, and before their Lordships no serious attempt has been made to support it.

In the High Court, however, it was contended for the first respondent that the appellant was in effect bound to the terms of the will by what was said to be a "family arrangement" embodied in a registered instrument dated March 11, 1910. The learned Judges accepted this contention, and their finding has been supported before the Board; if it is correct, the appellant necessarily fails.

The document in question was executed, during the minority of the contesting parties to this appeal, by their mother on her own behalf and purporting to act as guardian of her sons. The other parties were their sisters, the three daughters of Khadim Husain, who disputed the validity of his will. Shortly put, the effect of this arrangement was that the mother gave up, in favour of her sons, a claim to dower amounting to about a *lakh* of rupees, taking for herself only a life annuity of Rs.600 out of the estate, while the sisters accepted perpetual annuities of Rs.400 each charged upon specified immovable properties. Elaborate schedules of the various properties were annexed to the document, the first of which, referring to the *panchmi* properties, was headed "List of property which belongs exclusively to Shaikh Ghulam Husain (i.e., the first respondent), and with the income of which the slaves and slave girls will be maintained according to the conditions and restriction laid down in the wills of the ancestors."

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[1] 17 I. A. 28

[2] 19 I. A. 170

[3] 22 I. A. 76

The learned Judges of the High Court thought that this should be read as an agreement made by the mother, acting on behalf of the younger son, with herself, acting on behalf of the elder son, that the latter should be the owner of the *panchmi* properties, and that it was binding upon the appellant. But quite apart from the question whether the mother could legally bind the appellant by such an agreement, their Lordships are unable to hold that this was either the intention or the effect of the document. The only object of the arrangement was, they think, to get rid of the daughter's claims, leaving the landed estates for the sons. Apart from the heading to the schedule of the *panchmi* properties, there is nothing to suggest that the rights of the sons *inter se* were considered. There was, and indeed could be, no dispute between them at their then ages, and the mother was evidently upon the terms of the document acting for them both jointly. Their Lordships must accordingly hold that the appellant was, when he came of age, free to dispute the validity of Khadim Husain's will, and to claim his share according to the Mohammedan law in the *panchmi* properties.

The last line of the first respondent's defence was limitation; it was contended first that the deed of March, 1910, should be read as having effected a transfer of the *panchmi* properties by the mother, acting on behalf of the appellant, to the first respondent, and that therefore the suit fell under Article 44 of Schedule 1 of the Limitation Act, which runs as follows:—

Description of Suit.	Period of Limitation	Time from which period began to run
44.—By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years	When the ward attains majority.

The trial Judge held that this article had no application on the ground that there was no transfer by the deed: the High Court took the opposite view. It is manifest, on the construction which their Lordships have put upon the deed, that the trial Judge was right.

Alternatively, it was argued that the suit was barred by twelve years' adverse possession under Article 144. Both the Courts in India have negatived this contention, and their Lordships have no doubt that they were right. The first respondent only attained majority in 1915, and the suit was instituted in July, 1924. Until 1915 the mother was in posses-

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sion of all the immovable properties of the estate on behalf of both her sons, and it would be impossible to hold that her possession was adverse to the appellant.

Before the Board it was for the first time suggested that the suit in reality falls under Article 123, which applies to a suit "for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate." The period of limitation in such a case is twelve years from the date "when the legacy or share became payable or deliverable." It is said that on the contentions of the appellant, Khadim Husain must be deemed to have died intestate, and that what the appellant is claiming is a distributive share in his estate. There is, however, a long series of decisions in India, dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate: *Issur Chunder Doss* v. *Juggut Chunder Shaha*[4]; *Keshav Jagannath* v. *Narayan Sakharam*[5]; *Umardaraz Ali Khan* v. *Wilayat Ali Khan*[6]; *Khandersa Hajee Bappu* v. *Puthen Veettil Ayissa*[7]; and *Mahomed Riasat* v. *Hasin Banu*[8].

Counsel for the first respondent drew their Lordships' attention to a decision of this Board reported as *Maung Tun Tha* v. *Ma Thit*[9] where Article 123 was apparently applied in a suit by a Burmese-Buddhist son for his share in the paternal estate. No reference was made to the Indian case law on the subject, and the main question debated was as to whether the son was bound under the Burmese law to elect within a reasonable time afters his father's death.

Their Lordships have referred to the record of this case, and they find that in the Courts of Burma no issue was raised as to limitation, and that there was no discussion as to the article of the Act which should be applied. There had been at least one previous decision in the Lower Burma Court that Article 123 was applicable to such a case, and it seems to have been assumed on all hands that it must equally apply in the case then under consideration. After the decision in 44 I. A. it appears to have been considered in one case in the Bombay High Court that the Indian authorities had been over-ruled (*Shrinbai* v. *Ratanbai*[10]), but in two later cases the same High Court refused to apply Article 123 to claims by Mohammedan heirs: see *Nurdin Najbudin* v. *Bu Umrao*[11]. The specific question was considered by a full Bench of the Allahabad High Court in 1928, *Rustam Khan* v. *Janki*[12], another case between Mohammedan heirs, when the same conclusion was come to as in 45 Bom., the article applicable being held to be Article 144 and not 123.

Their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha* v. *Ma Thit* to over-rule the decisions to which they have referred, and they think that, at all events in cases from the Indian Courts, these authorities should be followed. They are therefore of opinion that the present case does not fall within Article 123, and that the appellant's suit was not barred by limitation.

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[4] I. L. R. 9 Cal. 79
[5] I. L. R. 14 Bom. 236
[6] I. L. R. 19 All. 169
[7] I. L. R. 34 Mad. 511
[8] 20 I. A. 155
[9] 44 I. A. 42
[10] I. L. R. 43 Bom. 845
[11] I. L. R. 45 Bom. 519
[12] I. L. R. 51 All. 101

It only remains to consider whether the trial Judge was right in holding that the appellant was entitled to recover a quarter share only, and not a half, of the *panchmi* property, and it is to be noted that upon this point the learned Judges of the High Court were in agreement with him.

The appellant's share in his father's estate under the Mohammedan law would be one-quarter only, but he contends that the widow and daughters having surrendered their rights in exchange for annuities which were charged upon the whole estate, he was entitled to share equally with his brother in all the residue.

The view taken by the Indian Courts was that the allocation of the *panchmi* property to the first respondent was an integral term of the arrangement under which the surrenders were made, and that if the appellant refused to be bound by this allocation he could claim no benefit from the surrenders.

In their Lordships' opinion, this view is based upon a misinterpretation of the deed of March 1910. They think that the rights of the widow and daughters, being in effect bought out by payments from the general estate, their interests enured for the benefit of the other heirs irrespective of their rights *inter se,* and that the whole, subject to the annuities so charged and the debts (which were considerable), became divisible equally between the two sons. If the annuities and the debts had been made payable out of the first respondent's share only, and in consideration of this the *panchmi* property had been allotted to him, the position would have been different, but this was not the effect of the deed.

Their Lordships are therefore of opinion that the appellant is entitled to share equally with the first respondent in the *panchmi* properties, and that a decree should have been entered in his favour for possession of a moiety thereof. This would, of course, be without prejudice to the rights of any persons claiming as slaves or disciples under the will of Khadim Husain. They are not parties to the present litigation, and such rights as they may be entitled to assert are not affected by it.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of the High Court in Appeals No. 132 and No. 164 of 1925 should be set aside, and that in lieu thereof a decree should be made in favour of the appellant for the shares in the several *panchmi* villages claimed by him in his plaint. The first respondent must pay the costs of the appellant in the High Court and before this Board, but, having regard to the order for costs made by the trial Judge, and to the fact that the appellant had raised issues on which he failed, their Lordships think that justice will be met by ordering the first respondent to pay only half of the appellant's costs in the Court of first instance.

Appeal allowed

Hy. S. L. Polak—Solicitor for the appellant.
Francis and Harker—Solicitors for the respondents.

CIVIL

1931

Nov. 24

MEARS, C. J.
SEN, J.

HIGH COURT

MAHADEO SAHAI (*Applicant*)

versus

THE SECRETARY OF STATE FOR INDIA AND OTHERS (*Opposite parties*)*

Civil Procedure Code, Sec. 110—Appellant's failure to furnish security for costs of respondent—Order dismissing appeal—Whether "affirms decision of court below"—Sec. 109 (a)—"Final order passed on appeal"—Construction of.

Where on the application of the respondent under Or. 41, R. 10 the High Court ordered the appellant to furnish security for the costs of the respondent, and on his failure to do so, the appeal was dismissed, *held*, that the order of the High Court dismissing the appeal is an order affirming the decision of the court below within the meaning of the last paragraph of Sec. 110 C. P. C. The words in Sec. 110 C. P. C. are "affirms the decision of the court", and not "affirms the decision of the court on the merits". *Re Radha Kishen* v. *Jumna Prasad*, 5 In. Cas. 940 *not followed.*

The words "final order passed on appeal" in Sec. 109 (*a*) should be construed broadly, and include an order directing the dismissal of an appeal, consequent upon the appellant's failure to furnish security for costs of the respondent.

ORDER on an application for leave to appeal to His Majesty in Council.

The applicant appeared in person.

U. S. Bajpai and *Kedar Nath Sinha* for the opposite parties.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an application for leave to appeal to His Majesty in Council from an order of this Court, dated June 17, 1931. The applicant prayed for a certificate under Section 109 of the Code of Civil Procedure. An ancillary prayer is contained in Paragraph 17 of his petition which is somewhat curious: "That the applicant solicits the favour of appointing a receiver and the printing and legal charges of both the parties be realised from the estate and justice be done to the case".

The subject-matter of this suit consisted principally of a property in Taluqa Imampur Pergana Ungli in the district of Jaunpur.

After various defeats in the Revenue Court going back nearly 15 years the applicant had instituted a suit in the court of the Additional Subordinate Judge of Jaunpur for declaration of title to the aforesaid properties. The suit was directed against the Secretary of State for India and against Mst. Tula and Mst. Sumitra. The plaintiff applicant had asked for leave to sue in *forma pauperis.* Upon a contest raised in the case, the court held that he was not a pauper. The result was that his application to sue as a pauper was dismissed with costs in favour of the Secretary of State and the other two defendants.

The plaintiff then instituted a regular suit on payment of the proper court-fee. This suit was numbered and registered as 57 of 1929.

The material allegations on which the claim was founded were that the property in Taluqa Imampur was owned by his maternal grandfather, Rai Hingan Lall who acquired the property, for loyal and meritorious services during the Sepoy Mutiny under a grant by the Government, dated June 9, 1860, that after the death of Hingan Lall, this property was settled upon Rai Daya Kishen, his son, that after the latter's demise, his son Rai Madan Makund became the owner, that the last named person died without leaving any issue, that Mst. Tula and Mst. Sumitra were not his wedded wives and that the property had devolved upon the plaintiff by force of the Crown Grants Act and the Pensions Act.

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*P. C. A. 34 of 1931

The defendants contested the suit upon the following grounds:—

(*a*) The property was acquired by Rai Daya Kishen under the Grant, dated June 9, 1860, and devolved upon Mst. Tula and Mst. Sumitra, who were widows of Rai Madan Makund and that the plaintiff had no place in inheritance.

(*b*) The defendants Nos. 2 and 3 were in possession of the property; and the suit for a mere declaratory relief was barred by Section 42 of the Specific Relief Act; and

(*c*) The plaintiff's claim was barred by Order 33, Rule 15 of the Code of Civil Procedure.

These pleas found favour with the trial court and the plaintiff's claim was dismissed on May 14, 1930.

The plaintiff preferred an appeal to this Court, which was duly admitted on July 21, 1930 and was registered as first appeal No. 378 of 1930.

On October 23, 1930, two of the respondents, namely, Mst. Tula and Mst. Sumitra applied to this Court under Order 41, Rule 10 of the Civil Procedure Code that the plaintiff-appellant be directed to furnish security for the costs of this Court as also of the court below for a total sum of Rs.2,500. This application was supported by an affidavit sworn by Dwarka Prasad in which he brought out very clearly the fact that the sanad, dated June 9, 1860, had been granted to Rai Daya Kishen and not to Rai Hingan Lall and that the plaintiff's suit was bound to fail. It had also been rightly dismissed by the court below as the plaintiff had contravened the imperative provision of Order 33, Rule 15 of the Code of Civil Procedure. The application was heard by a Division Bench which upon a consideration of the application, the affidavits and the judgment of the court below came to the conclusion that this was a fit case in which security should be ordered. An order was accordingly made on December 5, 1930 directing the appellant to furnish security for the respondents' costs "of this appeal" to the extent of Rs.2,500 within three months "of this date". It may be mentioned that Rs.2,500 did not represent the costs of the appeal only but included also the costs allowed by the trial court (*vide* affidavit of Dwarka Prasad, dated October 23, 1930, Paragraph 12).

The plaintiff-appellant moved this Court to revise the order dated December 5, 1930. By its order, dated March 11, 1931, this Court refused to revise the order in question but granted the plaintiff a further period of three months to furnish the required security. The plaintiff-appellant failed to furnish the required security and his appeal was dismissed with costs on June 17, 1931. It is against the order of this date that the plaintiff prays for leave to appeal to His Majesty in Council.

The value of the subject-matter of the suit in the court of first instance was above Rs.10,000. The value of the proposed appeal is also above Rs.10,000. It is debatable whether an order rejecting an appeal

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Mahadeo Sahai v. The Secretary of State for India

Sen, J.

for the appellant's failure to furnish security for costs of the respondent amounts to an affirmance of the decision of the court below.

A preliminary objection has been taken by the respondents that the order dated June 17, 1931 is not a 'final order' within the meaning of Section 110 of the Code of Civil Procedure and that an application for leave to appeal from such an order is therefore incompetent. Our attention has been drawn to a decision of the late court of the Judicial Commissioners of Oudh in *re Radha Kishan* v. *Jumna Prasad*[1]. It has been held in this case that an order rejecting an appeal for failure to furnish security for costs is not an order *affirming the decision of the court* below within the meaning of the last paragraph of Section 110, nor is such an order "a final order passed on appeal" within the meaning of Section 109 of the Civil Procedure Code. This decision, in our opinion, hinges upon a very narrow and technical construction of Sections 109 and 110. Where an order of this Court dismisses an appeal it has the effect of confirming the decision of the trial court. It should be noticed that the words in Section 110 are "affirms the decision of the court" and not "affirms the decision of the court on the merits".

Similarly, we are inclined to think that the words "final order passed on appeal" in Section 109 (*a*) may admit of a broader construction, so as to include an order directing the *dismissal of the appeal,* consequent upon the plaintiff's failure to furnish security for the costs of the respondents.

The appellant however has founded his application upon Section 109 (*c*) which provides for a right of appeal from any order, when the case is certified to be a fit one for appeal to His Majesty in Council. This clause evidently embraces cases other than those provided in Clauses (*a*) and (*b*) and the order sought to be appealed need not be a final order passed by a High Court or a final order affirming the decision of the lower court.

We are however of opinion that the application should be dismissed, the applicant having failed to satisfy this Court either that a substantial question of law was involved in the case or that it was otherwise a fit case to appeal to His Majesty in Council.

At the earnest request of the applicant, we sent for the record of civil revision number 119 of 1920. He wished to examine the contents of an envelope which contained a petition of the applicant dated February 1926. We did so and it was found that in Paragraph 4 of this petition, the *sanad* dated June 9, 1860 had been reproduced *verbatim*. The sanad was clearly in favour of Daya Kishen and not in favour of Hingan Lall. The property has devolved upon Mst. Tula and Mst. Sumitra, who have been found to be the widows of Madan Makund and, as such, his heirs. The court below found that the plaintiff's claim by right of inheritance from Hingan Lall was absolutely baseless. There is no question of law involved here. The plaintiff in his petition has not formulated any question of law.

We have already seen that the plaintiff had attempted to sue in *forma pauperis* but that his application had been dismissed with costs. Before instituting the present suit, he had not paid the costs incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. The provision of Order 33, Rule 15 of the Code of

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[1] 5 I. C. 940

Civil Procedure was imperative. The court below was therefore bound to dismiss the suit as being barred by Order 33, Rule 15. It is not clear in which way the plaintiff hoped to get over this fatal defect by his appeal to this Court. We have not been shown on what ground the order of this Court, dated June 17, 1931, dismissing his appeal is open to attack. We have no hesitation in holding that the application now before us is devoid of substance and the case is not "otherwise a fit case for appeal to His Majesty in council". Let a copy of this order be sent to the applicant by registered post to the address given by him. *Application dismissed*

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MAHADEO SAHAI
v.
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Sen, J.

CIVIL
1931
Dec. 8
PULLAN, J.

RAGHUNANDAN CHAUBE (*Defendant*)
versus
BHUWAL TEWARI (*Plaintiff*)[*]

Civil Procedure Code, Or. 9, R. 13—Decree specifies liability of each defendant—As against one ex parte*—Other defendants appeal—Appeal dismissed—No notice served on defendant against whom* ex parte *decree passed—Whether he can apply to court of first instance to set aside* ex parte *decree.*

The decree passed in a suit for contribution specified the liability of each defendant. The decree as against one defendant, viz., the present applicant, was *ex parte.* An appeal by the other defendants was dismissed by the Additional Subordinate Judge. The present applicant was made a party in the appeal but no notice was served on him. His application for setting aside of the decree having been disallowed by the munsif on the ground that no such application could be entertained by him, he appealed against this decision and on the same day applied to the Subordinate Judge for rehearing the appeal against the original decision of the munsif. Both the appeal and the application were dismissed. *Held*: that there was still a subsisting decree against applicant in the munsif's court and he was acting rightly when he applied to that court to have the decree against him set aside. *Brij Lal Singh* v. *Mahadeo Prasad,* 17 C. W. N. 133 *relied on*; that Sec. 14 of the Limitation Act applied to this case and the Subordinate Judge was wrong in dismissing the application for rehearing the appeal in his own court on the ground that it was too late. *S. T. Garde* v. *Brij Nandan Saran,* 21 A. L. J. R. 205 *dissented from.*

CIVIL REVISION from an order of BABU SARUP NARAIN, Second Additional Subordinate Judge of Gorakhpur.

N. P. Asthana, B. N. Sahai and *Shankar Sahai Verma* for the applicant.

A. P. Pandey for the opposite party.

The judgment of the Court was delivered by

Pullan, J

PULLAN, J.—The circumstances which give rise to this appeal and this application in revision are as follows:—

On April 25, 1927, the Munsif of Deoria passed a decree against certain persons in a suit for contribution based on a mortgage. In the decree the liability of each defendant was specified. The decree as against Raghunandan Chaube was *ex parte.* The other defendants appealed against the decision, and their appeal was dismissed by the Additional Subordinate Judge on January 5, 1928. In that appeal Raghunandan Chaube was made a party, but it has been found definitely by the court below that he was not served with any notice. The plaintiff applied for a final decree on June 6, 1928, and Raghunandan Chaube applied on October 26, 1928 in the court of the munsif of Deoria to get the *ex parte* decree of the munsif's court set aside. The munsif dismissed the application on the ground that no such application could be entertained by him. His decision is dated March 5, 1929. On April 8, 1929, Raghunandan Chaube appealed against this decision to the Additional Subordinate Judge, and on the same day he put in an application in the Subordinate Judge's court for rehearing the appeal against the original decision of the munsif. The learned Additional Subordinate Judge dismissed the application on the ground that it was made too late, and he dismissed the appeal on the ground that the decision of the Munsif was correct. The position is, therefore, that this Raghunandan Chaube has never obtained any decision as to whether he had notice of the suit which was decreed against him *ex parte*. Both courts have dismissed his claim to be heard on a technical ground.

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[*] Civ. Rev. 338 of 1931

I shall deal first with the application in revision. The view taken by both the courts below is that, as there had been an appeal against the *ex parte* decree, the only court which could take action in the matter was the appellate court. For this general proposition there is authority both of this High Court and of the other High Courts. But all the cases, which are directly in point, are those in which there has been a joint decree and where an appeal by one of those persons against whom the decree has been passed is in substance an appeal for all. In making this application in the court of the munsif Raghunandan Chaube relied upon a decision of the Calcutta High Court in the case of *Brij Lal Singh* v. *Mahadeo Prasad*[1]. In that case a suit was brought on a mortgage and a decree was passed *ex parte* against some of the mortgagors. In the decree only the share of the absent defendants was ordered to be sold, but the contesting defendants were made personally liable for the unsatisfied balance of the mortgage debt. Against this part of the decision the plaintiff appealed, and the contesting defendants made cross-objections. In the appeal the absent defendants were impleaded, yet the Calcutta High Court held that as no relief was claimed in the appeal against the absent defendants there was still a subsisting *ex parte* decree against them over which the Subordinate Judge who was the trial court had control, and he had jurisdiction to entertain an application by the absent defendants to set aside the decree. It has not been shown to me that this ruling has ever been dissented from by the Allahabad High Court. It was considered by a Bench of this Court in *Gajraj Mati Tewarin* v. *Swami Nath Rai*[2] and it was followed in so far as was necessary for the purpose of that case, namely, to decide that persons who are not made parties to an appeal are not precluded from applying for setting aside the *ex parte* decree against them. It appears to me that the present case more nearly resembles the case reported in 17 Cal. W. N. 133 than any of the other cases which have been cited. The appeal preferred by the contesting defendants related only to their own specific liability and had nothing to do with the liability imposed by the trial court on the absent defendant. Moreover, it is difficult to distinguish between persons who are not parties to an appeal and persons who have been impleaded in the appeal but have never received any notice, and

[1] 17 Cal. W. N. 133

[2] I. L. R. 39 All. 13

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Pullan, J.

are ignorant of the fact that any appeal has been preferred. As their Lordships of the Calcutta High Court observed:

> In cases of this description we must look rather to the substance than to the form of the proceeding.

In my opinion, the appellate court never considered the case of this person at all and was never asked to consider his case; nor had he any opportunity of putting his case before that court. I find, therefore, that there was still a subsisting decree against this Raghunandan Chaube in the court of the Munsif, and he was acting rightly when he applied to that of the Munsif, and he was acting rightly when he applied to that court rather than the appellate court to have the decree against him set aside.

On this view of the case, it follows almost inevitably that the order of the judge dismissing the application for rehearing of the appeal in his own court is erroneous. The appellate court can clearly take advantage of Section 14 of the Indian Limitation Act. Until the very day on which the application was made he was contesting a *bona fide* application in the court of the munsif for having his case reheard. I have been referred to a single Judge decision of this Court in the case of S. *T. Garde* v. *Brij Nandan Saran*[8] in which the learned Judge observed:

> The only section which deals with the exclusion of the period during which such a case is pending in any court is Section 14 of the Limitation Act, but that Section does not apply to applications.

I cannot accept this observation as being a correct view of the law, as Section 14, Clause (2) of the Limitation Act applies in set terms to applications. Possibly some error has crept into the report. This was the case in the only other ruling on which the learned counsel relied which was a decision in Execution Second Appeal No. 1833 of 1925. The report in the All India Law Reporter showed that the learned Judge in that case also held that Section 14 of the Limitation Act did not apply to applications, but the judgment was subsequently corrected.

An attempt has been made to support the Additional Subordinate Judge on the ground that the relief claimed in the munsif's court was not the same as the relief claimed in the appellate court. I cannot, however, see that there is any difference between the reliefs claimed in the two courts. The applicant merely wished to have his case heard on the merits, and this is the prayer which he made to both courts. In my opinion, therefore, Section 14 of the Indian Limitation Act applies to this case, and the Additional Subordinate Judge should not have dismissed the application on the ground that it was made too late.

In the view which I have taken on the application, it is clearly unnecessary for me to take any action in the appeal except to express my opinion that the view taken by the lower court was wrong. It is useless to send the case back to the lower appellate court, as the only order it would be able to pass would be one which I can myself pass on the application.

I allow the application in revision and direct the learned munsif of Deoria to rehear the application for setting aside the *ex parte* decree passed by him on April 25, 1927 on its merits. Costs both in the appeal and in the application in revision will abide the result. *Application allowed*

[8] 21 A. L. J. R. 205

Civil

1931

Dec. 7

Mears, C. J.

Sen, J.

KALLU MAL (*Applicant*)
versus
BIKRAMAJIT SINGH (*Opposite party*)*

Provincial Small Causes Courts Act, Sec. 17—"Amount due under the decree"—Interpretation of.

The words "the amount due under the decree" as used in Sec. 17 of the Provincial Small Causes Courts Act, 1887, mean "the amount due under the decree at the date it was given" and not "the amount due under the decree at the date when the application for restoration was presented". *Bisesar Ram Dassi Ram* v. *Har Kishan Pahlad Rai*, 47 All. 623=23 A. L. J. R. 296 *followed.*

Civil Revision from an order of Babu Kauleshar Nath Rai, Small Cause Court Judge of Cawnpore.

S. N. Seth for the applicant.

R. C. Ghatak for the opposite party.

The judgment of the Court was delivered by

Sen, J.

Sen, J.—On January 20, 1930 an *ex parte* decree was passed in favour of Kallu Mal by a court of Small Causes for a sum of Rs.792-2-3 together with interest at the rate of 6 per cent per annum. The decree also allowed Rs.108-8-0 as costs to the plaintiff. On November 4, 1930 the defendant applied to set aside the *ex parte* decree under Section 17 of the Provincial Small Courts Act. His application was accompanied by a deposit and the deposit amounted to a sum of Rs.934-2-3. The court below considered that the conditions of Section 17 of the Provincial Small Cause Courts Act were fulfilled and it accordingly set aside the *ex parte* decree. It has been contended that the amount deposited in the Court of Small Causes fell short by a small amount and the court had therefore no jurisdiction to set aside the *ex parte* decree. Our attention has been drawn to a ruling of this Court in *re Bisesar Ram Dassi Ram* v. *Har Kishan Pahlad Rai*[1] in which it has been held by a learned Judge of this Court that on a construction of Section 17 of the Provincial Small Cause Courts Act, 1887, the words "the amount due under the decree" mean "the amount due under the decree at the date it was given" and not "the amount due under the decree at the date when the application for restoration was presented." This ruling is of the year 1925. There is no published decision that we know of in which a contrary view has been taken. The ruling in question therefore was an authority for the defendant in depositing in court the amount which was equivalent to the amount which *ex facie* was due on the decree on the date when the decree was passed. The Small Cause Court Judge in entertaining the application under Section 17 of the Provincial Small Cause Courts Act was bound by this ruling. Even assuming that the case referred to above may at some time require consideration we are of opinion that this is a case in which the revisional jurisdiction of this Court should not be exercised in favour of the plaintiff under Section 25 of the Act because we think that substantial justice has been done. We accordingly dismiss this application with costs.

Application dismissed

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*Civ. Rev. 45 of 1931

[1] I. L. R. 47 All. 623

Civil

1931

Dec. 21

Pullan, J.
Niamat-ullah, J.

SOHAN PAL (*Minor*) THROUGH RADHA BALLABH (*Defendant*)

versus

MUSTAFA HUSAIN AND OTHERS (*Plaintiffs*)*

Limitation Act (IX of 1908), Arts. 60 and 59—Suit for recovery of money—Loan or deposit—Distinction between.

Where plaintiffs sued to recover a sum of money alleged to have been deposited by their mother with the defendant in the year 1921, *held,* that the Article applicable was Article 60 of the Limitation Act and not Article 59, and the transaction was a deposit and not a loan in the ordinary sense of that term.

Juggi Lal v. *Kishan Lal,* I. L. R. 37 All. 292=13 A. L. J. R. 402 *followed. Dharam Das* v. *Ganga Devi,* I. L. R. 29 All. 773 *referred to.*

SECOND APPEAL from a decree of J. ALLSOP ESQ., District Judge of Aligarh, confirming a decree of MAULVI SIRAJUDDIN, Munsif of Koil.

Panna Lal, S. N. Seth and *Hari Pal Varshini* for the appellant.

Zafar Mehdi and *Hyder Mehdi* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—The plaintiffs in this suit sued to recover a sum of money alleged to have been deposited by Mst. Sakina Begam, who was the mother of plaintiffs 1 to 8, with the defendant in the year 1921. It is alleged that two deposits were made, a sum of Rs.2,450 deposited directly by Mst. Sakina Begam and a sum of Rs.550 deposited by Mustafa Husain, plaintiff No. 1, and transferred to the account of his mother. The suit was decreed for the sum of Rs.3,000 together with interest, and the appeal was dismissed by the learned District Judge of Aligarh.

In Second Appeal the only matter pressed is the point of limitation. The defendant-appellant claims that this sum should not be held to be a deposit but rather a loan and that as such it is barred by limitation. The courts below decided that the Article of the Limitation Act which applied is Article 60, and the appellant urges that rather Articles 57, 59 and 62 should be held to apply. In our opinion the matter lies between Article 59 and Article 60. Reliance has been placed by the counsel for the appellant on a decision of this Court in the case of *Dharam Das* v. *Ganga Devi*[1] where it was held that in India the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former. This judgment was pronounced in the year 1907 and the Indian Limitation Act of 1908 made it clear that deposits included money of a customer in the hands of his banker. The matter was considered again by a Bench of this Court in 1915 in the case of *Juggi Lal* v. *Kishan Lal and Mool Chand*[2] and that ruling is a clear authority for the view that in a case such as the present the Article applicable is Article 60 of the Limitation Act and not Article 59. There is, in our opinion, no doubt whatever as to the nature of this transaction. It is clearly a deposit as held by the courts below and not a loan in the ordinary sense of that term.

We dismiss the appeal with costs. *Appeal dismissed*

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*S. A. 1453 of 1929

[1] I. L. R. 29 All. 773

[2] I. L. R. 37 All. 292

CIVIL

1932

Jan. 6

PULLAN, J.
NIAMAT-ULLAH, J.

NASARULLAH (*Applicant*)

versus

WAJID ALI AND ANOTHER (*Opposite parties*)*

Mussalman Waqf Act (XLII of 1923), Secs. 10, 3 and 5—'Mutawalli' furnishes particulars under Sec. 3—Deemed to have admitted 'waqf'—Failure to file statement of account under Sec. 5—Liable to be punished under Sec. 10—District Judge's jurisdiction to impose fine.

Where a "Mutawalli" complies with the provisions of Sec. 3 Mussalman Waqf Act (XLII of 1923), no question as to whether he desires the waqf or admits it can arise, because by his conduct in furnishing particulars of the waqf he must be deemed to have admitted the 'waqf' and his own position as a 'mutawalli', and having furnished particulars required by Sec. 3, he is also under an obligation to file a statement of account in terms of Sec. 5, and if omits to do so, he can be punished under Sec. 10.

The whole scheme of Act XLII of 1923 suggests that the District Judge (and not the criminal court) is the proper authority to fine a 'mutawalli', who is in default in respect of certain duties enjoined by the Act, under Sec. 10.

CIVIL REVISION from an order of D. C. HUNTER ESQ., District Judge of Moradabad.

A. M. Khwaja for the applicant.

M. A. Aziz for the opposite parties.

The following judgments were delivered:—

Pullan, J.

PULLAN, J.—This is an application in revision of an order of the District Judge of Moradabad imposing a fine of Rs.50 upon the applicant, Nasarullah, under Sec. 10 of the Musalman Waqf Act (Act 42 of 1923). The proceedings are the direct outcome of former proceedings which have been the subject of a reported ruling of this Court (*Nasrullah Khan* v. *Wajid Ali*[1]). My brother Niamatullah was a member of the Bench which decided that case. There the question was whether under S. 5 of Act 42 of 1923 the District Judge could, on the intervention of other persons, call upon a 'mutawalli' to furnish accounts of a 'waqf' and the view taken by the Bench was that the Act does not authorize the District Judge to pass an order that the 'mutawalli' should file a statement of account as contemplated by S. 5, and that the only procedure provided was to punish him under S. 10 of the same Act for not doing so. Accordingly, the same persons approached the District Judge and requested him to take action under S. 10. The Judge felt that he had to decide the question which was left undecided by this Court, namely, whether the 'waqf' was a 'waqf' covered by Act 42 of 1923, before passing an order of fine. In my opinion, he was bound to decide this question. His jurisdiction depended on the fact that the 'waqf' was one under Act 42 of 1923, and until he decided that question, he could impose no fine under the Act. Nasrullah is a person who, in compliance with S. 3 of the Act, made a statement as to the property of the 'waqf' and by so doing was held in the judgment of this Court to which I have already referred, to have fulfilled the require-

*Civ. Rev. 397 of 1930

[1] I. L. R. 52 All. 167

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WAJID ALI
Pullan, J.

ments of S. 3 of the Act. I am of opinion that he brought himself under the other provisions of the Act also and established his own liability to furnish accounts and made himself open to punishment for not doing so. It is true that from time to time Nasrullah has denied that the property which he manages was a 'waqf' within the meaning of the Act, but I cannot consider that this denial is of any value in view of his own action in complying with the requirements of the Act in the first instance. Moreover, once the learned District Judge went into the facts of the case as, in my opinion, he was entitled to do, he found that in the year 1842 the Commissioner passed an order showing the nature of this 'waqf', and it is clear from that order that this was a 'waqf' such as is contemplated by Act 42 of 1923 and is not one of those 'waqfs' which are excluded from the Act by S. 2(*e*). Thus, in my opinion, the District Judge was in a position to deal with Nasrullah under the Act if he found that Nasrullah had not complied with the provisions of the Act in the matter of filing accounts. In such cases the District Judge appears to act *suo motu;* but in actual practice he can never take action, unless somebody calls his attention to the fact that a 'mutawalli' has failed to perform his duties. The part played by the opposite party in this case is merely the part of calling to the notice of the District Judge an impropriety of which he is able to take cognizance. The Judge has imposed a fine of Rs.50. His jurisdiction is not impeached in the grounds for revision, and although the wording of S. 10 is far from clear, I am of opinion that the District Judge is, under that Section, the only person who can take proceedings and who can, therefore, impose the fine. The fine does not appear to be exclusive, and I do not consider that this Court has any cause to interfere with the decision. I would, therefore, dismiss this application, but I do not consider this is a case in which costs should be allowed.

Niamatullah, J.

NIAMATULLAH, J.—The applicant has been held guilty of what should be considered to be an offence under Section 10 of Act 42 of 1923, and sentenced to a fine of Rs.50. Two main questions arise in revision: first, whether the applicant incurred the penalty provided for by S. 10 of the aforesaid Act, and, secondly, whether the District Judge, who convicted and fined him, had jurisdiction to do so.

As regards the 1st question, S. 10 makes an omission to do what is required of a 'mutawalli' by S. 3 or S. 5 of the Act punishable. As both these sections make use of the words 'mutawalli' and 'waqf', we must consider, at the threshhold of the case, whether the applicant is a 'mutawalli' and the property in question in the present case is 'waqf'. 'Waqf' has been so defined in Act 42 of 1923, S. 2(*e*), as to include all endowments other than those to which the Musalman Waqf Validating Act (6 of 1913) applies. In other words, all waqfs other than 'waqfs alal aulad' are within the purview of Act 42 of 1923. The property in dispute in this case has been in possession of the applicant and his predecessors for a considerable length of time, and its character is clearly determined by an order of the Commissioner passed in 1843. The learned District Judge has referred to the terms of that order which satisfied him that the property in question was 'waqf' for the support and upkeep of a mosque and incidental purposes, including the maintenance of a 'muazzin' who is to be selected from among the descendants of the original mutawalli, the applicant's ancestor.

Nothing has been said on behalf of the applicant which can induce me to differ from the view taken by the learned District Judge as regards the character of the property in possession of the applicant. I am, therefore, in entire agreement with my learned colleague that the property in question is 'waqf' and not dedicated for the personal benefit of the descendants or family of the 'waqf'. The applicant himself professed to act as 'mutawalli' and thereby admitted his position as such, in furnishing particulars of the property in his possession, as required by S. 3 of Act 42 of 1923. It follows from what has been said already that the property in question is 'waqf' within the meaning of that Act and the applicant is the mutawalli thereof.

It is necessary to refer to two sections of Act 42 of 1923 before examining the terms of S. 10. S. 3 requires every mutawalli to furnish particulars of the 'waqf' property in his possession. S. 5 requires him, if he has furnished particulars under S. 3, to file a statement of account within three months after the 31st day of March following the passing of Act 42 of 1923 and thereafter within 3 months after the 31st March of each year. S. 10 makes failure to furnish particulars as required by S. 3 or to file statements of accounts as required by S. 5 punishable with fine, which may extend to Rs.500. It has been argued before us that Act 42 of 1923 is applicable only to cases in which a 'mutawalli' accepts his position as such and furnishes particulars required by S. 3. This contention is correct so far as the 'mutawalli's' omission to file a statement of accounts under S. 5 is concerned, because he has to file such statement only if he has already furnished particulars under S. 3. It is, however, incorrect to say that a person is not liable to be punished under S. 10 at all, unless he admits certain property in his possession to be 'waqf' and himself to be the 'mutawalli' thereof. S. 10 makes omission to furnish particulars as required by S. 3 also punishable. All that is needed to bring home an offence under S. 10 read with S. 3 to a defaulting 'mutawalli' is to establish by evidence that he is a 'mutawalli' in respect of property which is 'waqf' within the meaning of Act 42 of 1923. Whether the character of the property as 'waqf' and his own position as 'mutawalli' are admitted or are established by evidence, if denied, S. 10 is equally applicable, if a 'mutawalli' has failed to comply with S. 3. If a 'mutawalli' has complied with the provisions of S. 3, no question as to whether he denies the 'waqf' or admits it can arise, because by his conduct in furnishing particulars of the 'waqf' property he must be deemed to have admitted the 'waqf' and his own position as 'mutawalli'.

The applicant in this case furnished particulars of the property in question under S. 3. He cannot, therefore, be convicted of an offence under S. 10 read with S. 3. Nor has the learned District Judge convicted him of such offence. But, having furnished particulars required by S. 3, he was also under an obligation to file a statement of account in terms of S. 5. He omitted to do so. S. 10 makes such omission to be as much punishable as the noncompliance with the provisions of S. 3, the penalty in either case being the same. In these circumstances, I do not think there is anything wanting in the case before us to complete an offence under S. 10 of Act 42 of 1923, and so far as the applicant's liability to pay the penalty provided for by S. 10 is concerned, there can be no doubt.

The next question, which is not free from difficulty, relates to the Court which is empowered to enforce the penal provision contained in S. 10. I was a member of the Bench which decided *Nasrullah Khan* v. *Wajid Ali*[2] which is, in fact, an earlier stage of the case before us. The only question which called for decision in that case was whether S. 5 of Act 42 of 1923, apart from laying an obligation on a 'mutawalli' to furnish a statement of account, also contemplated regular proceedings being taken before the District Judge for the determination of the question whether a certain property is 'waqf' or whether a certain person is a 'mutawalli' in respect thereof. It was held that S. 5 did not empower the District Judge to decide these questions in a proceeding taken by interested parties under S. 5. The Court went on to observe that the determination of such questions may be necessary if the 'mutawalli' is prosecuted for an offence under S. 10, and the alleged 'mutawalli' denies facts which establish his offence and which have to be enquired into. As regards the forum, it was assumed rather than decided that the District Judge can enforce the penal provision contained in S. 10. Any remark, therefore, as to whether the District Judge could impose the fine provided for by S. 10 is in the nature of an *obiter dictum*. The question has directly arisen in the present case and must be decided, though, I may note, that it was not argued before us that any court, other than that of the District Judge, could impose a fine under S. 10. The applicant's contention was that no court had jurisdiction to do so in the circumstances of the case. We cannot, however, refuse to take notice of the narrower question, namely, whether the District Judge as such can take cognizance of a case under S. 10. On the one hand, it can be reasonably contended that S. 10 contains merely a penal provision which declares a certain omission to be an offence punishable with fine, that the manner in which and the court by which the penalty is to be enforced are outside the purview of Act 42 of 1923, and that the 'mutawalli' should be punished by a regular criminal court in accordance with the provisions of the Criminal Procedure Code. There are many enactments, besides the Indian Penal Code, which declare certain acts and omissions to be offences, though the trial for those offences is regulated not by those Acts but by the general Criminal Law. On the other hand, the whole scheme of Act 42 of 1923 suggests that the District Judge is the proper authority to impose the penalty provided for by S. 10 in respect of certain duties enjoined by that Act. S. 11 requires the local Government to make rules "to carry into effect the purposes of this Act". This seems to include rules prescribing the forum and the procedure for enforcement of the penalty laid down in S. 10. No rules have, however, been framed by the local Government in this behalf. In this state of things, I am inclined to the view, though not without hesitation, that the District Judge is the proper authority to enforce the provision contained in S. 10 of Act 42 of 1923. For these reasons, I concur with my learned brother in dismissing this revision.

BY THE COURT—We dismiss this application. The parties shall bear their own costs.

Application dismissed

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[2] I. L. R. 52 All. 167

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1932

Jan. 6

PULLAN, J.
NIAMAT-ULLAH, J.

AFZAL HUSAIN (*Applicant*)

versus

MOHAMMAD AHSAN AND ANOTHER (*Opposite parties*)*

Mussalman Waqf Act (XLII of 1923), Secs. 10 and 3—Failure to comply with Sec. 3—Necessary to decide whether person in default is 'mutawalli' of a 'waqf'—Sec. 10 applicable if position as 'mutawalli' established by evidence.

Before a person described as 'mutawalli' can be fined for failure to comply with the provisions of Sec. 3, Mussalman Waqf Act, it is necessary for the District Judge to decide whether the person who is alleged to be in default is or is not the 'mutawalli' of a waqf within the meaning of Sec. 2(*e*) of the Act. All that is needed to bring home an offence under Sec. 10 read with Sec. 3 to a defaulting 'mutawalli' is to establish by evidence that he is a 'mutawalli' in respect of property which is waqf within the meaning of Act XLII of 1923. Whether the character of the property is 'waqf' and his own position as 'mutawalli' are admitted or are established by evidence, if denied, Sec. 10 is equally applicable, if a 'mutawalli' has failed to comply with Sec. 3.

CIVIL REVISION from an order of HARISH CHANDRA ESQ., District Judge of Benares.

A. M. Khwaja for the applicant.

B. Malik for the opposite parties.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—Many points raised in this application have already been discussed by us in our judgment in Civil Revision No. 397 of 1930*. There are, however, two facts in particular which differentiate this case from the one decided by that judgment. In both the cases the District Judge fined persons described as 'mutawallis' of the 'waqf' under S. 10 Act 42 of 1923, but in the other case the 'mutawalli' had himself filed accounts under S. 3 of the Act, and he was fined for failure to file further accounts under S. 5 of the Act, in the present case the person described as 'mutawalli' has never admitted that the property which he manages is a 'waqf', and he has been fined for failure to comply with the provisions of S. 3 of the Act. We have expressed the view in the former case that to come to a decision under S. 10 of the Musalman Waqf Act it is necessary for a Court to decide whether the person who is alleged to be in default is or is not the 'mutawalli' of a 'waqf' within the meaning of the Act. This person, Syed Afzal Husain, had on many previous occasions, described himself as 'mutawalli' and the judge has given good reasons for holding both that he is the 'mutawalli' and that the 'waqf' managed by him is one which comes within the purview of Act 42 of 1923. It would be clearly impossible to fine any person under S. 10 of the Act for failure to comply with S. 3 of the Act if all he had to do was to deny that he was the 'mutawalli' of a 'waqf' and that is all the applicant in the present case has been able to do. There is ample proof that he is the 'mutawalli' of the 'waqf' and the Court cannot be excluded from considering this question when exercising its jurisdiction under Section 10 of Act 23 of 1923.

*Civ. Rev. 481 of 1930

*1932 A. L. J. R. 262

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1932
AFZAL HUSAIN v. MOHAMMAD AHSAN
Pullan, J.

We have also held in the connected case to which we have already referred that in our opinion the District Judge is empowered by S. 10 to impose the penalty of fine. Thus the order in this case, in so far as it is an order imposing a fine of Rs.50 on the applicant, is, in our opinion, a good order, which must be maintained, but no provision is made in the section for imposing a sentence of imprisonment in default of payment, and that part of the order of the District Judge must accordingly be set aside. We are also not of opinion that in a case of this kind any portion of the fine, when realized, should be paid to the informer. We, therefore, modify the order of the District Judge in this case, upholding the order of fine only and setting aside the order that in default the applicant should undergo simple imprisonment for one month and the order directing that Rs.25 out of the fine, if realized, should be paid to the applicants.

CIVIL
1932
Jan. 5
MUKERJI, J.
BENNET, J.

RAM KUNWAR (*Plaintiff*)
versus
AMAR NATH AND ANOTHER (*Defendants*)*

Hindu Law—Widow—Maintenance—In possession of a portion of joint family estate in lieu of maintenance—Whether can be dispossessed by decree-holder holding decree against rights of the family.

A widow has a right to hold that portion of the joint family estate of which she is in possession in lieu of maintenance as long as she is entitled to maintenance as a Hindu widow. On her death or if she ceases to be entitled to maintenance as a Hindu widow, the right to hold the estate would terminate. Subject to her right to hold the estate, it is open to a decree-holder of a simple money decree against the rights of the joint Hindu family to bring the property to sale.

FIRST APPEAL from a decree of M. O. KARNEY ESQ., First Subordinate Judge of Saharanpur.

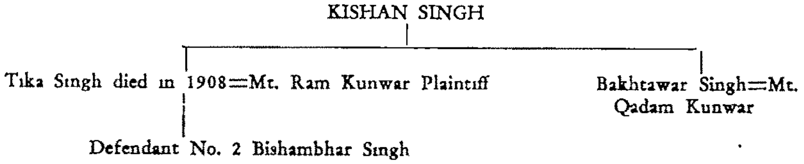
P. L. Banerji and *Akhtar Husain Khan* for the appellant.

K. Verma for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a first appeal by the plaintiff Mst. Ram Kunwar whose suit has been dismissed by the court of first instance. She claimed to be in adverse possession of certain zamindari property and asked for the relief of a declaration that she was the owner of that property and that it was not attachable or saleable in execution of a decree No. 140 of 1924 held by defendant No. 1 against defendant No. 2, Bishambhar Singh. The following family tree is relevant:—


KISHAN SINGH
Tika Singh died in 1908=Mt. Ram Kunwar Plaintiff
Bakhtawar Singh=Mt. Qadam Kunwar
Defendant No. 2 Bishambhar Singh

Bishambhar Singh is the son of an earlier wife of Tika Singh and on the death of Tika Singh in 1908, there was a dispute in mutation proceedings for which there is the evidence of a witness Ajmer Singh, which, following the court of first instance, we accept. This witness states that there was an agreement made during mutation proceedings by virtue of which the property in suit was recorded in the name of the plaintiff and the remaining property which was larger was recorded for Bishambhar Singh. Subsequently to this on September 8, 1915 there was a lease executed by the plaintiff and defendant 2 of their half share in certain property which had come from Tika Singh and also by Mst. Qadam Kunwar, who owned the other half share. This lease was for a period of 10 years ending with the rabi of the year 1924-25 two years before the suit, and by virtue of the lease the net profits of the property leased, said to amount to Rs.6,000 were divided as one-half to Mst. Kadam Kunwar and the other half between the plaintiff and defendant 2 in the proportion that the plaintiff received Rs.200 annually and the remainder of the Rs.3,000 went to defendant No. 2 and to pay a debt due from defendant No. 2. The lease set forth five items of property. Of these five items the plaint claimed one-fourth of items 2 and 5 for the plaintiff and one-half of item 4. Comparing the figures for revenue in the lease with the property claimed in the plaint we find that the share of revenue on the property in the plaint would be Rs.154 per annum. The rate of profit therefore of Rs.200 per annum is not improbable as put down by the lease. The question is as to whether the plaintiff obtained possession of this property as claimed by her. She has produced four witnesses and they have given evidence to the effect that payments were made by the lessee of the Rs.200 per annum to the plaintiff and one tenant has stated that he made certain payments to the plaintiff of rent. It is true that the plaintiff might have produced very much better evidence of payment of rent such as siyaha which would be signed by the person dictating the payment. But on the other hand the defendant No. 1 has not produced any evidence to contest the evidence on behalf of the plaintiff. We consider therefore that the finding of the court of first instance is correct and that the plaintiff has proved that from the year 1908 on the death of her husband she has been in possession of the property in the plaint which has been entered in her name. We agree with the court of first instance that that possession was permissive and arose from an agreement with her step-son. Therefore it follows that the plaintiff cannot succeed in her claim that she has a title of absolute ownership to the property by adverse possession, but when possession could be referred to a lawful source adverse possession should not be inferred. In the present case the possession of the plaintiff is referable to the agreement with her step-son. It is true that the plaintiff has not put forward her case on that ground. But we consider that on the finding that she is in possession by virtue of such an agreement with her step-son the plaintiff is entitled to a declaration, although not precisely the declaration for which she had asked in the plaint.

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*F. A. 49 of 1928

Considerable argument was made as to the right of the plaintiff holding in lieu of maintenance against a decree-holder holding a decree against the defendant No. 2, who is undoubtedly the person entitled to hold the property in the plaint, because the defendant No. 2 was a member of a joint family with his father at the time of the death of his father. Argument was made in regard to cases where there was a charge of a widow against an estate and in regard to the nature of the rights of a widow where

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RAM KUNWAR
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Bennet, J.

a charge had not been made. Reference was made to Mulla's Hindu Law, 6th edition, page 577, paragraph 569 for the proposition that the claim of a Hindu widow for maintenance was not a charge, and that a charge would not arise until there was a decree of a court or an agreement between the widow and the holder of the estate, and therefore that the widow's claim to maintenance is liable to be defeated by a transfer of her husband's property to a *bona fide* purchaser for value without notice of the claim of the widow for maintenance. These propositions are also contained in Section 39 of the Transfer of Property Act. But we consider that the present case is clearly distinguishable on the facts from either a claim for maintenance or a charge. The present case is not one of charge, because the widow is in actual possession of the property in the plaint. And the rights of the widow amount to more than a claim for maintenance, because she has been placed in possession of the property in the plaint in lieu of her claim for maintenance. The question before us is can the decree-holder of a simple money decree against the rights of the joint Hindu family dispossess the widow who is in possession of a portion of the estate in lieu of her maintenance? We consider that this proposition should be answered in the negative. We hold that the widow has a right to hold this portion of the estate of which she is in possession in lieu of maintenance as long as she is entitled to maintenance as a Hindu widow. On her death or if she ceases to be entitled to maintenance as a Hindu widow the right to hold the estate would terminate. Subject to her right to hold the estate it is open to the decree-holder defendant No. 1 to bring this property to sale. Accordingly we modify the decree of the lower court and the decree which we grant to the plaintiff-appellant is a declaration that the property in suit may be sold but the purchaser is not entitled to possession during the period in which the plaintiff is entitled to maintenance as a Hindu widow and the plaintiff is entitled to hold the property in suit for that period. As neither party has succeeded in their suit in full, we consider that the correct order for costs is that each party shall pay their own costs throughout.

Decree modified

BRIJ LAL
versus
EMPEROR*

CRIMINAL
1932
Jan. 11
BENNET, J

Criminal Procedure Code, Sec. 179—Offence under Sec. 409 I. P. C.—Complainant in Cawnpore—Goods sent to agent in Bengal for sale there—Money to be remitted to Cawnpore—Agent only accounted for part of price—Whether Cawnpore courts had jurisdiction.

Where a complainant in Cawnpore employed a commission agent in Bengal and sent goods to the agent for sale in Bengal, and the agent promised to send the money on receipt of the goods but only accounted for part of the price, *held,* that on the allegations jurisdiction lay in the criminal courts at Cawnpore to try the agent for an offence under Sec. 409 Penal Code. *Queen-Empress* v. *O'Brien,* I. L. R. 19 All. 111, *Longridge* v. *Atkins,* I. L. R. 35 All. 29, *Emperor* v. *Mahadeo,* I. L. R. 32 All. 397 *relied on; Ganeshi Lal* v. *Nand Kishore,* I. L. R. 34 All. 487 *not followed.*

*Cr. Rev. 681 of 1931

CRIMINAL

1932

BRIJ LAL
v.
EMPEROR

Bennet, J.

CRIMINAL REVISION from an order of BABU KALI DAS BANERJI, Additional Sessions Judge of Cawnpore.

Saila Nath Mukerji for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

BENNET, J.—This is an application in criminal revision by a complainant Brijlal of Cawnpore against an order of the Additional Sessions Judge of Cawnpore confirming the order of the Joint Magistrate of Cawnpore dismissing the complaint of Brijlal on the ground of want of jurisdiction in the Cawnpore courts. The complaint of Brijlal was made under Section 409 I. P. C. against an accused Hanuman Bakhsh. The complaint sets forth that Hanuman Bakhsh, who is the owner of a firm of Bhairon Bakhsh Mangi Lal, resides in Faridpur district in Bengal, and that the agent of the Cawnpore complainant, one Hoti Lal, appointed the accused as commission agent or arahtia for the sale of oil in the district of Faridpur, and that a consignment of oil was sent to the accused and that the accused had only accounted for part of the price. The Magistrate summoned the accused and the accused raised the plea that the Cawnpore criminal courts had no jurisdiction as the offence alleged would be an offence triable only by the courts of Faridpur. The Magistrate set forth certain facts, but he was not accurate in the facts which he set forth. He states in his judgment:

> Further the connection between the accused and the firm at Cawnpore is not direct.

Now two letters (one a copy and the other in original) have been produced by the complainant in this Court; one from the complainant to the accused was sent by post on a date corresponding to June 21, 1930. A copy of this letter states:

> No letter from you. Reply by return post. Our agent (gumashta) has appointed you our commission agent (arahatia). We are sending you, therefore, enclosed with this letter, railway receipt No. 001018 for one tank of Sarson oil which please receive and acknowledge. The mustard oil sent is of a fine quality. You should sell it at Rs.22-8-0 or at the lowest at Rs.22-4-0. Make best efforts in the work. Remit us Rs.7,000 on account of the railway receipt.

To this the accused is alleged to have sent a letter in reply which is produced in original:

> Received your registered letter yesterday with the railway receipt for a tank of oil. We shall write on receipt of the goods. The wagon, i.e., the tank has not arrived yet which please note We shall send the money on receipt of the consignment.

There is therefore a direct connection between the complainant and the accused as regards this tank of oil. The complainant sent the tank under a railway receipt which the complainant sent to the accused directly by registered post and the accused acknowledged the receipt of the railway receipt and promised to send the money to the complainant. Apparently the promise means that the money should be sent directly to the complainant at Cawnpore. These are the facts alleged by the complainant. I have set them forth, but of course I do not mean to imply that I consider these facts are proved. I only set them forth, because they constitute the allegations made on behalf of the complainant in this case. On these allegations it appears to me that the case is similar to several cases which have formed the subject of rulings of this Court—strangely enough cases which are also connected with Cawnpore. One of these cases is *Q.-E.* v. *O'Brien*[1], where the learned Chief Justice of this Court held that as loss occurred to the complainant at Cawnpore by the accused failing to send the price of goods sold on tour in Bengal to the complainant at Cawnpore, therefore the Cawnpore courts had jurisdiction to try the offence of Section 408 I. P. C. In that particular case there were no doubt other facts which are not existent in the present case, but learned Chief Justice based his judgment on the point that the loss was caused by the failure to remit money to Cawnpore. A case more similar to the present was reported in *Longridge* v. *Atkins*[2], and again the criterion taken for jurisdiction for criminal breach of trust is the failure to return profits to a complainant who was residing in Cawnpore. In that particular case there were two men who were residing in Cawnpore who went to Bombay and obtained a machine and apparently had a partnership in regard to this machine and one died in Bombay and the other took the machine on tour to Madras. His failure to return the machine to the widow of his partner in Cawnpore was held to be sufficient to give jurisdiction to the Cawnpore courts. In *Emperor* v. *Mahadeo*[3] there was a case similar to the present where a complainant in Mirzapur employed an agent in Bengal and sent goods to the agent who remitted money to Mirzapur. Failure to account for certain items involved a charge of criminal breach of trust and it was held that there was jurisdiction in the courts at Mirzapur. On the other hand there was a ruling in *Ganeshi Lal* v. *Nand Kishore*[4] to the contrary in a somewhat similar case. But the weight of authority is that there is jurisdiction in a case of this nature in the courts of the district to which the accused is alleged to be bound to make a remittance. Having regard to these various rulings, I consider that I should follow the weight of judicial decision in this Court, and accordingly I hold that, on the present allegations, jurisdiction lies in the criminal courts at Cawnpore. Accordingly I set aside the order of the Magistrate and the order of the Additional Sessions Judge and I direct that the Magistrate should dispose of this complaint according to law. The letter and copy produced by the complainant in this Court will be sent to the court of the Magistrate and also the translations. Notice has been served on the accused, but he did not appear.

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[1] I. L. R. 19 All. 111

[2] I. L. R. 32 All. 397

[3] I. L. R. 35 All. 29

[4] I. L. R. 34 All. 487

CIVIL

1932

Jan. 12

PULLAN, J.
NIAMAT-ULLAH, J.

BHAGWANT SINGH (*Applicant*)

versus

BHAO SINGH AND ANOTHER (*Opposite parties*)*

Legal Practitioner—Payment of fees—By execution of promissory note—Whether can be taxed as costs—General Rules, Chapter XXI, Rule 1—Actual payment necessary.

Where the certificate filed by a legal practitioner showed that cash had not been paid, but that a promissory note had been executed in his favour in lieu of the unpaid part of his fees, *held*, that payment of fees to a legal practitioner must be made in the manner laid down by General Rules, Chapter XXI, Rule 1 (applicable to subordinate courts), which contemplates *actual payment*, and if payment is not actually made but is only promised, it cannot be taxed as costs recoverable from the opposite party.

CIVIL REVISION from an order of ABDUL HALIM ESQ., District Judge of Budaun.

A. Sanyal for the applicant.

P. M. L. Verma for the opposite parties.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an application for revision directed against an order passed by the learned District Judge of Budaun in proceedings taken by the present applicant for amendment of a decree passed by him, which decree was subsequently appealed from and affirmed by this Court.

The applicant was the plaintiff in the suit originally instituted in the court of the Subordinate Judge of Budaun. It was decreed *ex parte*. An application for an order to set aside the *ex parte* decree was dismissed by that court; but on appeal to this Court it was successful. The suit was, however, remanded not to the court of the Subordinate Judge, but to that of the District Judge for trial on the merits. It was eventually dismissed by the District Judge with costs. Included in the memo of costs appended to the decree prepared by the District Judge were two sums taxed as costs properly incurred by the plaintiff: one was a sum of Rs.735, paid to Babu Sheo Narain Jafa, senior vakil, and the other a sum of Rs.299 paid to B. Prem Mohan Lal, junior vakil. It is conceded that these sums were not paid to the aforesaid vakils in cash and that a promissory note was executed by Mst. Pania, wife and 'mukhtar-i-am' of one of the defendants, in favour of both the vakils. The certificates filed by the vakils themselves showed that cash had not been paid, but that a promissory note had been executed in their favour in lieu of the unpaid part of their fees.

The defendants, on whose behalf the above-named vakils appeared, were in jail at the time the certificates were filed. The lower court has mentioned in its judgment that the promissory note was executed with the permission of the then District Judge. The learned counsel for the applicant has controverted this fact and drawn our attention to an application, dated March 8, 1927, presented by B. Sheo Narain Jafa, in which he represented to the District Judge that his clients were in jail, that those who looked after the case on their behalf had paid only Rs.140 in respect of the fees due to the vakils who acted for them and that, if payment was not made, they would not file certificates and the defendants would, on the one hand, not be entitled to have the legal practitioners' fees taxed, and would, on the other hand, be liable to pay on a suit being brought by the legal practitioners for recovery of their fees. B. Sheo Narain Jafa requested the District Judge by this application to send for the defendants, who, as already stated, were in jail, so that they might execute promissory notes in favour of the vakils, who would, in that case, file certificates and the fees thus paid would be taxed as costs recoverable from the opposite party. The only order which the learned District Judge noted on this application was "permitted". Reading this order in the context in which it occurs, we think that what the learned District Judge meant was that the defendants be allowed to come to the court to settle matters with their vakils. We are not aware whether this was done; but it is certain that no promissory note was executed by the defendants themselves and it was Mst. Pania who did so. A promissory note was filed with the certificates in which the vakils acknowledged receipt of a certain amount as fees by obtaining execution of the promissory note. The promissory note bears an order of the District Judge that the same be retained with the record. In these circumstances, it is not correct to say that the promissory note executed in favour of the two vakils, which constituted the payment referred to in their certificates was executed with the permission of the District Judge, though he was aware of the circumstances and the manner in which payment had been made; but even assuming that the District Judge expressly permitted this mode of payment, the legal aspect of the matter is not different. Rule 1, Chapter XXI of the General Rules applicable to the subordinate courts distinctly provides that

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*Civ. Rev. 566 of 1930

> in drawing up a decree or order no fee to any legal practitioner not appearing for the Crown or Government or the court of wards as a party shall be allowed on taxation between party and party or shall be included in any decree or order unless the Munsarim or, on application to the judge, the judge is satisfied that the fees was paid to such legal practitioner at or before the hearing of the suit and unless at or before such time there shall have been delivered to the munsarim a certificate signed by the legal practitioner certifying the amount of the fee or fees *actually paid to him* for his own actual use and benefit by or on behalf of his client.

There can be no doubt that the rule quoted above contemplates actual payment, and not a mere promise to pay, even though such promise is evidenced by a promissory note, bond or any other instrument. The learned District Judge was apparently under the impression that there is no law which made payment to a legal practitioner in the manner adopted in this case as no payment for the purposes of taxation of costs. The rule already referred to by us has the force of law, and is clearly against the view accepted by the learned Judge.

We think that B. Sheo Narain Jafa did not correctly represent matters to the learned District Judge in stating that, if payments were made to the legal practitioners by promissory notes being executed in their favour, the same would be taxed as costs in the suit. Either he did not acquaint himself with the rules on the subject, or knew the rule quoted above and yet assured the District Judge that such costs could be taxed. In either case, his action was unjustified. He was apparently anxious to secure the pay-

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ments of fees to himself and his junior colleague by promissory notes being executed in their favour. The District Judge was not opposed to that mode of payment, as he had been given to understand that payments made in that manner would be taxed as costs incurred in the suit. Be that as it may, we entertain no doubt that the payment of fees to a legal practitioner must be made in the manner laid down by Rule 1, Chapter XXI, already referred to, and that, if payment is not actually made but is only promised, it cannot be taxed as part of the costs incurred by the party alleged to have made the payment. This being so, the sums of Rs.735, taxed as fee paid to B. Sheo Narain Jafa and Rs.299 taxed as fee paid to B. Prem Mohan Lal, should not have been taxed.

The learned advocate for the opposite party has contended that the lower court had no jurisdiction to order an amendment of its own decree, which became merged in the decree of this Court passed on appeal and that, therefore, the application for amendment of decree was incompetent. According to his contention, the application for amendment of decree must be made to the court of appeal, that is, to the High Court in this case. It is not necessary for us to decide the legal question involved in this contention, because assuming the application for amendment of the decree should have been made to this Court in the first instance, we can treat and are inclined to treat the application for revision as such application and dispose of the matter on the merits to prevent multiplicity of proceedings. We have already expressed our opinion on the merits, and whether we entertain the application as one for revision or as an original application made to this Court, our view is the same. There is no doubt that the District Judge who took a contrary view acted in contravention of Rule 1, Chapter XXI, and to that extent he exercised his jurisdiction illegally. If, therefore, we entertain the application as revision, the ground for interference under Section 115 C. P. C. clearly exists.

The learned counsel for the opposite party also contended that the applicant was guilty of laches and his belated application for amendment of decree should not have been entertained by the District Judge and should not be entertained by this Court. We do not think there is any force in this argument. It is the duty of a court to prepare its decree in accordance with its judgment, and if there is any variance between the two it must correct the decree so as to make it in conformity with the judgment. The duty primarily rests with the court, and not with any interested party, to apply to that Court for amendment of the decree. When a judgment awards costs to a party, it implies costs deemed to be such according to rules. If a decree includes costs not legally taxable, it cannot be said to be in accordance with the judgment. Moreover, there are no facts on which the plea of laches or undue delay can be founded.

In view of the circumstances already stated, we allow this application in part and direct that the decree of the court of the District Judge, Budaun, in suit No. 70 of 1925, be so amended as to exclude the sums of Rs.735 and Rs.299, shown as fees paid to the defendants' pleaders, namely. B. Sheo Narain Jafa and B. Prem Mohan Lal, from the memorandum of costs incurred by the defendants.

Another prayer, which the applicant made to this Court in revision, and to the learned District Judge in the first instance, was that a sum of

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Rs.450, paid to the legal practitioners in miscellaneous proceedings taken for an order to set aside the *ex parte* decree, should not be taxed in its entirety. Rs.225 was paid to the legal practitioners of each of two sets of defendants, whose defence proceeded on a common ground. The decree prepared by the trial court allows the entire sum of Rs.450 as part of the costs incurred by the defendants against whom the plaintiff-applicant's suit was dismissed. There is no mistake in the decree in this respect. The suit was dismissed with costs, which means costs incurred by all the defendants against whom the plaintiff's suit was dismissed. We are satisfied that the order passed by the learned District Judge in this connection is not open to challenge. The application is dismissed in that respect.

In the circumstances of this case, parties shall bear their own costs of the proceedings taken before this Court and those in the court of the District Judge by an application for amendment.

Application allowed in part

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Pullan, J.
Niamat-ullah, J.

AMIR HASAN KHAN (*Defendant*)
versus
MOHAMMAD NAZIR HASAN (*Plaintiff*)*

Transfer of Property Act, Sec. 3—'Actionable claim'—Mohammedan widow's claim to unpaid dower debt—Whether amounts to—Mohammedan Law—Dower—Widow in possession of husband's property in lieu of dower debt—Transfers claim to debt and *right to possession, to a legal practitioner—Legal practitioner does not in law acquire widow's right to dower (Sec. 136 T. P. Act)—Whether husband's heir can dispossess legal practitioner.*

A Mohammedan widow entered into possession of her husband's property peacefully and without force or fraud in lieu of her dower debt. Later she executed a sale deed in favour of the present defendant-appellant, *a legal practitioner,* transferring her right to recover the dower debt and the right to remain in possession of the property till her dower was paid. Possession was obtained by the present defendant. Thereupon the present plaintiff-respondent, in whom the ownership of the property in possession of the defendant vested as the heir of the husband, instituted a suit for recovery of possession. *Held,* (1) that a Mohammedan widow's claim to unpaid dower debt is an actionable claim as now defined in Sec. 3 Transfer of Property Act, and the defendant being a legal practitioner was debarred under Sec. 136 T. P. Act from taking a transfer of such claim, (2) that the defendant, who had not in law acquired the widow's right to receive dower, was not entitled to retain possession as against the husband's heir who owned the property.

A Mohammedan widow in possession of her husband's property in lieu of dower, can sue for her dower and obtain a decree against the assets of her husband if her claim is not barred by limitation.

If the right to receive dower *and* the right to remain in possession of certain property in lieu of such dower are vested in the same person, by inheritance or transfer, he cannot be dispossessed by the heirs of the husband until the dower debt is satisfied. *Ali Baksh* v. *Allahdad Khan*, I. L. R. 32 All. 551.

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*S. A. 1268 of 1929

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AMIR HASAN KHAN *v.* NAZIR HASAN

Niamatullah, J.

SECOND APPEAL from a decree of M. F. P. HERCHENRODER ESQ., District Judge of Cawnpore, reversing a decree of BABU LAKSHMI NARAIN TANDON, Additional Subordinate Judge.

P. L. Banerji and *M. A. Aziz* for the appellant.

Zamirul Haq for the respondent.

The judgment of the Court was delivered by

NIAMATULLAH, J.—This second appeal has arisen out of a suit brought by the plaintiff-respondent for recovery of possession of a six anna share in village Bahrampur, district Fatehpur. The Subordinate Judge, in whose court the suit had been instituted, dismissed it; but on appeal by the plaintiff it was decreed by the District Judge.

Village Bahrampur above mentioned belonged to Saghir Hasan, husband of Kulsum Bibi, defendant No. 2, and Munshi Amir Hasan Khan, a vakil practising in Fatehpur, in equal shares. The two do not appear to belong to the same family, and the fact that they were co-sharers may be due to circumstances which are not material for the purposes of this case. Saghir Husain died in or about 1920, leaving his brother Nazir Husain, plaintiff-respondent, and Mst. Kulsum Bibi, defendant No. 2, as his heirs, the latter being entitled to one-fourth of Saghir Husain's property, and the former to the remaining three-fourths. The widow, however, entered into possession of the entire 8 anna share belonging to her husband, and obtained mutation of names, as owners to the extent of 2 annas (one-fourth), and in lieu of dower to the extent of 6 annas (three-fourths). The plaintiff contested her claim in the proceedings for mutation, but was unsuccessful. He acquiesced in the order of the revenue court upholding the widow's right to remain in possession of the plaintiff's share till her dower debt was paid. She executed on September 22, 1925, a deed of sale in favour of defendant No. 1 the validity of which is in question in the present case. The deed recites that a large sum of money was due to the executant, Mst. Kulsum Bibi, in respect of her unpaid dower debt, (the exact amount of which is not specified) and that she was in possession of six annas share in lieu thereof. The deed purports to convey the entire 8 anna share to the vendee in consideration of Rs.3,875, part of which was left with the vendee. The deed also purports to assign to the vendee the vendor's right to recover her dower debt and the right to remain in possession of 6 anna share until it is paid. Defendant No. 1 obtained possession of the entire 8 anna sold by the defendant No. 2.

The present suit was instituted on May 18, 1927 for recovery of possession of 6 anna share belonging to the plaintiff but previously held by the widow (defendant No. 2) in lieu of dower. The validity of the sale deed so far as it relates to 6 anna share belonging to the plaintiff is impugned on the ground that defendant No. 2 had no right to transfer her dower debt and her right to possession of 6 anna share to defendant No. 1. According to the plaintiff the dower of defendant No. 2 stipulated at the time of her marriage with Saghir Husain was no more than Rs.1,700. It was pleaded by defendant No. 1 in defence that the dower of defendant No. 2 agreed to by her husband was Rs.50,000, and that she was entitled to possession of her husband's share till the aforesaid amount was paid, which right she validly transferred to defendant No. 1.

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The trial court held that the dower of defendant No. 2, stipulated at her marriage with Saghir Husain, was Rs.50,000 and that she having transferred her right to receive dower as well as her right to retain possession of her husband's share in village Bahrampur in lieu of dower, the defendant No. 1 was entitled to remain in possession, the dower debt not having been paid by the plaintiff.

The learned District Judge took a contrary view in a well reasoned judgment holding that the widow's claim to dower is an actionable claim, as defined in the Transfer of Property Act, and that the defendant No. 1 being a legal practitioner was debarred from taking a transfer of such claim. Accordingly defendant No. 1 did not acquire the right to recover the dower debt and could not, for that reason, acquire an indefeasible right of possession of six anna share which was previously in the hands of the widow subject to the lien for her unpaid dower debt. As regards the amount of dower, the learned Judge held that the burden of proving the exact amount stipulated at the time of marriage lay on the widow, who failed to establish that it was Rs.50,000. He laid stress on the recital in the sale deed which did not specify the amount of dower but mentioned it generally as a large amount. Apparently the learned Judge was of opinion that the sum of Rs.50,000 alleged in the written statement was the result of an afterthought.

It was contended before us by the learned advocate for the defendant-appellant that the widow's right to recover her unpaid dower is not an actionable claim, as defined in the Transfer of Property Act. Reference was made to *Shib Lal* v. *Azmatullah*[1] and *Aruna Chelliam Chetti* v. *Subramaniam Chetti*[2]. In the first of these cases, which was decided by a Full Bench of this Court in 1896, it was held 'that the term "actionable claim" as used in Section 130 of Act IV of 1882, means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit'. The debt in question in that case was due under a simple mortgage payable after a specified date. It was held that a mortgage debt, before it became payable, was not an actionable claim. The second case follows the first. In view of subsequent legislation, which materially altered the definition of "actionable claim" both the above cases have become obsolete in relation to transactions entered into after 1900, when the Transfer of Property Act was amended. An actionable claim is now defined to mean "a claim to any debt, other than a debt secured by mortgage of immovable property which the civil courts recognize as affording grounds for relief, whether such debt be existent, accruing, conditional or contingent". In the Act as it stood before the amendment, Section 130 defined "actionable claim" as "a claim which the civil court recognises as affording grounds for relief whether a suit for its enforcement is or is not actually pending or likely to become necessary." A comparison of the two definitions makes it clear to us that there was room for argument before the amendment that a debt in respect of which no cause of action had arisen and which was not payable at the date of assignment did not amount to an actionable claim. The amended definition has excluded secured debts from the category of actionable claims on the

[1] I. L. R. 18 All. 265

[2] I. L. R. 30 Mad. 235

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one hand and included certain debts though they are 'accruing, conditional or contingent'. It is no longer possible to contend that a debt, which otherwise amounts to an actionable claim, is not such only because a cause of action in respect thereof has not arisen or the time for its payment has not arrived. Section 135 as it stood before the amendment and which was in question in *Shib Lal* v. *Azmatullah*[3] was repealed. It is not necessary to pursue this aspect of the case further, as we are satisfied that a claim to unpaid dower debt is an actionable claim as now defined in Section 3 of the Transfer of Property Act. This being so, and the defendant No. 1 being a legal practitioner, Section 136, Transfer of Property Act, is undoubtedly applicable. It forbids a legal practitioner among others to buy any actionable claim. The prohibition being absolute, any transfer in defiance of Section 136 is calculated to defeat its provisions and as such is void.

It was contended by the learned advocate for the appellant that the transaction evidenced by the deed dated September 22, 1925 should not be viewed as (1) an assignment of dower debt by Mst. Kulsum Bibi and (2) a transfer of her right to possession, taking the two separately, and that it amounted only to a transfer of the widow's right to possession in lieu of dower. The argument was that the claim to dower debt became merged in the widow's right to retain possession and had no separate existence as an assignable right. It was emphasised that the widow could not institute a suit for recovery of her dower and that her only remedy in respect of it was to remain in possession till she was paid off. We are unable to accede to this argument. A widow in possession of her husband's property, if she obtained it peacefully and without force or fraud, is entitled to retain it till her dower is paid. No exception can be taken to this statement of the law on the authorities of this Court. It implies the existence of the dower debt and the liability of the heirs to pay it before they can take possession of their shares. There is nothing to prevent a widow from instituting a suit for her dower for the purpose of obtaining a simple money decree against all the assets of her husband, including the property in her possession, at least by surrendering possession of such property in her hands. We refrain from deciding that she must in all cases surrender possession as a condition precedent to her obtaining a decree against the assets of her husband; but we entertain no doubt that she can sue for her dower, if she is so advised and obtain a decree against the assets of her husband, subject to her claim being unaffected by the law of limitation. The right of a Mohammedan widow, who has entered into possession of her husband's property peacefully and without force or fraud in lieu of her dower debt has been held by this Court to be heritable so as to entitle her heirs to remain in posesssion until the debt is satisfied. See *Ali Bakhsh* v. *Allahdad Khan*[4]. The possession of heirs who inherited not only her right to receive the dower but also her right to remain in possession is thus not open to question. It was also laid down in that case that a widow could transfer her right to possession, if she also assigned her right to receive the unpaid dower. One of the learned Judges observed that he knew of "no valid reason in law why she should not be entitled to transfer her debt together with her right to continue in possession". The heirs of the widow had, in that case, transferred part of their right to receive the dower and to possession of her hus-

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[3] I. L. R. 18 All. 265

[4] I. L. R. 32 All. 551

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band's property to strangers, who were jointly in possession with them and were defendants in the suit brought by the heirs of the husband for possession. We are bound to follow the cases of this Court, even if we thought differently, but as already stated we take exactly the same view. If the right to receive dower and the right to remain in possession of certain property in lieu of such dower are vested in the same person, he cannot be ousted by the heirs of the husband. If however the widow transfers her right to possession of the property itself, without transferring her right to receive dower, the transferee cannot defend his right to possession as against the heirs quo the latter's share. The ownership being vested in the heir of the husband, the only person who can stand between him and what belongs to him is the person who is entitled to the dower and to possession of the property in lieu thereof. In the present case the defendant No. 1, who has not in law acquired the widow's right to receive dower, is not entitled to retain possession, which the widow could not transfer without validly transferring her right to receive the dower debt.

The result is that this appeal fails, and is dismissed with costs.

Appeal dismissed

GIRDHARI LAL AND ANOTHER (*Defendants*)
versus
BISHUN CHAND THROUGH SRI RAM (*Plaintiff*)*

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Jan. 19
MUKERJI, J.
BENNET, J.

Limitation Act, Art. 64—'Account stated'—Meaning of—Bilateral account essential—Account must be stated within limitation—Burden of proof.

The expression "accounts stated" in Art. 64, Limitation Act, implies that there must be mutual demands on each side and the account must not be a unilateral but a bilateral account. In other words the Article contemplates an account stated by one party and an account stated by the other party, that is, two accounts and not merely an account stated by a single party.

Where the plaintiffs lent money to the defendants and the defendants merely made repayments of money which had been lent and had all along been debtors of the plaintiffs, and on a certain date the accounts were gone into and a sum of money found due to the plaintiffs, and the defendants acknowledged the said sum in the books of the plaintiffs, and within three years of the acknowledgment the plaintiffs sued the defendants for a certain sum of money as due on the acknowledgment, *held,* that the transactions were entirely unilateral, and there was no statement of a mutual account, and the case, therefore, did not come under Art. 64 Limitation Act.

For an account stated under Art. 64, Limitation Act, the account must be stated within the period of limitation, and it is necessary for the plaintiff to show that the acknowledgment is within the period of limitation.

FIRST APPEAL from a decree of BABU MAHESHWAR PRASAD, Subordinate Judge of Shahjahanpur.

S. K. Dar, Shiva Prasad Sinha, Badri Narain, Hazari Lal Kapoor, Ram Nivas Shukla and *Newal Kishore Seth* for the appellants.

K. N. Katju and *Iqbal Ahmad* for the respondent.

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*F. A. 33 of 1928

The judgment of the Court was delivered by

Bennet, J.—This is a first appeal by the defendants against a decree of the learned Subordinate Judge of Shahjahanpur decreeing the plaintiff's claim for a sum of Rs.18,467-9-0 together with costs and interest. The only question before us is one of limitation. The plaint set forth that the plaintiff's firm was a firm of money lenders and that it was agreed that the defendants should borrow money from the plaintiff's firm and interest would be payable on the loans at the rate of ten annas per cent per mensem and that entries should be made of the loans in the account books of the plaintiff. Paragraph 4 of the plaint set forth that on the date corresponding to September 26, 1925 the account as between the parties was adjusted and a sum of Rs.16,043-8-9 was found due to the plaintiff by the defendants. The defendants admitted and acknowledged the said sum of money to be due by them. The plaint then set out an acknowledgment in the books of the plaintiffs but we note that it is admitted by learned counsel on both sides that the translation at page 2 of the paper-book is inaccurate as it contains the words "by us" which are not in the vernacular in the original either of the plaint or of the account books. Paragraph 6 set out that, according to this agreement, a sum of Rs.17,347-1-0 was found due to the defendants on the date corresponding to October 15, 1926, and the defendants did not pay. The plaint therefore claimed a certain sum of money as due on the acknowledgment of September 26, 1925. The suit was brought on August 17, 1927, i.e., within three years of the acknowledgment. The written statement of the defendants pleaded that the defendants now and then took money from the plaintiff's firm and the defendants admitted that they signed the acknowledgment but denied that any account was made. The additional plea set forth that the defendants never advanced any sum of money to the plaintiff's firm as loan and that the defendants had neither taken any debt from the plaintiffs nor paid any sum of money to the plaintiffs within three years of the date of institution of the suit and that the suit was time-barred. The court of first instance held that the suit was within the period of limitation. On first appeal learned counsel for the plaintiffs supported the decree of the court of first instance on the ground that the acknowledgment would amount to an account stated under Article 64 of the Limitation Act, and argued that in the alternative it would come under Section 25 of the Indian Contract Act. The acknowledgment in question is contained in the books of the plaintiff which show the loans which have been taken by the defendants and the payment made by them. A correct translation is printed on page 15 of the paper-book and is as follows:—

> Balance due to be paid after adjusting the account up to Kunwar Sudi, 9. Rs.16,043-8-9.
>
> Signature of Girdhari Lal in autograph.
>
> Signature of Ram Charan Lal in autograph.

We may note that the account book shows that the vernacular words "baqi lenna rahe Miti Kunwar Sudi Naumi Sambat 1982 tain hisab karke rupaiya 16,043-8-9" are in the account book of the plaintiff's firm in the writing of a person who kept the account book. Below this entry there occur the following words written by a defendant and signed by the defendants and written across a one anna stamp: "baqi dena rahe Miti Kunwar Sudi Naumi

Sambat 1982 tainhisab karke rupaiya 16,043-8-9." The signatures of the two defendants follow.

Now the questions which have been argued in regard to Article 64 of the Limitation Act are two: firstly, was there an account stated within the meaning of that Article and, secondly, whether there can be an account stated after the period of limitation has expired in regard to the transactions between the parties. The learned counsel for the plaintiff-respondents did not show us any satisfactory authority in support of his argument that this acknowledgment would amount to an account stated. He referred to the statement of the plaintiff in evidence on pages 7 and 8 of the paper-book which is to the effect that the plaintiff had sent a note of their accounts to the defendants and that the defendants had understood the account and had then written the acknowledgment. The defendants did not give evidence to contradict that, so we accept that statement as correct. But the point is whether the words "account stated" can be applied to a money lending transaction like the present where one party the plaintiffs lent money to the defendants and the defendants merely made repayments of money which had been lent. It has been shown by the evidence of the plaintiff that the defendants never sent to the firm of the plaintiff a sum which made the defendants creditors of the firm of the plaintiff. The defendants have all along been debtors of the firm of the plaintiff. The transactions, therefore, are entirely unilateral, and there is no statement of a mutual account. In Article 64 of the first schedule of the Limitation Act the statement is "accounts stated between them." The Article, therefore, contemplates an account stated by one party and an account stated by the other party, that is, two accounts and not merely an account stated by a single party. The Article, therefore, contemplates mutual accounts. We would refer for the meaning of this expression to the case of *Laycock* v. *Pickles*[1], where it is stated as follows:—

> There is a real account stated when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side.

In *Jamun* v. *Nand Lal*[2] it was held that the striking of a balance in an account, the items of which are all on one side, does not amount to an "account stated." This ruling followed *Nahanibai* v. *Nathu Bhau*[3] and *Tribhovn Gangaram* v. *Amina*[4] on this point. In *Ganga Prasad* v. *Ram Dayal*[5] it was laid down "An account stated" in the true sense is where several cross claims are brought into account on either side, and are set off against each other and a balance is struck It was held in *Jamun* v. *Nand Lal*[6] that Article 64 of the Limitation Act applied only to such an account stated, and not to a case like the present, where there were no demand to be set off against each other, but only debts on one side of the account and payments made by the debtor on the other. In *Ganesh* v. *Mullu Mal Girdhas Das*[7] a Bench of this Court held that the term "accounts stated" will not cover the going into accounts and the ascertaining of what

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[1] Best and Smith's Q. B. R. Vol. IV, 497 at 506
[2] I. L. R. 15 All 1
[3] I. L. R. 7 Bom. 414
[4] I. L. R. 9 Bom. 516
[5] I. L. R. 23 All. 502 at 503
[6] I. L. R. 15 All. 1
[7] 1931 A. L. R. All. 375

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Bennet, J.

is due to the plaintiff from the defendant. We may also refer to *Deoraj Tewari* v. *Indrasan Tewari*[8] where it was held that the certain *chithas* were not in any sense an account stated for want of mutuality. Against this array of authorities learned counsel for the plaintiff-respondents referred to *Manjunatha Kamti* v. *Devamma* alias *Gomathiamma*[9] where it was held that reciprocal demands were not necessary for Article 64. In that case which was very briefly reported there was an account between the partners in a shop for the profits of the shop, and it was not a case of a money lending transaction between a creditor and a debtor. No authority was shown to us in which any Court had followed this ruling in I. L. R. 26 Madras, page 186. Reference was made by learned counsel for plaintiffs to *Sarifun Mandalin* v. *Feradoul Khatun*[10] where the court held that the case did not come under Article 64, but an observation was made that in two cases of the Calcutta High Court it had been held that for Article 64 it was not necessary to have reciprocal demands. The Court however stated that it was not going to express any opinion as to whether reciprocal demands were necessary or not for Article 64. As the Court did not state what were the cases in which the proposition advanced by the learned counsel for the plaintiffs was held, this ruling does not help him in the least. Reference was also made to *Kahan Chand-dula Ram* v. *Daya Ram Amrit Lal*[11] in which it was held that there was an account stated on the facts of that case where there was some loss from cotton seed. It was further stated:

> Now, the three expressions, 'balance due', "account adjusted" and 'balance struck' mean that the plaintiffs and the defendants went through the account. The defendant accepted the statement of account contained in plaintiffs' books and made it his own by signing in the way he did. This, in our opinion, fulfils all the necessary requirements of the words 'account stated between them'.

If this paragraph in the judgment is intended to state that Article 64 will apply to a case where there is only an account on one side and not on both sides, we respectfully differ from that opinion. In our opinion the expression "accounts stated" implies that there must be mutual demands on each side and the account must not be a unilateral but a bilateral account. We consider that the definition given in *Ganga Prasad* v. *Ram Dayal*[12] is correct and that the weight of authority supports that proposition. Accordingly we consider that the present case cannot come under Article 64, because there was no account stated between the parties.

It is perhaps unnecessary to go into the further question that the memorandum would be beyond the period of limitation and that for an account stated under Article 64 the account must be stated within the period of limitation. Supposing, for instance, a period of fifty years elapsed between the last transaction in question and the statement of the account, we are of opinion that an interval of this nature or any interval beyond the period of limitation may render the account stated useless for the purposes of saving limitation.

The next point which was advanced by learned counsel for the plaintiff-respondent was that his case would come under Section 25 of the Indian Contract Act. Section 25 lays down in Sub-section (3):

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[8] I. L. R. 8 Pat. 706 at 709

[9] I. L. R. 26 Mad. 186

[10] A. I. R. 1923, Cal. 578

[11] I. L. R. 10 Lah. 745

[12] I. L. R. 23 All. 502 at 503

> An agreement made without consideration is void, unless it is a promise, made in writing and signed by the person charged therewith, or by his agent generally or specially authorised in that behalf to pay wholly or in part a debt of which creditor might have enforced payment but for the law for the limitation of suits.

That is, a promise to pay a time-barred debt is valid if it is made in writing and signed by the person to be charged therewith. We may observe that the plaint set forth that there were transactions between the parties, and it is established by evidence that the last transaction by way of loan to the defendants from the plaintiffs took place more than three years before the acknowledgment of September 26, 1925, i.e., on August 9, 1921 the defendants borrowed Rs.1,000 from the plaintiff. That is the last transaction which is proved to have taken place between the parties. It is proved in fact that the amount of the debt on October 10, 1921 was Rs.17,057-11-3 and it was reduced on September 26, 1925 to Rs.16,043-8-9 and this implies that certain payments must have been made by the debtor in this interval of four years, but there is no evidence to show whether those payments were made within a period of three years from September 26, 1925 or not. It is also possible that some portion of the claim might have been remitted by the plaintiff. The learned counsel for plaintiff argued that as neither side had given evidence on this point, the burden of proof to show that the acknowledgment was beyond the period of limitation lay on the defendants. But we consider that the onus of proof lay on the plaintiff to show that his case came within the period of limitation on account of this acknowledgment and, therefore, that it was necessary for the plaintiffs to establish that this acknowledgment came within the period of limitation. Another reason why we consider that the burden of proof lay on the plaintiffs is that under Order VII, Rule 6 Civil Procedure Code where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

We now turn to the question of Section 25 of the Indian Contract Act. The argument centered round the question of firstly whether an express promise is necessary for that section or an implied promise is sufficient. The learned counsel for the defendant-appellants relied on *Ganga Prasad* v. *Ram Dayal*[13], *Gobind Das* v. *Sarju Das*[14], *Raj Narain Rao* v. *Ram Sarup*[15], *Allah Bakhsh* v. *Hamid Khan*[16] and *Ganesh* v. *Mallu Mal Girdhas Das*[17] for the proposition that it was necessary to show an express promise to pay for Section 25 of the Indian Contract Act, and a mere acknowledgment of liability, will not be sufficient. This doctrine of the Allahabad High Court has been followed in *Deoraj Tewari* v. *Indrasan Tewari*[18] and *Magan Lal Harjibhai* v. *Amichand Gulabji*[19] and *Ramaswami Pillai* v. *Kuppuswami Pillai*[20] and *Sasi Kanta Achabji Chowdhury* v. *Sonaulla Munshi*[21]. On the other hand, learned counsel for the plaintiff could only advance the ruling of *Kahan Chand-dula Ram* v. *Daya Ram Amrit Lal*[22] where it was held that an unconditional acknowledgment implied a pro-

[13] I. L. R. 23 All. 502

[14] I. L. R. 30 All. 268

[15] I. L. R. 52 All. 480

[16] 1931 A. L. J. R. 56

[17] 1931 A. I. R. All. 375

[18] I. L. R. 8 Pat. 706

[19] I. L. R. 52 Bom. 521

[20] 20 Mad. L. J. 656

[21] 33 Cal. W. N. 965

[22] I. L. R. 10 Lah. 745

mise to pay. We consider that the weight of authority is undoubtedly in favour of the doctrine advanced by the defendants, and we hold that it is necessary to show an express promise to pay in order that Section 25 of the Indian Contract Act should be applied. If the argument of the learned counsel for the plaintiff were correct and an implied promise were sufficient for Section 25 of the Indian Contract Act, then any acknowledgment could be used under Section 19 of the Limitation Act if the acknowledgment were made within the period of limitation and, if the acknowledgment were made beyond the period of limitation, then it could be used under Section 25 of the Indian Contract Act. If this were so, then the criterion in Section 19 of the Limitation Act that the acknowledgment must be made within the period of limitation would be useless.

We may note that it was admitted that Section 19 of the Limitation Act would not apply to the present case, because the period of limitation had expired before the acknowledgment in question was made.

Some further argument was made on the basis of a statement in a judgment of their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rup Chand*[23] which was as follows:—

> An unconditional acknowledgment has always been held to imply a promise to pay because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do.

We follow *Gobind Das* v. *Sarju Das*[24] in holding that as the acknowledgment before their Lordships of the Privy Council was held to come under Section 19 of the Indian Limitation Act, these words apply to an acknowledgment under that Act and are not intended to apply to Section 25 of the Indian Contract Act.

Further argument was made by learned counsel for the plaintiff to the effect that there was in the present case an express promise to pay. We consider that there is nothing whatever in the words of the memorandum to support such an argument, and we consider that the words "express promise" mean that there should be some such words as "I promise to pay". There is no such expression at all and we consider that the argument is unsound.

For the reasons stated, we consider that the case for the plaintiff is brought beyond the period of limitation. Accordingly we allow this appeal and set aside the decree of the lower court, and we dismiss the suit of the plaintiff with costs throughout.

Appeal allowed

[23] I. L. R. 33 Cal. 1047

[24] I. L. R. 30 All. 268 at 270

CIVIL

1932

Jan. 19

MEARS, C. J.
SEN, J.

SITA RAM AND ANOTHER (*Plaintiffs*)
versus
RECEIVER OF THE ESTATE OF RAM PRASAD, INSOLVENT AND OTHERS (*Defendants*)*

Provincial Insolvency Act, Sec. 28(2)—Hindu father declared insolvent—Untainted debts—Whether receiver can dispossess *sons from property available for payment of father's debts—Rights of receiver.*

Where property in the hands of Hindu sons can be made available for payment of the father's debts, the receiver of the father is entitled to *attach and sell* the property, but he has no right to dispossess the son of the insolvent from the property in their possession. In the reported cases, sometime the word 'seize' has been used and sometime the word 'attach' but they have been indifferently used to express the same idea. *Anand Prakash* v. *Narain Das Dori Lal*, 1931 A. L. J. R. 122 *explained.*

SECOND APPEAL from an order of G. O. ALLEN ESQ., District Judge of Agra.

B. Malik for the appellants.

The respondents were not represented.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal under Section 75 of the Provincial Insolvency Act from an appellate order of the District Judge of Agra dated December 15, 1930, confirming an order of the Judge of Small Causes, dated March 21, 1930, in certain proceedings relating to one Ram Prasad insolvent.

One Girdhari Lal had four sons, two of whom are Basanti Lal and Shambhunath. The names of the two others cannot be gathered from the papers before us. Basanti Lal died in the lifetime of Girdhari Lal leaving a son Ram Prasad.

On October 13, 1913, Ram Prasad applied that he should be adjudicated an insolvent. He was so adjudicated on May 18, 1914. Babu Jado Rai, who is an advocate of this Court practising at Agra, was appointed a receiver on June 3, 1914.

The receiver took certain steps to take possession of some property in the possession of Girdhari Lal on the averment that it was joint ancestral property and that the insolvent had a share therein. This was opposed by Girdhari Lal on the ground that the entire property in his hand was his self-acquired property. This contention was upheld by the court on September 10, 1915.

Girdhari Lal died. The receiver claimed that the insolvent had inherited a one-fourth share in the estate of Girdhari Lal. Shambhu Nath and his two brothers (names unknown) repudiated the title of the insolvent and claimed the entire estate left by Girdhari Lal under a will executed by him. The insolvency court on November 12, 1917 held the will to be genuine and decided the matter against the receiver.

Sita Ram and Tulsi Ram, the two minor sons of the insolvent, brought a suit for partition of their alleged share in the estate of Girdhari Lal. This

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*S. A. F. O. 6 of 1931

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suit was registered as suit No. 292 of 1921 and was directed against Shambhu Nath and his two brothers. The minors obtained a preliminary decree for partition on June 29, 1923. This decree appears to have been superseded by a compromise between the parties by which the defendants appear to have bought out the plaintiffs and the plaintiffs received from the defendants a house in haveli Bahadur Khan in Mohalla Belanganj in the city of Agra and Rs.8,000 in cash.

One of the scheduled creditors, named Beni Prasad, applied to the insolvency court to attach this house. This application was dismissed on September 24, 1923. On appeal, the learned District Judge by his order dated February 18, 1924 reversed the decision of the trial court and made the following order:—

> The receiver shall take possession of and distribute amongst the creditors the entire share of the one-sixth of the property of Girdhari Lal, etc.

The sons appealed to this Court. The appeal was heard by Walsh, A. C. J. and Dalal, J. Their judgment is reported in *Sita Ram* v. *Beni Prasad*[1]. It was held that the point at issue in the case was whether a Hindu father was entitled or not to property obtained by his sons on a division of joint ancestral property when he desired to satisfy his debts out of the proceeds of such property. This issue was answered in favour of the receiver and the following propositions were enunciated:—

> As soon as the sons received joint family property at partition, the right became vested in the receiver of taking their property to pay a Hindu father's debt. The receiver did not become entitled to this right subsequent to the partition.

It was therefore ruled that the property sought to be attached by Beni Prasad was liable for the debts due from the insolvent but the sons of the insolvent were entitled to prove the immorality of the debts. As a sequence, this Court modified the order of the District Judge dated February 18, 1924 and remanded the case under Order 41, Rule 23 of the Code of Civil Procedure.

On remand, the sons challenged the debts on the ground that the debts were not genuine. As the result of this objection, the insolvency court decided that the bulk of the debts was fictitious and that the sons were liable for only two debts amounting to Rs.210 and Rs.200 respectively. There was an appeal from this order and the learned District Judge held that it was not within the scope of the enquiry of the insolvency court as the result of the order of remand passed by the High Court to go into the question of the genuineness of the debts. The learned District Judge held that the debts included in the Schedule could be impugned by the sons on only one ground, namely, that they were tainted with immorality. There was a further appeal to this Court and the view of the learned District Judge was upheld.

Ram Prasad insolvent died on September 15, 1929.

On February 13, 1930 an application was presented by the receiver setting out in detail the facts which we have set out above. In Paragraph 5 of this petition we find the following statement:—

> The receiver applied to the insolvency court for orders for taking property in his possession under attachment. This application was resisted

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[1] I. L. R. 47 All. 263=22 A. L. J. R. 1097

> and the application was dismissed holding that in the insolvency proceedings, the minor sons of the insolvent could not be ejected and the receiver be put in possession.

The petition of the receiver referred to here has not been placed before us. The order of the insolvency court directing the dismissal of the petition on the ground that the minor sons could not be dispossessed by the receiver has not been placed before us. If there is such an order in existence and the petition does not state that such an order has been displaced on appeal, it is not within the competence of the receiver to make a second petition against the sons of the insolvent for the grant of the identical relief.

The petition dated February 13, 1930 with which we are now concerned does not ask for the sons of the insolvent being ejected from the property and the receiver being put into possession. In the sixth paragraph, the receiver states that there was once a sale of the *attached* house, that the bid of Mohan Lal creditor was for Rs.14,000, that this sale proved infructuous, that the property was again put to sale and that no one came forward to purchase it as the purchaser could not get immediate possession over the property. The relief claimed was in these terms:—

> Under the circumstances, I would request your honour to ask the scheduled creditors to bid over the house in question and the house should be knocked down to the highest bidder, or to pass such other order as the court considers reasonable and proper.

This petition was resisted by the insolvents' sons upon a variety of grounds including the ground that they were not liable to ejectment. Many of the pleas raised by them were not open to them by reason of previous orders against them which had the force of *res judicata*. Mr. Sayed Uddin disposed of the case by a most perfunctory judgment consisting of the following lines:—

> There is no force in the objection of the minors. The receiver should take possession of the property and after proper advertisements and notification should sell the same. The receiver may take the help of the police, if necessary. Locks, if any, may be broken open.

We are of opinion that the order was not reasonable and proper. In the first place, the receiver had not asked for the ejectment of the minors and for being put into possession of the property. In the second place, if the statement of facts embodied in Paragraph 5 of the petition are correct, such a relief would not be open to the receiver if such relief had once been claimed by the receiver before and refused by the court.

The order of Mr. Syed Uddin was affirmed by the District Judge. The judgment proceeded upon a ground which is perfectly intelligible to us although it may be erroneous. The learned Judge seemed to be of opinion that his predecessor by an order dated February 18, 1924 had directed the receiver to take possession of the property in question and that this order had been modified by the High Court but not set aside. We are of opinion that the learned District Judge had not been able to appreciate the nature and scope of the order of the High Court. We cannot enter into any question as regards the legality of the order of the High Court in the case reported in *Sita Ram* v. *Beni Prasad*[2]. If the matter were *res integra*, we might have held that where on a compromise the sons of an

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[2] I. L. R. 47 All. 263=22 A. L. J. R. 1097

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insolvent received property from certain persons who are the owners of the property under a will from their father, such property cannot be treated as the joint family property held by them (the sons of the insolvent) in co-parcenary with their father. We have already indicated we cannot enter into the question. The matter is concluded against the minors by previous judgments which are *inter partes*. But we have no doubt in our mind that the High Court by the judgment in the reported case did in substance though not in form supersede the order of the learned District Judge dated February 18, 1924. In modifying the order it did not intend to confirm and as a matter of fact did not adopt the order of that court authorising the receiver to take possession of the property. No question could arise as to the right of the receiver to seize the property so long as the question had not been settled as to whether the debts were enforceable against the sons. The High Court directed that as this had not been determined, the case must go back and the question determined. The question of the receiver's power to proceed in execution could not arise till that matter was disposed of. Under the insolvency law, the receiver is entitled under certain circumstances to seize or attach the property belonging to the insolvent. In the case of *Anand Prakash* v. *Narain Das Dori Lal*[3] one of the questions referred to the Full Bench was, whether it is open to the receiver in insolvency to seize the sons' share and sell it in order to satisfy the debts payable by the father, etc.? The question was answered in the affirmative and it was held that the receiver could *attach and sell* the joint family property so as to bind the sons. In the reported cases, sometime the word "seize" has been used and sometimes the word "attach". We are of opinion that they have been indifferently used to express the same idea. Where property in the hands of the sons can be made available for payment of the father's debts, the receiver is entitled to have recourse to the usual processes of law, namely, to attach and sell the property. Attachment does not create an interest in the property attached. It has the effect of invalidating alienations in conflict with the interest of the auction purchaser. There is nothing in the scheme of the Insolvency Act authorising the receiver to eject the sons of the insolvent from the property in their possession. The property of the sons is not the property of the insolvent. The right of the receiver to enforce the payment of the debts by reason of the pious obligation of the Hindu sons is not property which vests in the receiver under Section 28 of the Provincial Insolvency Act. Looked at from every possible angle, the receiver has no right to dispossess the sons of the insolvent from the property, and his right is restricted to *attach* and *sell* the property.

In the result, we allow the appeal and set aside the orders of both the courts below with costs. The case must go back to the trial court for the disposal of the application, dated February 13, 1930 after receiver has more clearly defined the exact nature of the relief claimed by him.

Appeal allowed

[3] 1931 A. L. J. R. 122

CIVIL

1932

Jan. 21

PULLAN, J

NIAMATULLAH, J.

FATIMA BEGAM AND OTHERS (*Defendants*)
versus
BANSIDHAR (*Plaintiff*) AND JAFRI BEGAM AND OTHERS (*Defendants*)*

Transfer of Property Act, Sec. 91 (f)—Simple money decree-holder attaches property subject to mortgage—Suit for sale on mortgage—Attaching creditor not made party—During pendency of mortgage suit attaching creditor purchases property in execution of his decree and obtains possession—Subsequent purchase by mortgagee in execution of his decree—Suit for possession by mortgagee—Whether attaching creditor's right to redeem subsists.

The defendant, who held a simple money decree, attached the property of his debtor, which was subject to a mortgage. After this attachment the mortgagee brought a suit for sale in which he did not make the attaching creditor a party. At the auction sale in execution of the simple money decree (which took place during the pendency of the mortgage suit) the defendant himself purchased the attached property and obtained possession. Subsequently a decree for sale was passed in the mortgage suit, and the mortgagee himself purchased the mortgaged property, and took out formal delivery of possession, but the revenue court refused to order mutation of names in his favour. Consequently the mortgagee brought the present suit for possession in the civil court; *held,* that the plaintiff was entitled to a decree for possession subject to the defendant's right to redeem on payment of the amount due to the plaintiff on his mortgage, and this right was not lost when the sale in pursuance of the attachment took place during the pendency of the mortgage suit.

Ghulam Husain v. *Dina Nath,* I. L. R. 23 All. 467 and *Ram Prasad* v. *Bhikhari Das,* I. L. R. 26 All. 464 *followed; Subramania Chettiar* v. *Sunnammal,* I. L. R. 53 Mad. 881 (F.B.) *not followed.*

SECOND APPEAL from a decree of J. ALLSOP ESQ., District Judge of Aligarh, reversing a decree of BABU PIAREY LAL GOVIL, Munsif of Havali.

A. M. Khwaja for the appellants.

Panna Lal for the respondents.

The judgment of the Court was delivered by

Niamatullah, J

NIAMATULLAH, J.—This second appeal has arisen out of a suit brought by the plaintiff-respondent for recovery of possession of certain properties, specified at the foot of the plaint. The first court dismissed the suit; but the lower appellate court decreed the plaintiff's claim in full. Some of the defendants have appealed to this Court.

The facts of the case are no longer in controversy. The property in dispute belonged to one Chiranji and Mst. Dharman, who executed a deed of simple mortgage in favour of the plaintiff's predecessor in interest (hereinafter referred to as plaintiff). The plaintiff appellants' predecessor-in-title (hereinafter referred to as defendant) held a simple money decree against the aforesaid mortgagors and had the mortgaged property now in suit attached in execution of their decree shortly before the mortgagee instituted his suit for sale on foot of his mortgage. The sale in execution of the simple money decree in favour of the defendants was not made till after the institution of such suit. The holder of the simple money decree himself purchased at the auction and obtained possession of the property now in dispute. Subsequently a decree for sale was passed in favour of the plaintiff. The mortgaged property (the property now in dispute) was sold and purchased by the mortgagee himself, who took out formal delivery of possession but was opposed in the revenue court on applying for mutation of names by the defendant, who had purchased it in execution of a simple money decree. Mutation of names was refused to the plaintiff. Accordingly, he brought the suit which has given rise to this appeal for recovery of possession.

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*S. A. 984 of 1929

The only defence, which it is necessary to mention for the purposes of this appeal, was that the plaintiff is not entitled in any case to an unconditional decree, that the defendant-appellants are entitled to redeem, and that only on their failure to exercise such right of redemption should the plaintiff be given a decree for possession. The learned District Judge overruled this defence. The only question argued in second appeal is that the defendant being an attaching creditor had a right to redeem the mortgage in favour of the plaintiff, that the defendant should have been made a party to the plaintiff's suit on foot of the mortgage and that he, not having been impleaded and afforded an opportunity to exercise his right of redemption, is entitled to redeem now. Subject to the defendant's right of redemption, the plaintiff's right to possession has not been disputed by the learned counsel for the appellant. The auction sale at which the defendant purchased the property in dispute in execution of his simple money decree took place during the pendency of the plaintiff's suit on foot of his mortgage. Thus the defendant's right under the auction sale was affected by the rule of *lis pendens* and was therefore subject to the plaintiff's right under the decree for sale. In this view, the plaintiff's right to possession, subject to the defendant's right to redeem, if he has any, cannot be disputed.

The important question for determination is whether the defendant has a right of redemption on the facts already stated. There can be no doubt that, under S. 91 (*f*), Transfer of Property Act, as it stood before the amendment of 1929, an attaching creditor among others has a right to redeem the property under attachment. Under O. 34, R. 1, C. P. C. all persons having a right to redeem should be made parties to a suit brought by a mortgagee for sale of the mortgaged property. It follows that the defendant had a right to redeem the mortgage in favour of the plaintiff and that he should have been made a party to the plaintiff's suit on his mortgage.

The next question is whether the defendant, not having been made a party, can now exercise the right of redemption, which he undoubtedly had when the mortgagee's suit was brought. The learned District Judge has held that an attaching creditor, such as the defendant was, has a right to redeem; but such right is extinguished when a sale in pursuance of the attachment takes place. According to this view, the defendant lost his right of redemption when he purchased the property during the pendency of the plaintiff's suit. There can be no doubt that this view makes the attaching creditor's right of redemption in a large number of cases, liable to be defeated with impunity by a mortgagee, because if the attaching cre-

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Niamat-ullah, J.

ditor is not made a party and the property is allowed to be sold in execution of the simple money decree, the sale itself being *pendente lite* can give no right to the auction purchaser against the auction purchaser in the mortgagee's suit and the right of redemption is *ex hypothesi* lost in consequence of such auction sale. The logical result of the view has been taken in a Full Bench case decided by the Madras High Court in *Subramania Chettiar* v. *Sunnammal*[1], which merely gives effect to two earlier cases of that Court, namely, *Veyindramuthu Pillai* v. *Maya Nadan*[2] and *Chamiyappa Tharagan* v. *Rama Ayyar*[3]. On the other hand, a contrary view has been taken by this Court in *Ghulam Husain* v. *Dina Nath*[4] and *Ram Prasad* v. *Bhikari Das*[5]. Both these cases appear to be on all fours with the present one, though the head note of the second case is misleading and shows that the sale in execution of the simple money decree had taken place before the institution of the mortgage suit. This, however, is not correct, and as would appear from the body of the judgment such sale was held during the pendency of the mortgage suit. In both of these cases the right of the attaching creditor to redeem the mortgage was deemed subsisting after the sale in execution of the simple money decree and when there was a conflict between the auction-purchser in the mortgage suit and the auction-purchaser in execution of the simple money decree, both claiming the right to possession of the property. It was clearly held that the auction-purchaser in execution of the simple money decree could redeem. The *ratio decidendi* adopted in both of them is well stated in *Ram Prasad* v. *Bhikari Das*[6] in the following dictum:—

> The respondents (auction purchasers in the simple money decree) are entitled to redeem. But they are not entitled to anything further by reason of the fact that the plaintiff in that suit omitted to implead them as defendants. The omission to implead them can neither improve their position nor the reverse. The plaintiff appellant, who purchased the property at a court sale, in a suit in which the mortgagee Nath Mal was the plaintiff and the mortgagor was the defendant, purchased the property, that is, whatever rights the mortgagor and mortgagee then possessed, subject to the infirmity that the present respondents had not been impleaded, and consequently he must suffer by reason of the neglect of the plaintiff to implead the respondents. He did not get a clear title to the property, but he got all the title which Nath Mal and the mortgagor could give, and that was a title subject to the equity which the respondents had of redeeming Nath Mal's mortgage and preserving the property for themselves. That right will still be secured to them.

The case of *Ghulam Husain* v. *Dina Nath*[7] was followed in *Venkata Seetharamyya* v. *Venkataramyya*[8] which was disapproved in *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat*[9]. To that extent there is difference of opinion among the learned Judges of the Madras High Court on this point. We are bound to follow the rulings of this Court which were not referred to before the learned District Judge, otherwise we have no doubt his decision would have been different.

[1] I. L. R. 53 Mad. 881

[2] I. L. R. 43 Mad. 696

[3] I. L. R. 44 Mad. 232

[4] I L. R. 23 All. 467

[5] I. L. R. 26 All. 464

[6] I. L. R. 26 All. 464 at 477

[7] I L. R. 23 All. 467

[8] I L. R. 37 Mad. 418

[9] I. L. R. 42 Mad. 232

The result is that the plaintiff-respondent is entitled to possession of the property in dispute as against the defendant-appellants. This right, however, is so far qualified that the defendants are entitled to be placed in the position they would have been in if they had been impleaded by the plaintiff in the mortgage suit, that is, they would have had a right to redeem within the period of six months fixed by the preliminary decree. The proper order in this case, therefore, is that the defendants should be given the opportunity to redeem the mortgage within six months from the date on which the court of first instance will declare the amount due to the plaintiff on his mortgage, which the defendants must pay if they desire to redeem and if they fail to redeem within such time, the plaintiff shall be entitled to recover possession of the property in dispute. If they redeem within that period, the plaintiff's suit shall stand dismissed. Accordingly, we allow this appeal, set aside the decree of the lower appellate court and also that of the court of first instance, which dismissed the plaintiff's suit in toto, and pass a decree in favour of the plaintiff respondent in the above terms. Our decree should be considered to be a preliminary decree. We remand the case to the court of first instance to ascertain and declare the amount payable by the defendants for redemption of the mortgage in question and to pass a final decree dismissing or decreeing the plaintiff's suit according as the defendants redeem or fail to redeem by payment of the amount declared by the court within the period of six months, as already stated. The costs here and hitherto incurred by the parties shall abide the result to be embodied in the final decree which the court of first instance will eventually pass.

Appeal allowed
Case remanded

PRIVY COUNCIL

KADIYALA VENKATA SUBAMMA AND ANOTHER (*Plaintiffs*)
versus
KATREDDI RAMAYYA, SINCE DECEASED, AND OTHERS (*Defendants*)*

CIVIL

1932

Jan. 12

VISCOUNT DUNEDIN
SIR LANCELOT SANDERSON
SIR GEORGE LOWNDES

Probate and Administration Act (V of 1881), Secs. 4 and 90 (=Succession Act (XXXIX of 1925), Secs. 211 (1) and 307)—Executor—Not clothed with probate—Estate vests from date of testator's death—Vesting under Sec. 4 or power of disposal under Sec. 90—Not dependent upon grant of probate.

In case of Hindu wills to which the Hindu Wills Act does not apply, the estate vests in the executor (who accepts office) from the date of the testator's death, even though probate has not been obtained, and he is competent to deal with the testator's property. *Fatima* v. *Shaik Essa*, I. L. R. 7 Bom. 266 *overruled.*

APPEAL from a decision of the High Court of Judicature at Madras.

E. B. Raikes, K.C., K. V. L. Narasimham and *Lakshmanne Rao* for the appellants.

P. V. Subba Row for the respondents.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—The appellants are beneficiaries under the will of one Madduru Venkata Subanna, who died on January 5, 1917. He was a Hindu residing at Pedakapavaram, in the Kistna District of Madras. The respondent, Madduri Gangamma, is his widow, and was appointed (as is now admitted) executrix according to the tenor of the will, but has not obtained probate. The other respondents are a minor son, adopted by the widow, and various persons interested in the properties of the testator under alienations made by the widow purporting to act as his executrix.

The suit out of which the appeal arises was instituted by the appellants to enforce their right to particular parcels of land which they alleged had been allotted to their shares under a family arrangement made shortly after the testator's death, or in the alternative for partition of the estate without regard to the alienations which, it was contended, the executrix had, in the absence of probate, no power to make, and which were further charged as fraudulent.

The trial Judge held against the appellants as to the family arrangement, and this is no longer in dispute. He was of opinion, however, that the alienations were incompetent, and he accordingly passed a preliminary decree in the appellants' favour, declaring the rights of the parties, and appointing a Commissioner to carry out the partition and to assess mesne profits. The Commissioner duly reported to the Judge, and eventually a final decree was made.

Appeals and cross-objections were filed against both these decrees by some of the respondents, and on the hearing in the High Court the following question, upon which the decision of the appeals turned, was referred to a Full Bench, viz.:—

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*P. C. A. 95 of 1929

> Whether an executor appointed by a will made in the *muffassal* of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act, even though such executor does not obtain probate of the Will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act.

The reference was heard by the Chief Justice and two puisne Judges, who recorded their opinion that—

> In case of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death, and that the provisions of the Probate and Administration Act are applicable, even though probate has not been obtained.

The appeals then came on again before the referring Judges who by their order of December 9, 1925, set aside the decrees of the trial Judge and remanded the suit for disposal on the basis of their judgment, with directions to try the question of the *bona fides* of the widow's alienations, and for that purpose to ascertain what debts were outstanding at the death of the testator.

From this order of remand the appellants have brought their appeal to His Majesty in Council, and the sole matter for the consideration of the Board is whether the judgment of the Full Bench, upon which the order under appeal rests, should be upheld.

The Hindu Wills Act (XXI of 1870) has no application to the present case, but the greater part of the Probate and Administration Act (V of 1881) applies to the wills of Hindus generally, and it is upon the terms of this Act that the result of the appeal turns.

The authorities have been discussed at length by Kumaraswami Shastri, J., who delivered the judgment of the Full Bench, and their Lordships think that nothing can be added by them to his careful examination of the case law on this subject. They will, however, refer later on to two decisions of the Board which have been relied upon by the appellants.

There has been a divergence of opinion between the High Courts of Madras and Bombay on the one hand, and of Calcutta on the other. It is the view of the former that has now prevailed, and their Lordships think that it is undoubtedly the right one.

The provisions of the Act directly in point are the first part of Section 4 and Sub-sections (1) and (2) of Section 90, which run as follows:—

> Section 4. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.
>
> Section 90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under Section 4.
>
> (2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the court which granted the probate permits him by an order in writing, nothwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order .

The reasoning of the Calcutta decisions as to the meaning of Section 4 was based largely on the preamble, which showed that the object

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of the Act was to provide for grants of probate and letters of administration, and upon the heading of Chapter II, in which the section occurred, "of grant of probate and letters of administration," and it was thought to follow from this that "executor" in Section 4 could only mean an executor to whom probate had been granted.

This argument was elaborated before their Lordships, and reference was made to other sections of the Act which, it was urged, contained the same implication, particular reliance being placed upon Sections 12 and 59.

With regard to the first branch of the argument, their Lordships note that the wording of the opening paragraph of Section 4 is identical with that of Section 179 of the Succession Act of 1865, which occurs in a chapter bearing the same heading as that of Chapter II of the Act of 1881. But, so far as their Lordships are aware, it has never been held that Section 179 of the Act of 1865 applies only to an executor who has proved the will.

Section 12 of the Probate and Administration Act no doubt implies that until probate is granted the will is not "established," and it validates all intermediate acts of the executor. It is contended for the appellants that this necessarily leads to the inference that before probate there is no valid will and no authority in the executor. This was the view taken by West, J. in *Fatima* v. *Shaik Essa*[1] but which failed to find acceptance on appeal (*Shaik Moosa* v. *Shaik Essa*[2]). It is, their Lordships think, based upon a misconception of the object of the section. Before the grant, it is obvious that in every case where either the will itself, or anything done under it by the executor, is challenged, proof of execution and capacity on the part of the testator, and of the appointment of the executor, would be required. The object of the section is only to get rid of this multiplication of proofs. Probate once granted authenticates the will against all the world; it affords a ready means of proof of the contents of the will (*see* Sections 41 and 91 of the Evidence Act); and it is a complete answer by the executor to any challenge of his authority as such. The provisions of the section do not, in their Lordships' opinion, suggest that before probate the executor had no title, but are only intended to simplify the proof of his title as dating from the testator's death.

Section 59 merely amplifies the position by making probate conclusive of the executor's representative title against debtors of the estate, and provides for their indemnification on making payments to him. This again is only a matter of simplification of proof, with the necessary corollary protecting debtors who have paid on the faith of the probate.

There can be no doubt that in England the title of an executor is derived from the will and not from probate, though it is probate alone which authenticates his right (*see* Williams on Executors, 12th edition, p. 1226). Section 12 of the Probate and Administration Act is a reproduction of Section 188 of the Successsion Act of 1865, and it has always been recognized that the latter Act was largely based on English law. It is not suggested that this doctrine is for any reason inapplicable to the wills of Hindus, and their Lordships think that the material parts of Sections 4 and 90, which are set out above, afford a strong indication in themselves that the legislature intended to adopt it.

[1] I. L. R. 7 Bom. 266.

[2] I. L. R. 8 Bom. 241

Section 4 makes no reference to probate, nor does the definition of "executor" in Section 3 (again a reproduction from the Act of 1865) suggest that probate is any part of his title: he is merely the person to whom the testator has confided the carrying out of his dispositions.

So, too, Section 90(2) clearly conceives of an executor not clothed with probate being able to dispose of the property "vested in him under Section 4." It makes such power subject to any restriction imposed by the will "unless probate has been granted," in which case the Court may relieve him from the restriction. In view of the terms of this section their Lordships think it would be impossible to hold that before probate nothing vested in the executor, and that he had no power of disposal at all.

Reference was made in argument to the terms of the original Section 90, which was repealed in 1889, when the present section was substituted. It may well be that upon the old section the argument on behalf of the appellants would have had more force, but their Lordships have to interpret the Act as it has stood since 1889, and they cannot attribute to Section 4 a meaning based on the reading of the repealed section.

It only remains to consider whether the two decisions of this Board, to which allusion was made above, afford any support to the appellants.

In *The Administrator-General of Bengal* v. *Pren Lal Mullick*[8], the executors of a Hindu testator, whose will was governed by the Hindu Wills Act of 1870, after obtaining probate, transferred to the Administrator-General "all estates, effects and interest vested in them by virtue of the probate." Such a transfer was authorized in the case of "any private executor" by Section 31 of the Administrator-General's Act, II of 1874. The majority of the Judges before whom the case came in the Calcutta High Court held that the executors of a Hindu will, governed by the Act of 1870, were not within the purview of the section, and this was the only question before the Board.

The judgment was delivered by Lord Watson, who in dealing with various portions of the Succession Act which were incorporated in the Hindu Wills Act, says:—

> It is sufficient for the purposes of this case to refer to two of these clauses. Section 181 is to the effect that probate can be granted only to an executor appointed by the will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such.

He continues as follows, and it is this passage which is principally relied on in the present appeal:—

> It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of he late Nundo Lal Mullick was executed in August, 1889; and his executors therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease.

The question now before their Lordships, viz., as to the effect of the words of Section 179 (reappearing in the present case as Section 4 of the

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[8] 22 I. A. 107

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Probate and Administration Act) *unaccompanied by probate,* was clearly not under the consideration of the Board in the case cited, as the authority to transfer under Section 31 of the Administrator-General's Act was expressly dependent upon the grant of probate, and their Lordships have no doubt that the words used by Lord Watson were not intended to have the wider significance which the appellants seek to attribute to them.

In *Mirza Kurratulain* v. *Peara Saheb*[4] the question considered by the Board was one of estoppel, affecting a Mohammedan will of which probate had been granted. Here again, therefore, the contention now raised as to the effect of Sections 4 and 90 of the Act of 1881 standing alone, did not arise. and the only support that the appellants claim from it is derived from two sentences in the judgment which will be found on pp. 256 and 257 The first of these speaks of "the title thus conferred upon every executor who has obtained probate," and the second, of the trusteeship for the purposes of the will "created by the will established by the probate." Their Lordships are unable to treat these isolated quotations as affording any support to the argument of the appellants. There is, they think, nothing in the judgment of Sir Arthur Wilson, read as a whole, to suggest that the vesting under Section 4, or the power of disposal under Section 90, is dependent upon the grant of probate.

For the reasons given their Lordships are of opinion that the order of remand made by the High Court on December 9, 1925, was right, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondents of the appeal.

Appeal dismissed

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[4] 32 I. A. 244

SATGUR PRASAD *alias* BHAIYA HARI SARAN DAS (*Defendant*)
versus
HAR NARAIN DAS (*Plaintiff*)*

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Jan 18

LORD BLANESBURGH
SIR GEORGE LOWNDES
SIR DINSHAH MULLA

Civil Procedure Code, Sec. 2(12)—Suit for possession—By setting aside deed of conveyance on ground of fraud—Suit decreed—Whether plaintiff entitled to mesne profits from date of suit or date of decree.

By a deed dated November 25, 1924, plaintiff purported to make over a valuable estate to the defendant subject to certain conditions. On February 21, 1927 the plaintiff instituted a suit for possession by setting aside this deed on the ground that it was procured by undue influence and fraud. The courts in India found the allegations of undue influence and fraud proved and awarded possession. *Held,* that the plaintiff was entitled to mesne profits from the date of the deed, inasmuch as on the findings as to fraud, the possession of the defendant must be deemed to have been wrongful from the very date of the deed.

APPEALS from a decision of the Chief Court of Oudh at Lucknow.

Upjohn, K.C., De'Gruyther, K.C. and *L. M. Jopling* for the appellant.

A. M. Dunne, K.C., Dube, K.C., Wallach and *Sir T. B. Sapru* for the respondent.

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*P. C. A. 24 of 1930

The following judgment was delivered by

SIR GEORGE LOWNDES—These are consolidated cross-appeals against a decree of the Chief Court of Oudh dated May 2, 1928. The appellant in the one case, Satgur Prasad, was the principal defendant in a suit instituted on the original side of the Chief Court, which was decided against him both by the trial Judge and the Court of Appeal. In the other the plaintiff, Mahant Har Narain Das, is the appellant, raising subsidiary questions on which the Court of Appeal had decided against him.

The main issue in the suit was as to the validity of a deed, dated November 25, 1924, by which the plaintiff purported to make over a valuable estate and other property to the defendant-appellant subject to certain conditions. The object of the suit was to set aside this deed on the ground that it was procured by undue influence and fraud. There are concurrent findings of both the Courts in India that this has been established, and they are undoubtedly findings of pure fact. It is not disputed that if they are to stand the appellant cannot escape the decree which has been passed against him

The practice of this Board with regard to concurrent findings of fact is well established. Such findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure: *Moung Tha Hnyeen* v. *Moung Pan Nyo*[1], *Rani Srimati* v. *Khajendra Narayan Singh*[2] *per* Lord Lindley at p. 131; cited and followed in *Robins* v. *The National Trust*[3].

This does not necessarily imply that their Lordships make the findings their own, for, almost *ex hypothesi*, they have not considered them in detail: but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than this Board, and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal.

Nothing has been suggested, during a two-days' argument for the defendant-appellant which would bring the case within the principles so laid down, the learned counsel confining themselves to a searching criticism of the reasons assigned by the learned Judges in the Courts below for the conclusions to which they had come. Their Lordships think that no useful purpose would be served by following their argument through the somewhat unsavoury details so disclosed. They will only record their opinion that no sufficient reason has been shown for disturbing the concurrent findings to which they have referred.

The cross-appeal of the plaintiff raises a question of greater difficulty. Under the decrees of both Courts he is entitled to possession of all the properties sued for. The details were set out in three schedules annexed to his plaint. These are embodied in the decree of the trial Judge, which in this respect was confirmed by the Court of Appeal.

He also claimed by his plaint mesne profits accruing during the possession of the defendant-appellant (hereinafter for convenience referred to as the defendant),* the amount of which he estimated at five lakhs of

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[1] 27 I. A. 166

[2] 31 I. A. 127

[3] [1927] A. C. 515

*Note—There were two other defendants to the suit, but neither of them has appeared on the present appeals.

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rupees. There seems to have been no discussion upon this question in the trial Court, the learned Judge merely reciting an agreement of the parties that the issue as to the defendant's liability to account should be left to be dealt with in execution proceedings, which their Lordships understand to be in accordance with the usual practice.

In the Court of Appeal, however, it was urged on behalf of the defendant that the account should only go from the date of suit (February 21, 1927), and not from the date when the defendant got possession, i.e., approximately November 25, 1924. The learned Judges of the Appellate Court accepted this contention, assigning as their reason for so doing "that the document of November 25, 1924, was only voidable at the option of the plaintiff, and the plaintiff did not exercise that option earlier than the date of the suit."

It is against this finding only that the cross-appeal of the plaintiff has been pressed, and it is contended on his behalf that, having regard to the conclusion, now established, that the deed under which the defendant got possession was procured by undue influence and fraud, the plaintiff is entitled to the account which he has claimed.

The defendant supports the finding of the Court of Appeal on this question. Mesne profits, it is said, under the definition contained in Section 2(12) of the Civil Procedure Code, can only be awarded for the period during which the defendant was in wrongful possession, and until the plaintiff elected to avoid the contract under which possession was made over to him, his possession was not wrongful.

But in the first place their Lordships are unable to regard the deed of November 25, 1924, merely as a contract voidable at the option of the plaintiff, but good until avoided. It was in effect a conveyance, under which the title to the properties passed to the defendant, and which had to be formally set aside. Before the institution of the suit the defendant could no doubt have made a valid transfer to an innocent purchaser, but it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful. To admit of such an assertion would be to allow him to take advantage of his own wrong, which no court of equity will permit.

If the matter could be regarded as one of contract, their Lordships think that it would fall within the terms of Section 65 of the Contract Act, which provides that "when a contract becomes void"—and their Lordships would have no difficulty in holding these words sufficient to cover the case of a voidable contract which had been avoided—any person who has received any advantage under such contract is bound to restore it to the person from whom he received it, or make compensation therefor.

Regarding the transaction, however, as one that has passed out of the realm of contract, it would seem to be met by Section 88 of the Trusts Act, which has always applied to the province of Oudh. Both Courts in India have found that the defendant stood in a fiduciary relation to the plaintiff, and that he procured the conveyance by taking advantage of this relationship. He would therefore be bound under the terms of the section to hold any advantage so gained for the benefit of the plaintiff.

But apart from either of these statutory provisions, their Lordships

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think that the plaintiff is entitled to succeed in his claim upon general principles of equity. So it is stated in Kerr on Fraud and Mistake (6th Edition, 469), dealing with the doctrine of *Restitutio in integrum,* that "a party exercising his option to rescind is entitled to be restored as far as possible to his former position." For this proposition there is ample authority. In *Queen* v. *Saddlers' Company*[4], Lord Blackburn says:—

> Fraud, as I think, renders any transaction voidable at the election of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning.

In *Dally* v. *Wonham*[5] where a purchase by the agent of a vendor was set aside upon much the same grounds as here, the vendor-plaintiff was given an account of rents and profits received by the defendant, from the date of the conveyance, the defendant being allowed credit in the account for all moneys properly expended by him on repairs and lasting improvements, and all sums paid to the plaintiff on account of an annuity which was, as in the present case, part of the consideration for the conveyance.

In *Mulhallen* v. *Marum*[6] the Lord Chancellor (Lord Lyndhurst). in setting aside a lease which had been obtained by fraud and undue influence, said, "I shall give an account against the defendant from the time of filing the bill, but not before on account of the delay." In this case eleven years had elapsed since the date of the lease before the bill was filed.

Reference might also be made to the form of decree proposed by Lord Westbury L. C. in *Tyrrel* v. *The Bank of London*[7] and to *Erlanger* v. *New Sanbrero Coy*[8].

Their Lordships think that in the case now before them, where there is no difficulty in putting the parties back in the position which they occupied respectively on November 25, 1924, and where there is no proof of undue delay on the part of the plaintiff in bringing his suit, he should have an account of the rents and profits of the immovable properties from that date, the defendant being entitled to credit in the account for all payments made by him to the plaintiff. Interest should be allowed at the usual rate upon both sides of the account.

For the reasons given their Lordships will humbly advise His Majesty that the appeal of Satgur Prasad should be dismissed, and that of Mahant Har Narain Das allowed; and that the decree of the Chief Court of Oudh dated May 2, 1928, should be varied by substituting for the words "date of the suit" the words "twenty-fifth of November, 1924," and by adding after the words "possession by him" the words "the defendant-appellant being entitled to credit in the account so to be taken for all sums paid by him after that date to the respondent No. 1, and interest being allowed at the usual rate on both sides thereof". In other respects the decree of the Chief Court will stand.

The appellant, Satgur Prasad, must pay the costs of Mahant Har Narain Das before this Board.

Decree modified

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[4] 10 H. L. C. 404 at 420

[5] 33 Beav. 154

[6] 3 Dr. & War. 317

[7] 10 H. L. C 26

[8] 3 A. C. 1218

HIGH COURT

KING-EMPEROR

versus

ABDUL AZIZ AND OTHERS*

CRIMINAL

1931

June 9

YOUNG, J.
BAJPAI, J.

Criminal Procedure Code, Sec. 162 and Evidence Act, Sec. 32(2)—Statement made to police officer (investigating a dacoity) by M—That A and B took part in dacoity—Police officer made entries in the diary—M was later murdered—A, B and others charged under Sec. 302—Whether entries in police diary inadmissible under Sec. 162.

A police officer in the course of investigations in connection with a dacoity made entries in the diary to the effect that a statement had been made to him by a person who attended the meeting of the villagers called by him, that two of the present appellants had certainly taken part in the dacoity along with some others. Three days after this information was given to the police the person who gave the information was beaten and killed. Six persons (including the two whose names were mentioned to the police officer as having taken part in the dacoity) were charged before the Sessions Judge under Sec. 302 I. P. C., who found them guilty of murder. On appeal to the High Court it was objected that the evidence of the police diary was inadmissible in evidence under Sec. 162 Cr. P. Code; *held*, that this enquiry or trial, in which it is sought to use these records in the police diary as evidence, could not even have been thought of, and was not under investigation at the time that the statements were made, and Sec. 162 did not apply; and these statements were admissible in evidence under Sec. 32(2) Evidence Act. *U Htin Gyaw* v. *King-Emperor*, I. L. R. 5 Rang. 26 at 37 *followed.*

CRIMINAL APPEAL from an order of BABU RAGHUNATH PRASAD, Sessions Judge of Bulandshahr.

F. Owen O'Neill for the appellants.

Sankar Saran (Government Advocate) for the Crown.

The judgment of the Court was delivered by

Young, J.

YOUNG, J.—Abdul Aziz, Chand Khan, Ghafur Khan, Yusuf Wahid, Tahsin, Mustafa Khan and Sahibdad Khan were charged before the Sessions Judge of Bulandshahr, the first six under Section 302 of the Indian Penal Code, and the last two under Section 302, read with Section 109 I. P. C. The first six accused were found guilty of murder, and condemned to death by the learned Sessions Judge. The last two, Mustafa Khan and Sahibdad Khan, were acquitted. Those condemned to death have appealed to this Court. They have been represented here by Mr. O'Neill; he has addressed to us an able argument and has said everything for his clients which could possibly be said.

On the morning of September 9, 1930, between the hours of 9 and 10, Mahmud Ali Khan, a man aged 60 years, was assaulted, severely beaten, and subsequently died. The case for the prosecution is that in the month of May 1930 a dacoity had taken place in village called Mirpur. On September 6, Raza Ahmad, police officer, was making investigations in the neighbouring village of Lohagara concerning this dacoity. A meeting of

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*Cr. A. 210 of 1931

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Young, J.

the villagers was called by the policeman, and questions were put. Mustafa Khan denied that either he, or his brother, Yusuf Khan one of the appellants or their partisans had taken part in the dacoity. But Mahmud Ali Khan, deceased, had stated publicly at this panchayat that certain of the people of Lohagara had taken part in the dacoity. Subsequently the Sub-Inspector took Mahmud Ali Khan aside and obtained a statement from him that Ghafur and Wahid two of the appellants had certainly taken part in the dacoity, along with some others. The relationship between the deceased and Mustafa Khan and Yusuf Khan had clearly been strained in the past. Both sides had made accusations against each other in reports to the police. It is suggested by the prosecution that this act of Mahmud Ali Khan made the party of Yusuf and Mustafa Khan make up their minds to take action against Mahmud Ali Khan, and that that action took the form of murdering him. The learned Sessions Judge has found in his judgment that there was no enmity between these two parties; but we are satisfied, on the evidence on the record, that there clearly was enmity between the two, and we think it highly probable that the fact that Mahmud Ali Khan had given information to the police implicating certain of the accused had become known to the accused. In any event, there is the positive evidence of Mahmud Illyas that the party of the accused took the action of Mahmud Ali in this matter very ill. At any rate, the one fact that is uncontested is that three days after this information was given to the police Mahmud Ali Khan was beaten and killed by some one. The evidence concerning the information to the police is contained mainly in the police diary. The Sub-Inspector who made the entries in the diary, which are Exhibits H and J on the record, was murdered a few days later. Mr. O'Neill, on behalf of the accused appellants, objects that the evidence of the police diary is inadmissible in evidence, and he relies upon Section 162 of the Code of Criminal Procedure. That Section reads as follows:—

> No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

He lays stress upon the words in the section, "nor shall any such statement or any record thereof be used for any purpose". We are clearly of opinion that Section 162 does not apply in this case. The words after "be used for any purpose" are "at any inquiry or trial in respect of any offence under investigation *at the time when such statement was made*". Now it is obvious that this inquiry or trial, in which it is sought to use these records as evidence, was not under investigation at the time when these statements were made. In the Mirpur dacoity case, if indeed that matter had ever come to trial, it is clear these statements would have been inadmissible. But when this trial or enquiry had never even been thought of, Mahmud Ali Khan at that time never having been murdered, it is, in our opinion, perfectly clear that this section does not apply. When we look at the previous Section 162 of the Code of Criminal Procedure (Act V of 1898), our present opinion is confirmed in the strongest possible manner. The

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section originally stood as follows:—"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it; nor shall such writing be used as evidence". As the section originally stood, it was open to be argued that such a statement could not be admitted as evidence at any time or in any trial. The words "be used as evidence" have deliberately been omitted from the present Section 162, and the words recorded above have been substituted. The view that we take of the effect of the present Section 162 has also been taken by the High Court of Rangoon in *U Htin Gyaw* v. *King-Emperor*[1]. Section 162, therefore, not prohibiting the use of this evidence, we must fall back upon Section 32 (2) of the Evidence Act, which, in our opinion, makes these statements admissible in evidence in this case. We think these statements come under the words, "when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty". There can, in our opinion, be no doubt that the Sub-Inspector, who is now dead, made these entries in the discharge of his professional duties.

[Their Lordships after reviewing the evidence came to the conclusion that the prosecution had proved strong motive for the accused to commit this crime, and that the evidence called for the Crown established the fact that these appellants did commit the murder.]

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[1] I. L. R. 5 Ran. 26 at 37

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1931

Dec. 16

MEARS, C. J.
SEN, J.

PARMARATH GIR (*Applicant*)

versus

RAM SARUP SINGH *alias* TRIGUNANAND (*Opposite party*)*

Civil Procedure Code, Or. 33, R. 5 (d)—Application for permission to sue as a pauper—By a mere Sanyasi—Neither nominated as successor by last Mahant nor placed on Gaddi by electoral body—No cause of action disclosed.

A person, who is a mere Sanyasi of the math and who has not been nominated as the successor by the last mahant, or elected by the mahants, the members of the sect and the *raises* and placed upon the *gaddi* after due performance of rituals is not competent to maintain a suit for ejectment and does not possess the necessary cause for action and therefore an application for leave to sue in *forma pauperis* by such a person is liable to dismissal under Or. 33, R. 5 (*d*) C. P. C. *Sumatra Devi* v. *Hazari Lal*, A. L. J. R. 1930, 901 and *Ram Lal Sah* v. *Allahabad Bank*, A. L. J. R. 1929, 1059 *referred to.*

CIVIL REVISION from an order of J. N. KAUL ESQ., Additional Subordinate Judge of Benares.

Harnandan Prasad for the applicant.

B. E. O'Conor and *Ram Nama Prasad* for the opposite party.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an application for revision under Section 115 C. P. C. and is directed against an order of the learned Subordinate Judge of

*Civ. Rev. 549 of 1930

Benares, dated November 3, 1930, dismissing the plaintiff's application for leave to sue as a pauper upon the ground that the plaint did not disclose any cause of action. The facts of this case which have given rise to this application are briefly these:—The plaintiff alleges that there is an ancestral Math belonging to Dasnami Sanyasis of the Gir sect in Mohalla Suraj Kund in the city of Benares and that this Math owns property worth Rs.1,000,000. A geneological table has been set out in paragraph 3 of this application. Narain Gir is alleged to be the last mahant of this Gaddi. He died a minor on July 9, 1910. Swarath Gir, Guru of the applicant, who was a chachera Guru Bhai of Narain Gir, is described as the next mahant of the Gaddi, as (according to Parmarath Gir) he was duly given the *chadar* according to the custom of the Math and thus became the Mahant. The property was in possession of the Court of Wards. Three suits were instituted with reference to this property; one by Jagannath Gir; the second, by Swarath Gir and the third by Trigumanand. These suits were numbered and registered respectively as No. 29 of 1913, No. 122 of 1913 and No. 27 of 1915. There was a triangular fight amongst these three persons, the position of the Court of Wards being that of a neutral which held the property in the capacity of a stake-holder. All the three suits were dismissed by the trial court in December 1915. There were three appeals lodged in this Court. The appeal of Trigumanand was allowed and the other two appeals were dismissed. These appeals were decided on April 30, 1922. Swarath Gir made two applications to this Court for leave to appeal to His Majesty in Council; one in his own suit and the other in the suit of Trigumanand. Leave to appeal was granted on both these applications. Swarath Gir failed to deposit Rs.4,000 as security, in one of his appeals, and the result was that that appeal was dismissed for default of prosecution. Swarath Gir died on February 22, 1924. On July 25, 1924, Parmarath Gir, alleging himself to be the *chela* of Swarath Gir, applied for substitution of his name in place of Swarath Gir in Privy Council Appeal No. 17 of 1922. Trigumanand opposed this application on the ground that Parmarath Gir was not the *chela* of Swarath Gir at all but was an imposter. On November 28, 1924, Parmarath Gir's application was dismissed for default of prosecution and it was declared that the Privy Council Appeal No. 17 of 1922 had abated. On December 23, 1924 Parmarath Gir applied for setting aside the order, dated November 28, 1924, dismissing his application for substitution of his name and he further prayed for the setting aside of the order of abatement but this application was dismissed on January 8, 1925.

The present application for leave to sue in *forma pauperis* was lodged by him on March 31, 1930. This was rejected by the Subordinate Judge on the ground that so far as the claim purported to be one for the determination of his title to the property as *chela* of Swarath Gir, it offended against the provisions of Order 22, Rules 9 and 11 C. P. C. and was not competent, and so far as it purported to be a claim founded upon his personal right as a Sanyasi belonging to the Gir sect, which held the Math, his application did not disclose any cause of action and was therefore liable to dismissal under O. 33, Rule 5 (*d*) C. P. C. An application for revision has been filed against this order.

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Upon an examination of the petition, it is clear that the applicant plaintiff has no cause of action for the reliefs claimed. He is not the successor nominated by the last mahant nor is he a person, who has been selected and placed upon the *Gaddi* by the electoral body in accordance with the custom of the foundation. He comes into court on the allegation that as the sole surviving Sanyasi, belonging to this Math, he has a right of action. Upon his own showing, he is not a person who is qualified to sue because he is not a person who has been duly elected to the *Gaddi* in accordance with the conditions set out in paragraph 4(*a*) of his plaint. We are therefore of opinion that the court below was right in coming to the conclusion that his petition did not disclose any cause of action.

A 'cause of action' may consist of a single fact or of an assemblage of facts which it is essential for the plaintiff to prove in order to support his claim against the defendant about the subject-matter in dispute. Where the plaintiff has no immediate title to the property in dispute, he cannot sustain an action for ejectment. A person, who is a mere sanyasi of the Math and who has not been nominated as the successor by the last Mahant or elected by the mahants, the members of the sect and the *raises* and placed upon the *Gaddi* after due performance of rituals, is not competent to maintain a suit for ejectment and does not possess the necessary cause of action.

The learned Subordinate Judge had these considerations in view when he made the following statements which have our approval:—

> In the absence of nomination, the right of appointment, according to the customs of the Math mentioned above, vests in the fraternity. The plaintiff says that he is merely a Sanyasi of the Math. Unless therefore he is elected and given the chaddar, he has no right to seek the intervention of the court   The Court have no power to give the chaddar and cannot therefore intervene against the co-sharers of the Math
> There is nothing to show that he (the incumbent) has been removed by his fraternity on account of his misconduct or that any other appointment has been made in his place by those who possess the right to do so. The plaint as it stands does not disclose any cause of action.

We have to remember that this is not a suit instituted by the relators under Section 92 C. P. C. with the sanction of the Advocate-General for the administration of the trust or for the removal of the trustees upon the ground that a breach of trust had taken place. Different considerations arise in such suits.

Our attention has been drawn to the decisions of this Court in *Sumatra Devi* v. *Hazari Lal*[1] and *Ram Lal Sah* v. *Allahabad Bank*[2]. In the former the application was dismissed not on one of the grounds specified in Order 33, Rule 5 C. P. C. but mainly upon the ground that the case of the plaintiff was weak. In the second case, the application of the plaintiff was thrown out on the ground that the evidence produced by him did not show that he had a good case. In the present case, the court definitely came to the conclusion that the plaint did not disclose any cause of action and this view was supported by an examination of the plaint, with reference to paragraphs 1, 3 and 4 of the plaint. In paragraph 18 of the plaint, the only cause of action alleged by the plaintiff is that the defendant

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[1] A. L. J. R. 1930, 901

[2] A. L. J. R. 1929, 1059

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was put into possession of this property by the Court of Wards on January 1, 1924. That is immaterial. We are of opinion that the plaint does not disclose any cause of action against the defendant and the petition has been rightly dismissed under O. 33, R. 5 (*d*) of the Civil Procedure Code.

We dismiss this application with costs.

Application dismissed

Civil — 1932 — Jan. 7 — Mears, C. J. Sen, J.

BHAN DATT (*Defendant*)

versus

MOTI LAL (*Plaintiff*)*

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Whether suit cognizable by small cause court—Test.

Where the plaintiff sued in the Court of Small Causes to recover a sum of money on the ground that the defendant had cut a *nim* tree belonging to the plaintiff which was growing upon the plaintiff's ground, and had done so without the knowledge of the plaintiff and without any right, and had taken it away, *held,* that on a fair reading of the plaint it did not disclose a criminal offence, and the suit was cognizable by the court of Small Causes. *Raghubar Dayal* v. *Mulwa,* I. L. R. 49 All. 440 and *Bandhu Pandey* v. *Gauri Dat Pandey,* 1930 A. L. J. R. 1247 *relied on.*

Civil Revision from a decree of Maulvi Manzur Ahmad Khan, Small Cause Court Judge of Agra.

N. P. Asthana and *B. N. Sahai* for the applicant.

Jwala Prasad Bhargava for the opposite party.

The judgment of the Court was delivered by

Mears, C.J.

Mears, C. J.—Chaube Moti Lal sued Chaube Bhan Dat to recover Rs.80 on the ground that Chaube Bhan Dat had cut a *nim* tree belonging to the plaintiff which was growing upon the plaintiff's ground and had done so without the knowledge of the plaintiff and without any right and had taken it away. Those ambiguous phrases might be deemed to cover the commission of a criminal offence but might very well be nothing more than an assertion that the defendant had committed a civil wrong. The civil revision came up before Mr. Justice Bajpai on April 21, 1931, and the case of *Raghubar Dayal* v. *Mulwa*[1] was presented to him. Also his attention was called to the case of *Deoki Rai* v. *Harakh Narain Lal*[2]. Those were the only two cases before the learned Judge. We shall have, in a moment or two, to refer to a third. Now the case of *Raghubar Dayal* v. *Mulwa* is extraordinarily like the matter that is now being debated in this revision. The headnote says that Article 35 (*ii*) of the Second Schedule to the Small Cause Courts Act applies only to those acts which, by the circumstances of the case, are clearly alleged or shown to be punishable by the Penal Code. Now there is no clear allegation in this plaint that the offence was one which came under the Penal Code. The headnote continues, "merely removing from or cutting trees under a *bona fide* claim or right or as the result of a dispute is not necessarily a criminal offence." Mr. Justice Bajpai would have had no hesitation in deciding this case of

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*Civ. Rev. 83 of 1931

[1] I. L. R. 49 All. 440

[2] I. L. R. 49 All. 85

Chaube Bhan Dat's in favour of the plaintiff had it not been that there was the decision to be found also in I. L. R. 48 All. 85. That case decided that the test as to whether the case would be heard by a small cause court or not had to be settled by an examination of the plaint, and if upon a fair and ordinary construction of the plaint the matter appeared to be a criminal one rather than a civil matter than the case was not entertainable by the small cause court. A number of authorities were referred to, and Mr. Justice Boys dealt with the matter thus:

> There can be no question but that the jurisdiction of the court has to be determined, in the first place, by a reference to the plaint. That which is exempted from the jurisdiction of the small cause court is "a suit" of a certain nature. To determine of what nature the suit is, we have obviously got to see what is sued for, and that brings us to the plaint and there is nothing to go any further.

We can follow that as a decision and at the same time we can give effect to the case of *Raghubar Dayal* v. *Mulwa,* neither of which are in conflict with the other. In our opinion, having examined the plaint we cannot say that on a fair reading of it it discloses a criminal offence. It was open to the immediate defence of the defendant, which in fact we know later he put up, that he had a perfect right to do what he did. There has been a later case, *Bandhu Pandey* v. *Gauri Dat Pandey*[3]. There the ratio of the decision was that on an examination of the plaint there was nothing in it to indicate that the defendant was acting with such knowledge or intention as would constitute an offence under Chapter XVII of the Indian Penal Code. That case again is very similar to the one now under discussion. The case on the other side of the line is the one we have already referred to, of *Deoki Rai* v. *Harakh Narain Lal,* because there the allegations in the plaint were that the defendants had forcibly cut and appropriated the tree which belonged to the plaintiff and that they had committed this act of cutting and taking away the tree after unlawfully conspiring together. There a criminal offence or offences were indicated. We think that no more definite rule can be laid down than is to be found in the case that we have cited and that the question whether a case is determinable by a small cause court Judge must rest upon an examination of the plaint and a decision by the judge as to whether or no the language of the plaint, on a reasonable construction, imports the commission of an offence under Chapter XVII of the Indian Penal Code. We therefore dismiss this application with costs.

Application dismissed

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[3] 1930 A. L. J. 1247

CIVIL

1932

Jan. 6

MEARS, C. J. SEN, J.

PUTTOO LAL AND OTHERS (*Plaintiffs*)

versus

MUNSHI LAL AND OTHERS (*Defendants*)*

Civil Procedure Code, Or. 22, R. 3—Court disallows substitution of names in place of deceased plaintiff—Order not appealable.

Where a court rightly or wrongly comes to the conclusion that certain persons cannot in terms of Or. 22, R. 3 C. P. C. be substituted in place of a deceased plaintiff, such an order is not a decree nor is it an order from which an appeal has been provided in the C. P. C.

CIVIL REVISION from a decree of MAULVI MUHAMMAD TAQI KHAN, Subordinate Judge of Farrukhabad.

Shiva Prasad Sinha for the applicants.

R. C. Ghatak for the opposite parties.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—Munshi Lal and others had executed a mortgage bond in favour of Behari Lal, Putto Lal and four others on January 20, 1914. The bond provided that the debt was to be paid after 7 years. On May 25, 1925, the mortgagees brought a suit for recovery of Rs.9,359-8-0 in enforcement of their mortgage and obtained a decree on July 21, 1925. The mortgaged property was sold for Rs.8,000 on August 21, 1929. This left a balance of Rs.3,066-8-0 still due from the mortgagors.

Behari Lal died on April 4, 1930. On July 2, 1930, two applications were presented in the court of the Subordinate Judge of Farrukhabad; one by Puttoo Lal and 4 others, who were co-plaintiffs with Behari Lal and the other by the widow of Behari Lal. The applicants prayed for substitution of names in place of the deceased Behari Lal. These applications were dismissed by the court below; hence this appeal. We are of opinion that where a court rightly or wrongly comes to the conclusion that certain persons cannot in terms of Order 22, Rule 3 of the Code of Civil Procedure be substituted in place of a deceased plaintiff, such an order is not a decree nor is it an order from which an appeal has been provided for in the Code of Civil Procedure. The order is not a decree because it does not adjudicate the rights of the parties on any point or points in controversy in the suit. It is therefore an 'order' but is not an order from which an appeal has been provided in Section 104 C. P. C. or in Order 43 C. P. C. The order in question is therefore not open to appeal and the appeal must fail on this ground.

Mr. Shiva Prasad Sinha, on behalf of Puttoo Lal and others has prayed that his appeal should be treated as an application for revision, under Section 115 of the Code of Civil Procedure.

Mr. Shiva Prasad Sinha has argued that his application for substitution of names is a preliminary step to an application for a decree under O. 34, R. 6 C. P. C. which he intends to make. An application under O. 34, R. 6 is a proceeding in the suit. This has been held in numerous cases and the decision in *re Babu Lal* v. *Raghunandan*[1] is a case in point. In view of the fact that the mortgage suit was instituted within six years of the time when the money became payable and the projected application for a decree under O. 34, R. 6 C. P. C. will be within three years of the date when the mortgaged property was sold, we are of opinion that the right of Putto Lal and others for a decree over is not time-barred and the liability of the judgment-debtor still subsists. In view of these facts, we consider it proper to treat the appeal as an application for revision. We hold that the court below has erred in dismissing the application for substitution on the ground that the mortgaged property having been sold, the decree has practically come to an end. As we have pointed out, the liability of the defendants for the balance of the decree still subsists. Whoever allege themselves to be the legal representatives of Behari Lal are competent to make an application for substitution of names. We allow the appeal and set aside the order of the court below. It will be for the court below to determine the question as to whether or not Behari Lal was joint with Putto Lal and others. If he was joint, the widow has no right to be substituted in place of Behari Lal. If, on the other hand, he was separate, in that case Puttoo Lal and others had no right to be substituted in place of Behari Lal and the only person who could be brought on the record in place of the deceased was the widow. This matter will have to be determined by the Subordinate Judge upon the evidence which the parties may adduce. The result is that we dismiss the appeal but treating the petition of appeal as an application for revision we allow the application subject to the remarks contained above and send back the case to the learned Subordinate Judge for disposal according to law. We make no order as to costs.

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*Civ. Rev. 41 of 1932

[1] A. L. J. R. 1930, 1200

Case remanded

Civil
1932
Jan. 7
Mears, C. J.
Sen, J.

JAGDISH NARAIN AND ANOTHER (*Applicants*)
versus
HAZARI LAL (*Opposite party*)*

Civil Procedure Code, Or. 6, R. 16—Hindu son's suit—To set aside alienation by father—Plaint alleges that father was 'extravagant and dissolute'—Paragraph to be struck out.

In a suit by a Hindu son to set aside an alienation by his father on the ground that the debt contracted was tainted with immorality, the immorality must be pleaded with particularity, that is, the exact nature of the immorality must be specified, and it must be shown with precision exactly how it came about at the particular time that the particular money was needed and used for the particular immorality charged. No judge should allow a general charge of immorality (e.g., that the father was 'extravagant and dissolute' to remain on record; and if, on the application of the opposite party, the whole statement is struck out, such opposite party should have the costs.

Tulshiram v. *Bishnath*, 25 A. L. J. R. 753 and *Gauri Shankar* v. *Manki*, 21 A. L. J. R. 571 *relied on*.

First Appeal from an order of Maulvi Muhammad Taqi Khan, Subordinate Judge of Farrukhabad.

Panna Lal and *M. L. Chaturvedi* for the appellants.

B. Malik for the respondent.

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*F. A. F. O. 114 of 1931

The judgment of the Court was delivered by

MEARS, C. J.—This is an appeal by two minor sons against the order of the learned Judge, who refused to issue an injunction restraining the decree-holder from selling property mortgaged to him by their father. We do not propose to interfere with the decision of the learned Judge in this matter. In view of the statement made to us by Mr. Panna Lal, it appears that the principal, if not the only, allegation upon which this suit could succeed would be to prove the alleged immorality of the father. Paragraph 3 of the plaint starts by the allegation that the father was "extravagant". As extravagance has no bearing on the matter, it is an irrelevant allegation. The paragraph further says that the father was "dissolute". That bare statement by itself is insufficient and offends against well known rules. A general charge of immorality cannot be permitted in a pleading. The immorality must be pleaded with particularity. That is, the exact nature of the immorality, be it gambling, drinking, women or anything else must be specified. Further the pleading must show with precision exactly how it came about at the particular time that the particular money was needed and used for the particular immorality charged. No judge should allow a general paragraph of this nature to remain upon the record, and the proper order to make is to have the whole paragraph struck out. If so done on the application of the opposite party such opposite party should have the costs. This rule is most clearly set out in Chapter 6, paragraph 6 of Mr. P. C. Mogha's book on "Law of Pleadings in British India", 3rd Edition, page 47 and the case of *Tulshiram* v. *Bishnath*[1] and *Gauri Shankar* v. *Manki*[2] should be consulted as also the opening paragraphs of Chapter 6 of Mr. Mogha's book. One good reason for this exactness of particularity is that this type of case in which a Hindu son seeks to set aside an alienation by his father is a suit frequently engineered by the father. In this instance Mr. Panna Lal says that the father and sons are on perfectly good terms, living in the same house and it may be that the allegations of immorality exist only in the imagination of the father who has made these assertions about himself with a view that the family should escape liability for the debt. It has not been shown that there is any apprehension that the property will be wrongfully sold in execution of the decree. This appeal therefore fails and is dismissed with costs. The Registrar should direct the attention of the learned Subordinate Judge to our observations on Paragraph 3 of the plaint.

Appeal dismissed

[1] 25 A. L. J. R. 753

[2] 21 A. L. J. R. 571

Civil

1932

Jan. 15

Pullan, J.
Niamat-ullah, J.

BABU LAL (*Plaintiff*)
versus
RAGHUNANDAN (*Defendant*)*

Civil Procedure Code, Or. 34, R. 6—Applicable only to cases where there has been a sale.

In a suit for sale on a mortgage, a final mortgage decree was passed, but the mortgagee never brought the property to sale because one *D* brought a suit for a declaration that the mortgaged property belonged to him and this suit was decreed in favour of *D*. The mortgagee then applied for a decree under Or. 34, R. 6 C. P. C. *Held*, that Or. 34, R. 6 C. P. C. applies only to cases where there has been a sale and where the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff. When there has been no sale, an application under R. 6 of Or. 34 does not lie. *Badal Singh* v. *Debi Saran Dhur Dube*, 49 All. 506=25 A. L. J. R. 485 *explained.*

SECOND APPEAL from a decree of B. S. KISCH, District Judge of Allahabad, reversing a decree of BABU AMBIKA PRASAD SRIVASTAVA, Munsif of west Allahabad.

Harnandan Prasad for the appellant.

A. P. Dube and *S. K. Mittra* for the respondent.

The judgment of the Court was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—One application in revision, one second appeal and one appeal from the order of a Munsif which is connected with the said application for revision and second appeal have come before us in the following circumstances. In the year 1924 Raghunandan obtained a decree against Babu Lal on a mortgage which had been executed in the year 1913. On July 2, 1925 he obtained a final decree, but he never brought the property to sale because one Datti Lal brought a suit for a declaration that the mortgaged property belonged to him (Datti Lal) and not to the mortgagor Babu Lal, and this suit was decreed in favour of Datti Lal on February 13, 1926. On August 30, 1927 Raghunandan applied for a decree under Rule 6 of Order XXXIV of the C. P. C. and obtained a decree *ex parte* on October 22, 1927. Babu Lal applied for setting aside the *ex parte* decree and at first his application was dismissed on a technical ground. The decision of the Munsif dismissing the application was upheld in appeal by the District Judge but set aside finally by the High Court which directed that the Munsif should consider Babu Lal's application for setting aside the *ex parte* decree on its merits. The Munsif held that Babu Lal had not been served with a summons and set aside the *ex parte* decree, and a revision against that decree (Civil Revision No. 135 of 1931) has been presented by Raghunandan and is one of the three decisions which are now before us. The Munsif on the merits of the case decided against the decree-holder and the appeal against that decision of the Munsif was transferred by us from the court of the District Judge to be heard along with the application for revision.

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*S. A. 1731 of 1928 (connected with Civ. Rev. 135 of 1931, and L. A. Ct. Appeal 28 of 1931)

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1932

BABU LAL
v.
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Niamatullah, J.

Babu Lal on his part brought a regular suit to have the *ex parte* decree set aside on the ground that it had been obtained by fraud, but the District Judge on appeal found against him and a second appeal against that decision is the third matter which we have to decide.

As to the application in revision we may say very shortly that there is no ground for a revision as required by the C. P. C. The only point argued is that the Munsif had no jurisdiction to set aside the decree, on his finding that Babu Lal had not been served with a summons, in view of the fact that in the regular suit brought by Babu Lal the District Judge in appeal expressed an opinion showing that he disagreed with the view taken by the Munsif as to the service of summons. The finding of the learned District Judge has in no way affected the jurisdiction of the Munsif, as all that the District Judge had to decide, and all that he did decide, as is clear from his judgment, was that the decree had not been obtained by fraud. It is not even inconsistent with the decision of the District Judge to hold that the summons was not actually delivered and certainly there is no question that the Munsif had no jurisdiction to make the order against which this application has been filed. We accordingly dismiss the application in revision.

In the appeal against the decision of the Munsif on the merits that the decree-holder could not succeed in an application for a personal decree under Rule 6 of Order XXXIV of the C. P. C. the appellant is met by the initial difficulty which is, in our opinion, insuperable that in this case there has been no sale. Rule 6 of Order XXXIV applies only to cases where there has been a sale and where the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff. There are numerous decisions of this Court to the effect that when there has been no sale an application under Rule 6 of Order XXXIV does not lie. We have been referred to certain decisions where although there has been a sale the sale has been subsequently nullified, in particular to a decision reported in *Badal Singh* v. *Debi Saran Dhar Dube*[1] by a Bench of which one of us was a member. In that case not only was there a decree for sale but the whole of the plaintiff's claim was satisfied by the sale proceeds, and it was only afterwards that a suit was brought by the mortgagor's grandson and a decree was passed to the effect that the whole proceedings including the mortgagee and the sale, were void against him. The Bench in that case held that as there had been a sale, it was possible to apply the provisions of Rule 6 of Order XXXIV of the C. P. C. We cannot consider that case to be an authority for the argument raised by the appellant in the present case. A further point was argued in the lower court, namely, that the appellant should be held to have a remedy under Section 68 (*b*) of the Transfer of Property Act. We do not consider that this is a question which can be decided in an application under Order XXXIV, Rule 6 of the C. P. C. If the terms of that order do not apply the appellant cannot go beyond them to obtain a relief of a different nature in the present proceeding. We accordingly dismiss this appeal.

There remains only the appeal filed by Babu Lal against the decision of the District Judge to which we have referred to above. In view of our

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[1] 49 All. 506=25 A. L. J. R. 485

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ullah, J.

decisions on the revision application and the appeal filed by Raghunandan the learned counsel for Babu Lal does not wish to press this appeal which is accordingly dismissed. We consider that both in the revision and in the two appeals it is proper that the parties should bear their own costs throughout and we order accordingly.

Appeal dismissed

Civil
1932
Jan. 19
Sulaiman, J.
Young, J.

HANKAR KUNWARI (*Plaintiff*)
versus
ISHWAR DAYAL SINGH *alias* BABBAN SINGH (*Defendant*)*

Pre-emption—Plaintiff's property included in sale deed—Claim for possession as owner joined with alternative claim for pre-emption—Whether pre-emptor to pay proportionate amount of sale consideration for the rest of property.

Where plaintiff's property has been included in the sale deed, he can combine a claim for recovery of possession and a claim for pre-emption in one and the same suit and base his claim on alternative grounds.

Bhagwati Saran Man Tewari v. *Parmeshar Das,* I. L. R. 36 All. 476 *followed. Abdul Wahid Khan* v. *Shaluka Bibi,* I. L. R. 21 Cal. 496 *distinguished.*

Obiter dicta—Where plaintiff's property has been intentionally included either to defraud him or to embarrass him, the consideration paid may be treated as the consideration for the property which in reality belonged to the vendor, but where the vendee has acted in good faith, it may well be argued that the total consideration paid by him must be paid by the pre-emptor even though a part of his own property was included. *Abdul Aziz* v. *Mariam Bibi,* 25 A. L. J. R. 48 *doubted.*

Second Appeal from a decree of T. N. Mulla Esq., District Judge of Gorakhpur, reversing a decree of Maulvi S. Zillur Rahman, Munsif of Deoria.

P. N. Sapru for the appellant.

A. P. Pandey for the respondent.

The judgment of the Court was delivered by

Sulaiman, J.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption of shares in villages Pakri and Tengri transferred under a sale deed dated February 12, 1927 by the plaintiff's sister. The plaintiff alleged that under a deed of gift from her mother, Mst. Sunraj Kunwari, she was the sole owner of the property, and her sister had no interest in the major part of the property; as regards the rest she admitted her title. She claimed pre-emption of the property admittedly belonging to her sister, and also of the rest of the property, in the alternative, if her own title was not established. She offered to pay the amount to the court which was found to be the true consideration.

The claim was resisted on various grounds, but not on the ground that the fact that the plaintiff had asked for pre-emption in the alternative was fatal. The learned Munsif decreed the claim for pre-emption on payment of Rs.230 in cash, and subject to the charge of a mortgage deed dated September 9, 1913.

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*S. A. 920 of 1929 (connected with S. A. 919 of 1929)

Three appeals arose out of the connected suits, but the plaintiff did not raise the question of consideration afresh before the District Judge, and submitted to the amount ordered to be paid. The vendees in their appeal for the first time raised the plea that because of the alternative grounds on which the claim for pre-emption was based, the suit ought to fail.

The learned District Judge has acceded to this contention. He noted that there were authorities of this Court under which the plaintiff was not disqualified from claiming pre-emption merely because she had set up an alternative claim of title, but he felt himself bound by the pronouncement of their Lordships of the Privy Council in the case of *Abdul Wahid Khan* v. *Shaluka Bibi*[1].

In our opinion, the ruling of their Lordships of the Privy Council does not at all decide the point which arises in this case. There on the death of one Muradi Bibi, her mother Shaluka Bibi sold half of her legal share to certain purchasers, and they brought a suit for possession against Muradi Bibi's husband Abdul Wahid Khan. The defendant resisted the claim on the grounds (1) that Mst. Shaluka Bibi had before the sale relinquished all her rights in the property and (2) that the defendant had a right of pre-emption in respect of the property and that no notice as required by law was issued. Their Lordships of the Privy Council in dealing with the second plea referred to the provisions in the Oudh Laws Act relating to the right of pre-emption and the suits brought to enforce such a right and then remarked:

> This law is not applicable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell and alleges that they are not co-sharers and that he is entitled to the whole of the property.

It is this observation which is relied upon by the lower appellate court. It seems to us that their Lordships had before them the contention that a defendant is entitled to resist a claim for recovery of possession based on title on the ground that he himself had a right of pre-emption and that no notice had been served upon him which took away that right. Such a plea obviously could not prevail as a defence to a suit for recovery of possession where the defendant had not exercised his right of pre-emption by suit as required by law. We do not think that their Lordships have laid down that in the converse case where the plaintiff's property has been included in the sale deed, he cannot claim his own property and, in the alternative, claim pre-emption. When such a case arises, the plaintiff can maintain a suit for recovery of possession and can also independently maintain a suit for pre-emption. There seems to be no reason why he cannot be allowed to combine both the suits in one and base his claim on alternative grounds. In the case of *Bhagwati Saran Man Tewari* v. *Parmeshar Das*[2] it was held by a Bench of this Court that there is nothing in law to prevent a plaintiff in a suit for pre-emption from also setting up a claim for possession of property as owner, and his suit ought not to be dismissed on the ground that he has put his case in the alternative. This case was followed by another Bench in *Abdul Aziz* v. *Mariam Bibi*[3], in which two other cases where the plaintiff was trying to set up the title of a third party were distinguished. A pre-emptor is not allowed to put the vendee to the proof of the title of the vendor, which will be the case if he is asserting that some other person is entitled to a part of the property transferred. That difficulty does not arise where the plaintiff is asserting that his own property has been included in the sale deed. In our opinion, the view taken in the subsequent caes of this Court cannot be said to be contrary to the opinion expressed by their Lordships of the Privy Council in *Abdul Wahid Khan's* case.

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[1] I. L. R. 21 Cal. 496

[2] I. L. R. 36 All. 476

[3] 25 A. L. J. R. 48

In the present case there is no difficulty as regards consideration, because the finding of the first court was not objected to by the plaintiff before the lower appellate court. We would, however, like to point out that in *Abdul Aziz's* case the plaintiff's title to only part of the property was established, and the Bench, of which one of us was a member, followed the earlier cases and also reduced the consideration in proportion. The question does not arise in this case, but it may be a matter for reconsideration whether there should be any reduction at all. Where the plaintiff's property has been intentionally included either to defraud him or to embarass him; the consideration paid may be treated as the consideration for the property which in reality belonged to the vendor, but where the vendee has acted in good faith, it may well be argued that the total consideration paid by him must be paid by the pre-emptor, even though a part of his own property was included.

The result, therefore, is that we allow this appeal and setting aside the decree of the lower appellate court, restore that of the first court. We extend the time of payment till two months from this date. If the amount is paid in time, the decree for pre-emption shall take precedence over the decree for possession in the connected case. The plaintiff will have her costs in all courts from the defendants.

Appeal allowed

CIVIL
1932
Jan. 21
MUKERJI, J.
BENNET, J.

HARAKH CHAND (*Plaintiff*)
versus
SAJIDA BEGUM AND OTHERS (*Defendants*)*

Tenancy Act (III of 1926), Secs. 79 and 80, and Civil Procedure Code, Or. 20, R. 11—Suit for recovery of arrears of rent—Against tenant other than permanent tenure holder or fixed rate tenant—Revenue court incompetent to make decree payable by instalments.

In a suit for recovery of arrears of rent against a tenant other than a permanent tenure-holder or fixed rate tenant, it is not open to the revenue court to make a decree payable by instalments under Or. 20, R. 11 C. P. C.

Liladhar v. *Lalji*, Vol. 1, Unpublished Decisions, 259 *followed.*

SECOND APPEAL from a decree of AKBAR HUSAIN ESQ., District Judge of Azamgarh, confirming a decree of BABU RAJ KISHORE SINGH, Assistant Collector, first class.

Rama Kant Malaviya for the appellant.

M. Waliullah for the respondents.

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*S. A. 1679 of 1929

The judgment of the Court was delivered by

MUKERJI, J.—This appeal arises out of a suit for recovery of arrears of rent, and the question that we have to decide is whether it is open to the revenue court to make a decree payable by instalments under the provisions of Order 20, Rule 11 C. P. C.

The plaintiff, who is the appellant before us, brought the suit out of which this appeal has arisen, for recovery of arrears of rent. The defendants admitted the claim but asked for permission to pay by instalments. The learned Assistant Collector directed that the arrears decreed by him might be paid by three instalments. He took care to direct that in case of any instalment being over-due the whole decree might be executed. The plaintiff appealed to the District Judge, and the learned District Judge dismissed the appeal. The plaintiff has come up to us, and the argument of the learned counsel for the appellant is that so far as tenants other than a permanent tenure holder and a fixed rate tenant are concerned, the provision of Order 20, Rule 11, C. P. C. is inconsistent with the provisions contained in Sections 79 and 80 of the Tenancy Act of 1926, and that, therefore, it was not open to the Assistant Collector to make a decree payable by instalments.

Under the provisions of Section 79 of the Tenancy Act the decree-holder is entitled to execute the decree at once the very next day after the passing of it by the ejectment of the tenant. We have already mentioned that certain classes of tenants are exempted from the operation of this rule. In the present case the tenants are neither permanent tenure holders nor tenants at fixed rate. If the landlord has this right of executing the decree the very next day after it is passed, the making of an instalment decree will take away from him that mode of execution which is open to him by Section 79. Section 80 of the Tenancy Act lays down that a tenant must pay within 15 days of the service of notice the amount of the decree sought to be executed by his ejectment. The section provides certain facilities for the tenants to pay up and, with the consent of the decree-holder, the time for payment can be extended to six months. In our opinion the application of Order 20, Rule 11 in the case of tenants other than a permanent tenure holder or a fixed rate tenant would be inconsistent with the provisions of Section 79 and Section 80.

The view which we take was taken by two members of the Board of Revenue in a case decided under the Old Tenancy Act of 1901—*Liladhar* v. *Lalji*[1]. In the result we allow the appeal, modify the decrees of the courts below and grant a decree payable in a lump sum for the entire amount decreed by the court of first instance. The appellant will have his costs throughout.

Appeal allowed

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[1] Vol. I, Unpublished Decisions of Board of Revenue, 259

ZIA UDDIN AHMAD KHAN AND ANOTHER (*Defendants*)
versus
AKBAR ALI (*Plaintiff*)*

CIVIL
1932
Jan. 18
PULLAN, J.
NIAMATULLAH, J.

Limitation Act, Art. 116—Mortgage deed—Covenant—Mortgagee entitled to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third party—Suit to enforce covenant—Limitation—Starting point.

In the proceedings in execution of a mortgage decree, a certain person objected that the property sought to be sold belonged to him. His objection was disallowed, but in the declaratory suit brought by him it was declared that the property could not be sold in execution of the mortgage decree. A suit for a simple money decree was barred on that date. Thereupon the mortgagee brought a suit for compensation against the mortgagor for breach of the covenant contained in the mortgage deed, which entitled the mortgagee to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third party; *held*, that the plaintiff's suit was for compensation for breach of a covenant of indemnity, and was therefore governed by Art. 116; and was within limitation, whether it was reckoned from the date of objection in execution proceedings or the date of the decree nullifying the decree in favour of the plaintiff. *Collector of Mirzapur* v. *Dawan Singh*, I. L. R. 30 All. 400 *relied on*.

SECOND APPEAL from a decree of BABU GANGA NATH, District Judge of Agra, confirming a decree of BABU LAKSHMAN PRASAD, Subordinate Judge.

A. M. Khwaja for the appellants.

A. Dharam Das for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an appeal by the defendants and arises out of a suit brought by the plaintiff-respondent for recovery of Rs.3,580-10-0 as compensation for breach of a covenant contained in a mortgage deed executed by the defendant-appellants in his favour. Both the courts have decreed the suit. The facts are that the defendants executed on March 15, 1918, a deed of simple mortgage for Rs.1,600 in favour of the plaintiff, hypothecating a house situate in Firozabad, district Agra. The plaintiff brought suit No. 10 of 1925 in the court of the Subordinate Judge, Agra, for recovery of principal and interest due under the aforesaid deed by sale of the mortgaged property. A decree for sale under Order 34, Rule 4 C. P. C. was passed in favour of the plaintiff. Ismail Khan, the first cousin of the defendants, objected, in execution proceedings, to the house being sold on the allegation that it belonged to him and not to the mortgagors, the defendants. His objection was disallowed, and thereupon he instituted a regular suit for the declaration of his right to the house in question, which was dismissed by the first court but decreed by the court of the District Judge on appeal, on February 15, 1928. It was declared that the house in question could not be sold in execution of the decree obtained by the plaintiff on foot of his mortgage deed. Conse-

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*S. A. 1520 of 1929

CIVIL

1932

ZIA UDDIN AHMAD KHAN
v.
AKBAR ALI

Niamat-ullah, J.

quently the decree became infructuous. A suit for a simple money decree was barred on that date.

The suit, which has given rise to this appeal, was instituted on July 10, 1928 for damages for breach of a covenant contained in the mortgage-deed, which runs thus:—

> If, in consequence of any act done by me, the executant, or my heirs or in consequence of a dispute raised by a third person, any loss is occasioned to the mortgagee as regards the sum due under the deed, the person and the property of the executant shall be made liable to make good the loss and costs etc.

The cause of action for the relief claimed by the plaintiff is said to have accrued to him on February 15, 1928, when the house mortgaged by the defendant-appellants under the deed, dated March 15, 1928, was declared to be the property of Ismail Khan and not liable to be sold in execution of the decree in favour of the plaintiff.

The main contention put forward in appeal is that the plaintiff's claim, which is in substance a claim to the original debt with interest, is barred by limitation. It is argued that, in so far as, the plaintiff is claiming to recover money advanced to the defendants, Article 62 of the Indian Limitation Act is applicable and that the period of limitation began to run from the date of the deed. That article provides for suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use". We are clearly of opinion that that article has no application to the suit as framed by the plaintiff-respondent. It is not one for recovery of any money advanced by the plaintiff to the defendant for the use of the former, but seeks to enforce a covenant which is in the nature of indemnity. The learned counsel for the defendant-appellants referred to a large number of rulings in which Art. 62 was applied to cases in which the plaintiff sought to recover the consideration paid by him under a mortgage or a lease, which failed. In none of those cases did the plaintiff seek to enforce a specific covenant of indemnity contained in the deed. In determining the particular article of the Limitation Act applicable to a case much depends on the nature of the plaintiff's claim. If the plaintiff is entitled so to frame his suit as to make a certain article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise so as to make a less favourable article applicable. We should, therefore, find an appropriate article applicable to a suit for compensation for breach of a covenant of indemnity. In *the Collector of Mirzapur* v. *Dawan Singh*[1], Art. 116 has been applied and, in our opinion, correctly. It provides for suits "for compensation for the breach of a contract in writing registered". The only question is as to when the period of six years, provided for by it, begins to run. It was contended that as the mortgaged property did not belong to the mortgagor, a breach of the covenant occurred on the date of the mortgage. We do not think this argument can hold good in the circumstances of the case before us. The covenant already quoted entitled the plaintiff to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third party. The plaintiff's right to recover damages, therefore, accrued when loss was occasioned to him in consequence of a dispute raised by Ismail Khan for the first time in execution proceedings taken in 1926, that is, within three years before the present suit was instituted. The loss was occasioned to the plaintiff when it was declared in the suit brought by Ismail Khan that the plaintiff-respondent was not entitled to have the house sold in execution of his own decree. This was on February 15, 1928 well within 3 years. It was on this date that the plaintiff was deprived of his security and of the right to have the mortgaged house sold in execution of his decree for sale. In these circumstances, we hold that the plaintiff's suit, which is governed by Article 116 of the Limitation Act, is within limitation, whether it is reckoned from the date of Ismail Khan's objection or the date of the decree nullifying the decree in favour of the plaintiff.

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[1] I. L. R. 30 All. 400

The lower appellate court has applied Art. 97 of the Limitation Act, holding that the consideration paid by the plaintiff-respondent under the mortgage-deed executed by the defendant-appellants in his favour failed on a decree being passed in favour of Ismail Khan. The learned counsel for the appellants made a reference to a number of cases bearing on Art. 97; but it is not necessary for us to consider the applicability of Art. 97 or of the cases relied on by him in the view of the case we have taken.

It was also argued by the learned counsel for the appellants that the decree obtained by the plaintiff-respondent for sale of the house mortgaged to him was based on a compromise and that the mortgage-deed having thus become merged in the compromise and the decree based thereon, no covenant contained in the mortgage-deed can be enforced. We are satisfied that this contention is not well-founded. It may be correct to say that the mortgage-deed became converted into a judgment debt; but this cannot have the effect of making all collateral covenants contained in the mortgage-deed inoperative. The compromise related to the controversy in the suit, namely, the amount to which the plaintiff-respondent was entitled and his right to obtain satisfaction of such amount by sale of the mortgaged property. It did not relate to any other matter, nor did the decree proceed on the basis of such compromise. There was no question as regards the plaintiff's right to recover compensation for loss occasioned to him in consequence of a dispute raised by a third person. For these reasons, we hold that the covenant now sued on was unaffected by the compromise and the decree passed in pursuance thereof.

It was further contended that the only remedy which the plaintiff-respondent had was to obtain a decree over, under O. 34, R. 6, C. P. C. We do not think that the plaintiff could obtain a simple money decree under that rule before the sale of the mortgaged property and the sale proceeds proving insufficient to satisfy the mortgage money. Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgaged property at the date of the mortgage, O. 34, R. 6, can have no application.

The appeal fails on all the grounds urged on behalf of the appellants. It is accordingly dismissed with costs.

Appeal dismissed

CIVIL

1932

Jan. 22

MUKERJI, J.
NIAMAT-ULLAH, J.

KANHAIYA LAL (*Plaintiff*)

versus

MAHADEI AND OTHERS (*Defendants*)*

Court Fees Act, Sec. 13—'Lower Court'—Meaning of—Second Appeal—High Court remands suit to court of first instance—Whether fee paid on memorandum of appeal refundable.

> Where on second appeal to the High Court, the following order was passed:—"We modify the decree of the court below and remand the suit to the court of first instance for trial in its entirety", *held,* that the expression 'lower court' in Sec. 13, Court Fees Act, includes the court of first instance where the appellate court is the High Court, and the fee paid on the memorandum of appeal was refundable.

ORDER on application for refund of court-fees.

H. P. Sen for the applicant.

M. N. Kaul for the opposite parties.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is an application to refund the court-fee paid on the memorandum of appeal by the appellant under Section 13 of the Court Fees Act. The office report is in favour of the applicant, but we have considered the provisions of Section 13, in view of the rather complicated case before us.

It appears that the suit was brought against six defendants for recovery of a certain sum of money by sale of property. The suit was dismissed in toto by the court of first instance. On appeal to the lower appellate court, the latter held that the defendants 3 to 5 were liable, but the defendants 1 and 6 were not liable. The lower appellate court accordingly sent back the case to the court of first instance for adjudication of the liability of the defendants 3 to 5.

The plaintiff was dissatisfied with this order of the lower appellate court and filed a second appeal. Here this Bench held that the defendants Nos. 1 and 6 were equally liable and passed the following order:—

> We modify the decree of the court below and remand the suit to the court of first instance for trial in its entirety.

Now the question is whether this is a case which is covered by Section 13, Paragraph 1.

If we read the words "lower court" as including the court of first instance where the appellate court is the High Court, no difficulty would arise in granting the appellant the relief he asked for. In the last line of Section 13, Paragraph 1 the words "memorandum of appeal" would mean the memorandum of appeal filed in the High Court.

We do not see why we should give the expression "lower court" a restricted meaning. This being a fiscal enactment, it should be read, as far as possible in favour of the subject, and we, therefore, decide that the words "lower court" would include the court of first instance.

Then comes the proviso for our consideration. The whole of the subject-matter of the suit has not been remanded by us and, therefore, the certificate to be granted should authorise the appellant to receive only so much of the fee as would have been originally payable on the part of the subject-matter of the suit remanded. This, we take it, is the fee which has been paid by the appellant on his memorandum of appeal to this Court, because he was appealing only against the order which was in favour of the defendants 1 and 6.

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*Application in S. A. 270 of 1930

In the circumstances, the whole fee paid by the appellant is refundable as reported by the office. We order accordingly.

Civil
1931
Dec. 18
Sulaiman, J.
Niamatullah, J.

MISRI LAL (*Plaintiff*)
versus
DEBI CHARAN (*Defendant*)*

Pre-emption Act, Sec. 17—Sale—Price—Included mortgage money, which was in fact due—Whether value of mortgage debt limited to the market value of property—Striking disparity between ostensible price and market value—Whether burden of proving actual price shifted on vendee.

Per Niamatullah, J.—Where the mortgage money included in the price was *in fact due* and both the vendor and the vendee agreed that that amount be made part of the consideration, (there being no dispute as to the remainder of the consideration which was paid in cash) the ostensible price cannot be considered to be otherwise than the actual price merely because it greatly exceeds what the property can fetch in the open market. *Jagat Singh* v. *Baldeo Prashad,* 18 A. L. J. R. 974 *dissented from.*

Per Sulaiman, J.—Where the mortgage money included in the price was in fact due (i.e., the existence of the amount due on an arithmetical calculation of the principal and interest was not disputed), the court is not bound to find that the full amount due under the mortgage was a real part of the sale consideration.

Per Niamatullah, J.—It will be a highly objectionable mode of dealing with the evidence if we seize on only the disparity between the ostensible price and the market value, ignoring other circumstances simultaneously appearing and explaining the disparity, and to reserve consideration of them for the next step in the case, namely, to find whether the vendee has succeeded in discharging the onus laid on him by proof of the market price. The evidence should be taken as a whole, and if it does not suffice to prove, *prima facie,* that the ostensible price is not the actual price, the issue is answered against the pre-emptor.

Second Appeal from a decree of Maulvi Shamsul Hasan, Subordinate Judge of Mainpuri, modifying a decree of Babu Brij Behari Lal, Munsif.

Shiva Prasad Sinha for the appellant.

Baleshwari Prasad for the respondent.

The following judgments were delivered:—

Niamatullah, J.

Niamatullah, J.—This is a plaintiff's appeal arising out of a suit for pre-emption brought by him for recovery of possession of the property in suit on payment of Rs.400, which is alleged to be the market value of such property, on the allegation that Rs.1,200, the consideration en-

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*S. A. 554 of 1929

Civil

1931

Misri Lal
v.
Debi Charan

Niamat-ullah, J.

tered in the sale deed executed by the defendant Nos. 2 to 7 in favour of defendant No. 1, does not represent the actual price and has been fictitiously mentioned to deprive the plaintiff of his right of pre-emption. The court of first instance decreed the claim on payment of Rs.400 on a finding that the price entered in the sale deed was not the actual price. The lower appellate court took a contrary view on the question of the price shown in the sale deed being the actual price; and in allowing the plaintiff's claim to pre-emption it made him liable to pay the entire sum of Rs.1,200. The only question in dispute in second appeal is whether the lower appellate court was justified in holding that the ostensible consideration was the actual price.

Some transactions, anterior to the sale in question, have a material bearing on the controversy and should be noted in chronological order. One and a half biswa share of Nagla Balli belonged to Baji Lal and Saughar Bahadur Singh, the share of the former being one biswa and that of the latter half a biswa. Both of them hypothecated their shares under a deed, dated May 4, 1907, to one Chet Ram for Rs.300. By a deed, dated June 13, 1920, Chet Ram assigned his rights under the hypothecation bond to Debi Charan, defendant No. 1, for Rs.350, though a much larger sum was due under the deed. There is little doubt that Chet Ram sold his rights for less than the sum then due to him, because he did not expect to recover all his dues, having regard to the value of the property and the personal remedy against the mortgagor and his other property being barred by limitation. Baji Lal, one of the mortgagors, having died in the meantime, his heirs sold his one biswa share on April 29, 1926. This is the sale in respect of which pre-emption is claimed in the present case. The deed recites that two-third of the mortgage money then due was Rs.1,150 and that a sum of Rs.50 was paid in cash by the vendee so as to make a total of Rs.1,200, which was the price agreed on between the parties. It should be mentioned that Debi Charan, who, as shown, had become the owner of one biswa, had the remaining half biswa sold in execution of decree obtained by him on foot of the mortgage and purchased it himself. It is, however, not known for how much it was sold at the auction.

The Munsif's view proceeds on the reasoning that the market value of the property sold, that is, one biswa, is not more than Rs.400 calculating it on the basis of certain transactions he refers to as exemplars, and that, therefore, *prima facie,* it could not be the actual price. Starting with that assumption, he threw the burden of proof on the vendee to establish "that the property in suit is worth Rs.1,200." He then winds up with the observation that "the defendant vendee was out of pocket for Rs.400. The market value of the disputed property comes to Rs.400 or so." Accordingly, he decreed pre-emption on payment of Rs.400. There is a palpable error in this treatment of the case. Assuming the plaintiff discharged the initial onus, which undoubtedly lies on him, the vendee is to establish, if he can, the actual price agreed on between the parties to the transaction and not, as the Munsif thinks, that the property is *worth* the amount entered in the sale deed as the price. The learned Subordinate Judge, on the other hand, took the view that the ostensible consideration mentioned in the sale deed was the actual price and that there was, therefore, no occasion to ascertain the market value of the property. As I read his finding, it implies that the plaintiff failed to discharge the initial onus, which admittedly lay on him. Unless the finding of the learned Subordinate Judge is vitiated by some error of law or is not supported by any evidence, it must be accepted in second appeal, which must fail on the initial point, namely, that the ostensible price is the actual price. It is, however, argued, on the authority of *Jagat Singh* v. *Baldeo Prasad*[1], that where personal remedy under a mortgage is barred and the mortgage money greatly exceeds the market value of the property sold to the mortgagee himself, who pays a small amount over and above the mortgage money as the price of the property, the price should be deemed to be no more than the market value plus the cash paid. The following passage is relied on:—

> We agree with the argument raised on behalf of the appellant that the vendee is entitled to recover from the pre-emptor the full amount that he has in good faith actually paid for the property purchased, but we have to see what the appellant vendee did in the present case actually pay. He gave up the debt due on the bond plus Rs.100 for the property. The value of the debt due on the bond is clearly limited to the value of the property in question. Nobody would have given to the vendee a price for his mortgage debt greater than the security afforded by the property. Just as a time-barred debt is practically of no value, so a mortgage debt where the personal remedy is barred cannot be greater in value than the security itself. No one in the open market would have given the appellant any thing more than Rs.1,250 for his mortgage debt. It, therefore, is clear that the amount which the appellant paid for the property is not the amount which was due on the face of the mortgage deed but the amount which was recoverable under the bond from the security. Nothing more than the market value of the property could have been recovered.

The *ratio decidendi* of the above case, which was governed by custom, in the matter of pre-emption, is that the charge should be considered to be a property, and in judging of its worth for the purpose of pre-emption its face value should be disregarded and its value should be determined with reference to what it was likely to fetch in the open market. This way of looking at it is destructive of the right of pre-emption under the Agra Pre-emption Act, which limits pre-emption to sales; and to create a charge as a property of unascertained value when given in consideration of a transfer of the land on which it exists is to give to the sale the character of an exchange. If a pre-emptor insists on the charge being valued and refuses to accept it at its face value as the price of the property sold, he is at once out of court in cases governed by the Pre-emption Act. The case may be different where pre-emption is claimed in terms of a custom which allows pre-emption in cases of exchange as well.

The report of the judgment does not show whether the custom which governed the right of pre-emption in that case entitled the pre-emptor to pre-empt on payment of the actual price agreed on between the parties to the transaction of sale, as in the case under the Agra Pre-emption Act, or on payment of their fair value of the property, regardless of the actual price which, nevertheless, should be taken as indicating the fair value of the property, and whether according to the custom relied on in that case exchange could be the subject of pre-emption.

If the custom applicable in that case was substantially the same as

[1] 18 A. L. J. R. 974

the provisions of Section 17 of the Pre-emption Act, I respectfully dissent from the view and the reasons on which it proceeds. The word "sale" occurring in the Agra Pre-emption Act is to be taken as defined in S. 54, T. P. A. (*vide* Sec. 4(10), Agra Pre-emption Act.). The word "price" occurring in the definition of sale means money only. If charge included in the price be considered to be of fluctuating value according to market rate, it ceases to be money and is to all intents and purposes a commodity given in exchange for the land transferred to the owner of the charge.

We are not dealing with a case in which the mortgage money included in the price has been inflated to defeat pre-emptions nor should I be understood as holding that in every case the amount due on paper, if mentioned in the sale deed, must be accepted as the true consideration. No question of bad faith arises in a plain case like the one before us, in which it is not disputed that the sum of Rs.1,150 was a real charge on the property sold, and the ostensible price cannot be considered to be otherwise than the actual price merely because it greatly exceeds what the property can fetch in the open market. The words "actual price" in S. 17, A. P. A., means the price which the vendee agreed to offer and the vendor agreed to accept as consideration for the sale. If the mortgage money included in the price was in fact due and both the vendor and the vendee agreed that that amount be made part of the consideration it must be regarded as price in its entirety.

The charge gives to the charge-holder a whip hand in the matter of making a purchase of the property in competition with others, and its value cannot be judged solely with reference to the amount which can be recovered by sale of the property in open market. Much will depend upon the extent to which there is keen competition amongst the intending purchasers. If there is such competition, the mortgagee being one of the bidders, no one can purchase unless he is willing to pay more than the incumbrance. If the mortgagee obtains a decree for sale and the property is put to auction, he can offer the whole incumbrance as his bid; and if no one offers more and the property is consequently sold to him, he is entitled to have the incumbrance set off against the price. If a co-sharer were to exercise his right of pre-emption under O. 21, R. 88 C. P. C., there is no doubt he has to pay the whole of the incumbrance included in the price for which the property had been knocked down to the mortgagee. I fail to see why the position should be different if he does exactly the same thing in taking a sale directly from the mortgagor out of court. Again, if the mortgagee purchases from the mortgagor only the equity of redemption, instead of the property free from encumbrance, the pre-emptor, if he takes the equity of redemption, will have to pay the entire charge. Can it make any difference if the mortgagor and the mortgagee take an account of what is due under the mortgage and fix the price with reference to the charge and an agreed cash payment?

It was said in the course of arguments that ordinarily a great disparity between the market value of the property sold and the ostensible price should suffice for the court to form an "opinion that the ostensible price was not the actual price" and that on proof of such disparity the court should call upon the vendee to prove what the actual price was. This may be true where nothing else appears in the evidence to rebut the inference arising from the disparity between the ostensible price and the market value. But where it is equally clear, for instance, that the vendee had reason to offer a fancy price or that the price included mortgage money charged on the property and to be in fact due but not recoverable otherwise than out of the sale proceeds, the fact that the ostensible price is more than the market value of the property will, in general, not be enough to throw the burden on the vendee; for, if the onus be shifted, the vendee can prove no more than what is admitted or proved, namely, that the vendee's special requirement induced him to pay a fancy price, or that the price included money charged on the property and not otherwise recoverable. It will be a highly objectionable mode of dealing with the evidence if we seize on only the disparity between the ostensible price and the market value, ignoring other circumstances simultaneously appearing and explaining the disparity, and to reserve consideration of them for the next step in the case, namely, to find whether the vendee has succeeded in discharging the onus laid on him by proof of the market value. The evidence should be taken as a whole, and if it does not suffice to prove, *prima facie*, that the ostensible price is not the actual price, the issue is answered against the pre-emptor.

In my opinion there is nothing objectionable in the vendor and the vendee including in the price the whole of the mortgage money if in fact due, though they are conscious of the prohibitive effect the price fixed would have on the right of pre-emption. Such a result is inevitable if we accept the existence and the validity of the charge. There is no fraudulent device in such a transaction, which should be distinguished from a class of cases in which the element of fraud is present. For instance, where the transaction settled between the parties is one of sale but to defeat pre-emption, first a mortgage deed containing stipulations calculated to raise the amount of mortgage money in a few years is executed and afterwards a sale deed is executed in consideration of the accumulated mortgage money which greatly exceeds the market value of the property. In such cases the deeds are part of a fraudulent device to conceal the transaction of sale which had been completed long before the sale deed, indeed, even before the mortgage deed came into existence. Again, if the vendor and the vendee misrepresent in the sale deed the amount due under the mortgage deed by adopting a wrong method of calculation or otherwise and thus inflate the price, different considerations will arise. Nothing in the nature of a fraudulent device can be suggested in the present case. The vendee was an assignee of the mortgage which had taken place 19 years before the sale and as already mentioned it is not suggested that 1150 was not due in respect of two-thirds of the mortgage.

No part of the mortgage money being fictitious and the mortgagor and the mortgagee (vendor and vendee) having agreed that it was due, it is not conceivable why the vendee should have omitted to include part of it in the price, for, if he did, he must have either relinquished it gratuitously, which is not a permissible assumption, or he allowed part of it to stand, which is ordinarily an impossible position. At least some plausible suggestion of fraud ought to be forthcoming before the good faith of the

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Niamatullah, J.

transaction can be doubted. It is clear that in *Jagat Singh* v. *Baldeo Prasad*[2], already referred to, no want of good faith was imputed to the vendee. On the other hand, it was clearly accepted that he "gave up the debt" and the decision was made to rest on the value of the debt determined with reference to the value of the property on which it was charged. As I have already said, this is virtually treating the transaction as an exchange. In a later case, *Mst. Chunmun Kunwar* v. *Jagat Bali*[3], decided by a Division Bench of this Court on February 24, 1927, in which, however, no reference was made to *Jagat Singh* v. *Baldeo Prasad*[2] it was held that, as the vendees held a mortgage decree against the vendors

> for a sum in excess of Rs.1,500 and that the decree-holders were willing to take over the property in suit at a valuation of Rs.1,500 in satisfaction or, at any rate, reduction of the decretal-debt, we are not prepared to say that Jagatbali and his co-plaintiffs are entitled to have this property at Rs.1,000, although as a matter of fact it may be the case that the property is not worth more than Rs.1,000. Any person who wants to take the property from the vendees must satisfy the decree of the vendees to the same extent as the vendees were prepared to treat the sale as satisfied, and so we hold that the proper consideration is Rs.1,500.

This is, in my opinion, a correct view, though it may not be in accord with what was said in *Jagat Singh* v. *Baldeo Prasad*[2]. I would dismiss the appeal with costs.

Sulaiman, J.

SULAIMAN, J.—The only point that is pressed in appeal relates to the sale consideration. The claim was governed by the Agra Pre-emption Act of 1922, and the question has to be decided in accordance with the provisions of Section 17 of the Act. Principles deducible from previous rulings under the customary law need not be re-examined. An interpretation of Section 17 was given in the recent case of *Dhanukdhari Singh* v. *Suresh Singh*[4]. I do not understand that my learned brother in any way doubts the correctness of that ruling.

Prima facie the ostensible price mentioned in the sale deed is to be taken as the real price. In the absence of other circumstances it is to be presumed to represent the real sale consideration. The burden lies on the plaintiff to give *prima facie* evidence to rebut this presumption. In my opinion it would be quite incorrect to lay down as a matter of law what quantum of evidence is necessary to shift this burden of proof. The question is one of weighing evidence and circumstances and its decision primarily rests on the court which is the judge of facts.

The sale deed in this case recites that the consideration was Rs.50 paid in cash and Rs.1,150 given credit under a previous mortgage deed dated May 4, 1907. I am unable to agree that if the existence of the amount due on paper under this mortgage deed is not disputed, it absolutely concludes the question and the court is bound to find that the full amount due under it was a real part of the sale consideration. To argue that both the parties must have of necessity agreed upon this figure, because it was open to the mortgagee to go through a possibly lengthy litigation, incur the necessary costs, obtain a decree on his mortgage, and bid against all possible bidders up to the maximum amount of his mortgage decree, has an element of consi-

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[2] 18 A. L. J. R. 974

[3] S. A. No. 1504 of 1925

[4] [1930] A. L. J. R. 561

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derable speculation in it. The finding is to be recorded not on mere assumptions of possibilities. If assumptions were to be taken into account then one can conceive of another set of possibilities. It may well be that the mortgage suit would be resisted on various grounds. Even an ostensibly good mortgage may prove worth nothing if the property was joint family property of the mortgagor and there was absence of necessity. The mortgagee may be put to considerable inconvenience in procuring evidence to prove legal necessity. The court may even cut down the rate of interest. The amount of costs incurred may be considerable and may not be recoverable at all if the security is not sufficient to pay even the mortgage money. There is a possibility that the mortgagee may not happen to be present at the auction sale and an equally remote possibility that the court may not give him permission to bid. To avoid all such extra trouble, expense and risk, a mortgagee may well give up a portion of his mortgage money than insist upon obtaining a paper decree for the full amount. On the other hand, the fact that the mortgagee has already gone through the lengthy procedure and obtained his decree may be a circumstance in favour of the vendee. The recital of the price in the sale deed may be intentionally inflated by collusion. The marginal note in Section 17 of the Act shows that the section contemplates cases where the sale price entered in the deed has not been fixed in good faith. A recital in the sale deed is not absolutely binding on a pre-emptor, who is not a party to the deed. It is impossible to lay down as a matter of law that in every case the amount due on paper, if mentioned in the sale deed, must be accepted as the true consideration.

According to the learned Munsif, the plaintiff had shown that although the ostensible price was Rs.1,200, the real value of the property transferred was only Rs.400, that the vendee had himself purchased the mortgage debt which had been set off in the deed for Rs.350 shortly before the transfer and that the personal remedy on the mortgage had long since become barred and if the mortgagee wanted to realise cash he would ordinarily not have recovered more than Rs.400. Both the original mortgagor and the vendor were members of joint Hindu families. In my judgment the learned Munsif was perfectly justified in expressing the opinion that 'the plaintiff's *prima facie* evidence is sufficient to throw the burden of proof on the defendant vendee'. In many cases a striking disproportion between the ostensible price and the market price has alone been held to justify the opinion that the ostensible price is not the actual price, and therefore shift the burden on to the vendee under Sec. 17(1) of the Act. The existence of the previous mortgage does not raise an irrebuttable presumption as to its validity. Nor is there any absolute presumption that the total based on an arithmetical calculation of the principal and interest is in fact due, and that no part of it has been previously paid. The question in each case is entirely one of weighing evidence and circumstances. It is for the court to decide whether having regard to all the circumstances the plaintiff had or had not made out a *prima facie* case for shifting the burden. I think the learned Munsif was right in holding that the initial burden of proof had been shifted in this case.

It will be noticed in the case of *Jagat Singh* v. *Baldeo Prasad*[5] the Bench of which I was a member accepted the finding of the lower appellate court on the question of consideration. The appellant's argument that the finding of fact of the lower appellate court was vitiated because the amount on paper ought to be accepted as the real consideration was repelled. I do not think that Tudball, J. was at all considering whether the charge should be considered as a property. The reasons for the decision were reproduced in order to show that the finding of the lower appellate court was not in any way vitiated. A finding of fact could be interfered with only if there was a legal flaw in it. In the unreported case of *Mst. Chunnu Kunwar* v. *Jagat Bali*[6], there was no finding at all by the lower appellate court on the question of consideration. Lindsay, J. and I had to record a finding of our own on the point. The mortgagee had already obtained his decree for the full amount and in the circumstances of that case we did not agree with the view of the court of first instance and held that the ostensible consideration was the real consideration.

I still adhere to the same view and cannot agree that in every case the court has no option but to hold that the money due on paper, if recited in the sale deed, must be accepted as the real price agreed upon between the parties. Indeed, in cases where the mortgage is a charge on property other than that sold, it would most probably be not the real consideration but the measure of that consideration would be the value of this other property. I do not think it is correct to say that if the onus be shifted, the vendee can prove no more than what is already admitted. The vendee can always give other evidence to show that the parties actually accepted a particular figure as representing the true consideration for the sale. He will certainly be at liberty to produce evidence, in addition to the recital, showing the real contract price agreed upon. Under Sec. 17(2) the onus is on the vendee to prove what the actual price agreed upon was. The recital cannot be conclusive. Sufficiency of evidence is a matter for the court to decide. The question whether he has discharged his burden is one purely of fact and not of law.

In the present case the lower appellate court has not agreed with the first court that the market price of the property was Rs.400. After pointing out that the property contained a good number of trees and a large area of fallow land it has remarked 'So on the evidence on the record the plaintiff's allegation as to Rs.400 being the market price of the property is not made out'. As regards the actual agreed price there was the evidence of several witnesses for the defendant. Its finding on the question of consideration is in the following words "So the evidence adduced by the defendant vendee in this case satisfactorily proved that Rs.1,200 was the actual price paid by him." The court has not said that the burden of proof had not shifted.

It was pointed out in *Dhanukdhari Singh's* case that if on a consideration of evidence of both the parties the court can come to a definite conclusion as to the actual amount of the sale consideration its duty is to decree the claim for that amount, and that it is only when it is unable to make up its mind, and cannot come to a definite conclusion as to the exact sale

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[5] 18 A. L. J. R. 974

[6] S. A. 1504 of 1925, decided on Feb. 24, 1927

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price that it should proceed to ascertain the market value. The lower appellate court in this case has recorded a finding on the actual price paid. That finding must be accepted in second appeal.

On this last mentioned ground I concur in the order dismissing the appeal.

BY THE COURT—The appeal is dismissed with costs.

Appeal dismissed

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Jan. 21
MUKERJI, J.
BENNET, J.

NAND KISHORE (*Plaintiff*)
versus
BEHARI LAL AND OTHERS (*Defendants*)*

Contract—Written contract—Meaning doubtful—Surrounding circumstances at creation of contract—Conduct of parties—Whether can be looked into—To arrive at true meaning.

Where a written contract was doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subject-matter to which it was designed and intended to apply, as also the conduct of the parties might be looked into to help the court to arrive at the true meaning of the contract.

SECOND APPEAL from a decree of PANDIT PRAN NATH AGHA, Additional Subordinate Judge of Moradabad, modifying a decree of BABU SHEOBARAN SINGH, Munsif.

K. N. Katju, Iqbal Ahmad and *S. N. Seth* for the appellant.

B. Malik for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—These two appeals arise out of the same suit brought by the plaintiff-appellant under the following circumstances:—

It appears that a number of mills which did the business of grinding corn were in existence in Moradabad in 1927 and from sometime before that date. On September 1, 1927, fourteen persons, among whom was the plaintiff, agreed that only five of the mills should carry on the business of grinding corn, that they should charge the public at certain fixed rates, that they should contribute a certain amount towards a common fund and that the fourteen members should receive out of the common fund a certain share as their profits. The whole idea of the agreement was to avoid competition and a consequent cutting down of the rates, so that the mills may not be obliged to work at a loss.

The plaintiff's case is that by paragraph 17 of the agreement he was to get his share of the profits at the rate at which he was getting them, if the agreement could not last for the whole year for which it was meant. The agreement according to the plaintiff came to an end on January 8, 1928. The plaintiff accordingly claims a certain sum of money as his share of the profits.

The lower appellate court found that the pooling agreement did work for the whole year as agreed and that the charges to be made to the public for grinding corn were reduced as also the amount to be contributed to the pooling fund. The lower appellate court accordingly directed payment to be made to the plaintiff according to the reduced rate contributed to the common fund.

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*S. A. 1559 of 1929

In this Court it has been urged that the learned Subordinate Judge entirely misunderstood and misconstrued the pooling agreement of September 1, 1927 and that on foot of that agreement the plaintiff was entitled to a much larger sum.

A translation of the agreement of September 1, 1927 has been handed over to us. In paragraph 3 it is said that the working mills were to charge for grinding different kind of corn certain rates given therein. Paragraph 4 said that out of the charges received by the mills certain fixed rates were to be paid towards the pooling fund. Paragraph 5 said that the balance left was to go to the mill-owners to meet their expenses. Paragraph 3 also said that the charges mentioned "below" were liable to increase or decrease at a meeting of the partners. We have it as a matter of fact that on January 8, 1928 a meeting of the partners was held in which it was resolved (see resolution No. 2) that the grinding charges for wheat should be reduced from 8 annas (for large quantities) to 4 annas 3 pies and to 5 annas (for small quantities) and that out of these charges 3 pies should go to the common fund. The plaintiff-appellant was the chairman of this meeting, and the resolution shows that his proposal was that the grinding charges should be 6 annas and not the rates just mentioned. There is no indication in the proceedings of the meeting that the appellant ever objected to the sum of 3 pies per maund being contributed to the common fund.

We have been told that the language of the agreement of September 1, 1927 is clear, and it is not open to the court to hold that by the resolution of January 8, 1928 it was open to the partners to make a decrease in the rate to be contributed to the common fund.

If we look to the entire circumstances of the case, we should have no difficulty in finding that there must be a minimum cost at which the mills must work in order to work without any loss. The idea of having a common fund has behind it the principle that the mills which do work should have the working cost paid to them, and the profits alone should be shared. In this view, when it was provided that the grinding charges given "below" were liable to increase and decrease, it must have been in the mind of the parties that with the change in the grinding charges there would be a change in the contribution towards the common fund. It cannot be said the language of the agreement is absolutely clear. It cannot be expected that out of 4 annas 3 pies, the rates declared at the meeting of January 8, 1928, the mill-owners who worked their mills were to get only 3 pies and were to contribute 4 annas to the pooling fund. This would induce the mill-owners to close their mills and no mill could work under these conditions. The result would be that the whole agreement would come to an end. This would be an absurd conclusion. Their Lordships of the Privy Council have decided in an unreported case, Privy Council Appeal No. 145 of 1920, decided on May 5, 1924—*Sri Raja* v. *Sri Poosapati,* that where a written contract was doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subject-matter to which it was designed and intended to apply, could

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be looked into. Again their Lordships held in another unreported case (Privy Council Appeal No. 10 of 1923, decided on December 18, 1923, *Mathaung* v. *Mathan*) that where a written contract was of doubtful import, the conduct of the parties might be looked into to help the court to obtain an explanation of the true meaning of the contract. These cases apply clearly to the facts of this case, and from the conduct of the parties and from the absurdity to which the plaintiff's contention would reduce the contract, we can clearly infer that the idea of the parties to the agreement was that not only the grinding charges could be changed, but also the amounts that were to go to the pooling fund.

In this view, the opinion of the court below was right.

As to whether the pooling contract held good for the entire period of one year or not, there is the finding of the court below that it did hold good. This is a question of fact, but it was argued that new partners were introduced on January 8, 1928 and, therefore, the original contract came to an end. This is not a correct view of the situation. The original contract was no doubt confined to fourteen persons, but there is nothing in it which precluded other mill-owners being allowed to join in the transaction. Indeed, if the new mill-owners were left free to compete, the whole object of the contract would become infructuous. We find from the resolutions passed at the meeting of January 8, 1928 that no less than six new comers were invited to come to the meeting to be held on that very day at 4-30 P.M. Under Section 253 of the Indian Contract Act, with the consent of all parties to the contract, new partners could be introduced. We have already mentioned that the plaintiff himself was the president of the meeting of January 8, 1928. He never objected to the introduction of new partners. The finding of the learned Judge, therefore, that the pooling agreement did hold good for one year, is not liable to be successfully attacked.

The result is that the appeals fail, and we hereby dismiss them with costs.

Appeal dismissed

CIVIL
1932
Jan. 22
MEARS, C. J.
SEN, J.

SHEO NARAIN (*Defendant*)
versus
BALA RAO (*Plaintiff*)*

Civil Procedure Code, Schedule II, Para 20—Agreement to refer to arbitration—Arbitrators to partition entire estate including debts due to the estate—Arbitrators allotted debts en bloc *to one party and directed heirs to pay in cash half the value of the debts to the other party—Award invalid.*

Where a matter is referred to arbitration by an agreement between the parties *without the intervention of a court of justice,* the agreement to refer to arbitration cannot be revoked without good cause and a mere arbitrary revocation will not be permitted by the court. *Pestonji* v. *Manokjee,* (1868) 12 M. I. A. 112 and *Bansi Dhar* v. *Sital Pershad,* I. L. R. 29 All. 13.

A dispute having arisen between two brothers as regards their share in the property left by their father, the matter was referred to arbitration. The governing idea in the agreement of reference was that the arbitrators

*F. A. F. O. 198 of 1930

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were appointed to partition the entire property. The estate consisted *inter alia* of certain amounts due to the father on bonds, promissory notes, money lending business and *bahi khata* accounts, the total of which amounted to Rs.14,000. The arbitrators treated the entire debts as realisable assets and allotted them *en bloc* to one brother and directed him to pay in cash Rs.7,000 to the other brother as being the cash equivalent of his share in these assets; *held*, that the arbitrators travelled outside the scope of the reference and the award was not valid, and the court was not competent to enforce it. *Mustafa Khan* v. *Phulja Bibi*, I. L. R. 27 All. 526 *relied on.*

FIRST APPEAL from an order of KHALILUDDIN AHMAD ESQ., Subordinate Judge of Jhansi.

K. N. Katju and *P. M. L. Verma* for the appellant.

P. L. Banerji and *Shambhu Nath Seth* for the respondent.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by one Sheo Narain, defendant in suit No. 21 of 1929 of the court of the Subordinate Judge of Jhansi. Sheo Narain and Bala Rao respondent were sons of one Ganesh. Ganesh died leaving considerable property. There was a dispute between his two sons as regards their share in the said property. Mst. Dulari is the widowed aunt of Ganesh. She claimed a right of maintenance.

The dispute between Bala Rao and Sheo Narain reached such an acute stage that the police sent up a complaint against them in the court of the Magistrate recommending that they should be bound over under Section 107 Cr. P. C. During the pendency of the proceedings against them under Section 107 of the Code of Criminal Procedure, two agreements were entered into between Bala Rao and Sheo Narain on September 13, 1928, under which they agreed that their disputes should be referred to the arbitration of a board of arbitrators consisting of seven persons. Mst. Dulari joined in one of these agreements. On October 17, 1928, Sheo Narain gave a registered notice to each one of the seven arbitrators intimating that he had revoked the agreement of reference and that the arbitrators therefore should not proceed to make an award. On January 23, 1929, Bala Rao, by way of a counter-move, applied in the court of the Subordinate Judge of Jhansi under Schedule II, Paragraph 17 of the Code of Civil Procedure that the agreements, dated September 13, 1928, be filed in court. On April 6, 1929, the arbitrators delivered an award. Thereupon Bala Rao withdrew his application, dated January 23, 1929, and presented an application on June 27, 1929, under Schedule II, Paragraph 20 of the Code of Civil Procedure that the award be filed in court. This application was numbered and registered as suit 21 of 1929 in the court of the Subordinate Judge of Jhansi. Notice of this application was served upon Sheo Narain, who contested the application upon various grounds which are to be found in his petitions dated July 30, 1929 and August 8, 1929. Only some of his objections are material for the purpose of the appeal before us. The learned Subordinate Judge dismissed the objections of Sheo Narain, upheld the award and directed that a decree be framed in terms of the award. This order of the Subordinate Judge has been challenged in appeal before us by Sheo Narain; and three points have been argued.

It has been contended that Sheo Narain had revoked the reference by registered notices, dated October 17, 1928 and that, as the result of the said

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revocation, the arbitrators were *functus officio* on April 6, 1929, when they delivered the award. It is settled rule of law that it is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause and "that a mere arbitrary revocation of the authority is not permitted." *Pestonjee Nussurwanjee* v. *Manokjee and Co.*[1]; *Bansi Dhar* v. *Sital Pershad*[2] and *Ram Chandrapal* v. *Krishan Lal Pal*[3]. The ground on which the agreements were sought to be revoked was that one of the arbitrators, namely, Gayadin had figured as a witness for the prosecution in the case under Section 107 of the Criminal Procedure Code. This was no ground at all for resiling from the agreements. Where parties have once agreed to a submission to arbitration, the agreement is binding and enforceable and cannot be annulled except for some such reason as that the agreement had been obtained by fraud, coercion or undue influence. It is opposed to all legal principles to allow a party to the agreement to revoke it at his sweet will and pleasure. We hold that the plea put forward by Sheo Narain did not put an end to the agreement of reference and that the award was properly made.

It is next urged that the legal effect of Bala Rao's application, dated January 23, 1929 that the agreement of reference be filed in court was to oust the jurisdiction of the arbitrators. No authority has been cited in support of this contention and we are aware of none. The scope of Paragraph 17 of Schedule II is no more than this that where an agreement of reference to arbitration has been entered into by the parties but the arbitrators have not so far functioned, the court has power to enforce the agreement against the parties where the arbitrators are ready and willing to act in terms of the reference. Paragraph 17 of Schedule II, far from implying an ouster of jurisdiction, predicates that the arbitrators have the jurisdiction to act on the reference and that the court should step in and ask them to exercise their powers as arbitrators if they are agreeable to do so. We overrule the contention of the appellant and hold that the application of Bala Rao, dated January 23, 1929 did not take away the jurisdiction of the arbitrators to make an award.

Lastly, it has been urged that the arbitrators have not partitioned the property in dispute according to the terms of the reference and that therefore the award should not be filed under Paragraph 20 of Schedule II of the Civil Procedure Code. The material portion of the agreement of reference is as follows:—

> Whereas a dispute has arisen between us the executants as regards the claim of maintenance of Mst. Dulari and as regards the partition of the assets of Upadhya Ganesh deceased which consisted of bonds, promissory notes, money lending business, *bahikhata* account, grain, cash, houses, miscellaneous articles, business, ornaments in hand and in the possession of Mst. Dulari widow of Sheo Rakhan Lal and whereas this dispute cannot be settled without arbitration, we therefore agree to appoint the following persons as arbitrators and umpire Whatever decision is given by the majority of the arbitrators and umpire in respect of the above named properties and in respect of the points in controversy between the parties and their respective rights shall be binding on us.

[1] 12 Moore's I. A. 1868, 112

[2] I. L. R. 29 All. 13=3 A. L. J. 613

[3] 17 Cal. W. N. 351

The estate of Ganesh Upadhia consisted *inter alia* of certain amounts due to him on bonds, promissory notes, money lending business and bahikhata accounts, the total of which amounted to Rs.14,000. The arbitrators have not divided these debts half and half between Sheo Narain and Bala Rao. They have treated the entire debts as realisable assets belonging to Ganesh and have allotted them *en bloc* to the share of Sheo Narain and have directed Sheo Narain to pay in cash Rs.7000 to Bala Rao as being the cash equivalent of his share in these assets. They have made the following remark in their award:—

> That whatever be the genuine valuation of the aforesaid assets of the deceased Sheo Ganesh in possession of Ganesh comprising of bonds, promissory notes, *Bahi Khata* account, shall continue as before in possession of Sheonarain because of convenience in realisation, and as Bala Rao is entitled to half its value, in lieu of it, Sheonarain will pay Rs.7,000 in cash and on the failure of the latter to make the payment, the former will be entitled to recover it legally through court and no objection of Sheonarain against it will be maintainable.

It has been contended on behalf of the appellant that having regard to the terms of the reference, the arbitrators were bound to divide the debts aforesaid half and half between Sheo Narain and Bala Rao, that they were not competent to allot the whole debt to Sheo Narain and to direct him to pay Bala Rao Rs.7,000 in cash as the value of his share and that this constitutes a serious illegality which invalidates the entire award. The learned Subordinate Judge was of opinion that the method adopted by the arbitrators was "very unreasonable" and that "the more discreat arbitrators would have divided the debts themselves." The court however held that the scope of the reference was wide enough to enable the arbitrators to deal with the matter in the way in which they had done. The court observes:—

> *No restriction whatsoever has been placed on the powers of the arbitrators.* In dividing a property between two parties, the arbitrators would have certainly the power to give the property or a larger part to one and to award compensation to the other. The present case is similar to this.

We are of opinion that where arbitrators are appointed to make a partition of certain property, in the absence of express directions, they have an unfettered discretion as to the mode of partition and the consequent allotment of shares. Where the property is of such a nature and character as not to admit of partition, or where the division of the property is calculated to seriously impair its enjoyment, the arbitrators can properly refrain from dividing the property into small portions and allotting them to the several claimants. In such a case, the proper course is to allot the property to a particular party and with a view to equalize the share to make the said party pay the money equivalent of the share to the other party or parties who may have a claim therein. The governing idea in the agreement of reference was that the arbitrators were appointed to partition the entire property which descended from Ganesh. These debts formed part of the divisible assets and were clearly capable of partition. The agreement of reference is that the dispute between the two principal claimants was with reference to the partition of that property and the executants asked for a decision from the arbitrators in respect of the above-named property and in respect of the points of controversy between the parties and their respective rights thereto. Wide and extensive as these powers are, they did not authorise

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Sheo Narain v. Bala Rao

Sen, J.

the arbitrators to refrain from dividing such of the assets as were capable of division. The arbitrators were certainly not justified in directing Sheo Narain to pay Rs.7,000 to Bala Rao as the cash equivalent of his share. We do not see any real difference between the facts of this case and those of *Mustafa Khan* v. *Phulja Bibi and Yaqub Khan*[4]. In this case, it was the duty of the arbitrators to divide a number of debts outstanding in connection with a timber trade. The arbitrators did not divide the debts but directed that one of the appellants and he only should collect these debts and account to the other parties in respect of them. It was held that the arbitrators had travelled outside the provisions of the submission and that the award could not be filed.

For the reasons stated by us, we are distinctly of opinion that the arbitrators, in not dividing the debts have not acted according to the scope of the reference and that in view of the circumstances of this case and the terms of the reference they had no authority to allot the debts *en bloc* to Sheo Narain and to direct that Sheo Narain should pay Rs.7,000 to Bala Rao. We hold therefore that the award in question was not a valid award and that the court was not competent to enforce it on an application under Paragraph 20 of the Second Schedule of the Code of Civil Procedure. We therefore allow the appeal, set aside the order of the Subordinate Judge, dated July 10, 1930 and direct that the petition, dated June 27, 1929, be dismissed. As Sheo Narain has not succeeded in all his pleas and in view of the way in which he conducted his case in the court below, we make no order as to costs.

Appeal allowed

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[4] I. L. R. 27 All. 526=2 A. L. J. 416

ANANDI DEVI (*Plaintiff*)

versus

MOHAN LAL AND OTHERS (*Defendants*)*

Civil

1932

Jan. 28

Sulaiman, J.

Young, J.

Transfer of Property Act, Sec. 122—Gift—Acceptance—May be either express or implied—No presumption of acceptance operating immediately upon gift—Gift—By husband to wife—Gift within wife's knowledge—Mutation effected —Acceptance to be implied.

Under Sec. 122 Transfer of Property Act there is no presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee.

There is nothing in Sec. 122 T. P. Act to limit acceptance to an express acceptance, and acceptance may be either express or implied.

Actual or constructive possession is undoubtedly proof of acceptance, and in zamindari property, and especially in a case concerning husband and wife, mutation means delivery of possession, and the acts of the husband after mutation are acts on behalf of his wife. *Ma Mi* v. *Kallander Ammal*, 25 A. L. J. 69 *relied on.*

First Appeal from the decision of the Subordinate Judge of Mainpuri.

K. N. Katju and *Baleshwar Prasad* for the appellant.

N. P. Asthana for the respondents.

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*F. A. 101 of 1928

The judgment of the Court was delivered by

Young, J.—This is a first appeal from the judgment of the Subordinate Judge of Mainpuri. The plaintiff brought an action for possession of a 20 biswas zamindari share in muhal Mohan Lal, Mauza Birsinghpur, pargana Kuraoli. The plaintiff's case was that her father, Mohan Lal, had by a deed of gift, dated June 7, 1919, given this property to his wife, Musammat Kapuri; that in 1921 Musammat Kapuri died, and she (the plaintiff) and her sister then became the heirs to their mother's stridhan; that in 1924, by two sale deeds, dated January 19 and April 14, Mohan Lal, her father, having repented of the gift to his wife, and in fraud of his own daughters, sold the property to the other defendants in the case. The plaintiff prayed for a decree for possession.

The defendants admitted the gift, but said that the gift was fictitious and was never acted upon, that Mst. Kapuri had never accepted the gift and that it was, therefore, void.

The learned Judge has found that the gift was a real gift intended to be acted upon, but that the wife never having accepted the gift, it was void as against subsequent vendees. He, therefore, dismissed the suit; and the plaintiff appeals.

We accept the finding of the learned Judge as regards the value to be attached to the oral evidence called on behalf of the plaintiff, and his finding that an express acceptance by Mst. Kapuri has not been proved. The learned Judge, however, merely finds acceptance not proved, because he disbelieves the actual case set up by the plaintiff as regards express acceptance. He never directed his mind to the vital question as to whether there was proof of acceptance within the meaning of Section 3 of the Evidence Act. It has been argued here by counsel for the respondents that the only acceptance under Section 122 of the Transfer of Property Act contemplated by that section is an express acceptance. We, however, do not find anything in the section to limit acceptance to an express acceptance, and we must take it that acceptance may be either express or implied. As the learned Judge has not considered the question of an implied acceptance based upon circumstantial evidence at all, we must consider it. It has been argued by counsel for the appellant that the law in India based upon Section 122 of the Transfer of Property Act is similar to the common law of England with regard to acceptance. There is no doubt that in England the law is that acceptance of a gift will be presumed, unless dissent is shown. That would mean that, in this case, it would be for the defendants to prove that Mst. Kapuri had dissented from the gift. Lord Halsbury in his Laws of England (Vol. 15, p. 418) says:

> Express açceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of the gift, and this is equally so, although the gift be of an onerous nature or of what is called 'an onerous trust'.

This rule of law has been applied to India by a single Judge of the Patna High Court in the case of *Mahammad Abdul Nayeem* v. *Jhonti Mahton*[1]. We, however, are not prepared to go so far. If Section 122 stopped short at saying that the gift must be accepted by or on behalf of the donee, as it would be natural for any person to accept a non-onerous gift, we might be prepared to hold that the English law applied in India. However, a difficulty is put in the way of such a construction of the Section by the fact that the Section proceeds to enact that if the donee dies before acceptance, the gift is void. Such an enactment makes it, in our view, impossible to hold that there is a presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee. There is no difficulty, however, in reading into the Section that the acceptance may either be express or implied.

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[1] 41 I. C. 389

We shall look at the evidence in order to see whether it is possible to hold in this case that there is an implied acceptance.

The defendants' own case was that Mohan Lal intended to go upon a pilgrimage and wished to make some provision for his wife in case some accident might befall him, and that therefore he executed the deed of gift. This story is set out both in the deed of gift itself and in the sale deed executed by Mohan Lal in favour of the defendant vendees. We take the story of the defendants itself. The husband and wife were living together apparently, according to the story, on friendly terms. The fact that the husband intended to go upon a pilgrimage must have been known to the wife and must have been the subject of conversation between them. The intention of the husband to provide for his wife during his absence, and the precautions he intended to take in case of his death while on the pilgrimage, must in all probability equally have been the subject of discussion between the husband and wife. The question of what the husband intended to do must have been disclosed by him in all probability, to his wife, and we think it can be assumed, in view of the subsequent conduct of the husband, that the wife assented to the proposal of the husband. It is to be noted in this connection that it is nowhere suggested in the pleadings or in the deed of gift that the wife was ignorant of the deed of gift. Further, the deed of gift was witnessed by four witnesses, two of them actually resident in the village of Karauli itself. There must have been publicity of the deed of gift, and we think that apart from what we have said above, knowledge of the deed of gift must, in all probability, have come to the wife. The husband proceeded immediately to apply for mutation. In the ordinary course proclamation was made in the village of the intended change of names. This, therefore, must have been known to the inhabitants of the village, and again we think that knowledge of this must, in all probability, have come to the wife. A few days later Mohan Lal filed the deed of gift itself in the revenue court. He did everything he could possibly do to put his wife in possession of the property. The revenue court itself in its order dated July 21, 1919 says:—

> Notice was issued. "The time allowed under the notice has expired. No objection has been taken. From the statement of the patwari the transfer of share and possession are proved. The application is within time. The property of Mohan Lal has devolved upon Mst. Kapuri Kunwar by means of a gift.

It is to be noted that the revenue court says that possession was proved. Actual or constructive possession is undoubtedly proof of acceptance, and in zamindari property, and especially in a case concerning husband and wife, mutation means delivery of possession, and the acts of the husband after mutation are acts on behalf of his wife. See the case of *Ma Mi* v. *Kallander Ammal*[2]. We note this specially because the learned Judge has been greatly influenced in the decision to which he has come by the fact that after the mutation, the husband performed various acts which the learned Judge thought proved the contention of the defendants that there never had been a real transfer of the property or that the deed of gift was not intended to be operative. Further, when Mst. Kapuri died in 1921, Mohan Lal proceeded to get his name recorded in the revenue papers by mutation proceedings. The papers record that mutation was obtained by way of inheritance, that is, inheritance from his wife, Mst. Kapuri. If the contention of the defendants was correct, there would, of course, have been no necessity for this entry in the revenue papers. The plaintiff and her sister at that ime were very young and minors, and Mohan Lal was the guardian, at any rate, of one of them. They were not in a position to protest against or dispute the acts of their father.

All these facts amount, in our view, to very strong circumstantial evidence of acceptance by the donee, Mst. Kapuri, of the gift, and we hold accordingly that acceptance has been proved by the plaintiff within the meaning of Section 3 of the Evidence Act.

Counsel for the respondents has strongly relied upon the acts of Mohan Lal after mutation. We have examined them, and we note with regard to them that in spite of the mutation proceedings, Mohan Lal remained the lambardar of the whole village till 1923, and, further, that no proceeding is recorded by the learned Subordinate Judge by Mohan Lal with regard to any of the properties after May 23, 1921. The whole point, therefore, of the acts of Mohan Lal goes. His actions would be in his capacity as lambardar of the village. With regard to one or two actions in the civil court, we do not consider that these isolated acts prove anything. There is nothing to identify the property concerning which the actions were brought with the gift, and, in any event, in one of the cases Mohan Lal brought a false claim and in both the cases Mohan Lal lost. The appeal is, therefore, allowed with costs, and the claim decreed.

Appeal allowed

[2] 25 A. L. J. 69

Criminal
1932
Feb. 3
Boys, J.

RAGHUNANDAN AND OTHERS (*Applicants*)
versus
SHEW NANDAN AND OTHERS (*Opposite parties*)*

Criminal Procedure Code, Secs. 137 and 139A—Order under Sec. 133—Existence of public right of way denied—Magistrate must first proceed under Sec. 139A.

Where a person against whom an order is made under Sec. 133 Cr. P. Code, appears before the magistrate and denies the existence of the public right of way, *the magistrate must first proceed under Sec. 139A*, and if there is *reliable* evidence in support of the opposite party's denial, the magistrate should stay proceedings (under Sec. 139A(2)) until the matter of the existence of the public right of way has been decided by a competent civil court. The enquiry under Sec. 137 should not take place until after the decision required by Sec. 139A that the opposite party produced no reliable evidence.

CRIMINAL REFERENCE made by BABU GANGA NATH, Sessions Judge of Azamgarh.

N. Upadhiya for the applicants.
K. L. Misra for the opposite parties.

The following judgment was delivered by

Boys, J.

BOYS, J.—This is a reference by the Sessions Judge of Azamgarh in proceedings under S. 133 of the Code of Criminal Procedure.

It does not appear that the Magistrate had in view from the outset at any rate the provisions of S. 139A of the Code. I have already had to comment on the unfortunate position in which this section has been placed in the Chapter. It should really have found place immediately after S. 135. When a notice has issued under S. 133 and been duly served under S. 134, the person to whom the notice issues, and whom for the sake of convenience I will call the opposite party, must then either perform that which he is called upon to do, or appear to show cause why he should not. If he decides to show cause he will also have to decide whether he wants the matter tried by a jury, and if he does want it so tried, he will make the claim.

At this stage S. 139A should have been introduced, for it is provided that upon the opposite party's appearance the Magistrate should forthwith ask him as to whether he denies the existence of any public right in respect of the way, etc. It is only after the question contained in S. 139A has been decided that the Magistrate will then, if he decides to go on with the case at all, proceed under S. 137 to take evidence and he will take that evidence either sitting alone or, if an application has been made for a jury, he will under S. 138 proceed to the appointment of a jury. Now, the Magistrate in the present case appears to have overlooked S. 139A altogether, though it is true that in the general inquiry which he held under S. 137, and which inquiry should not take place until after the decision required by S. 139A, he has held that there was no public right of way. Now, this departure from the procedure provided is not immaterial for while dealing with the matter as if he was acting under Section 137, he would direct his mind to arriving at a final determination of the question; while if, as he should have done, he had considered the terms of Section 139A he would have only had to consider whether there was any reliable evidence in support of the opposite party's denial that there was any public right of way. I have already explained in an earlier judgment, *Manohar Singh* v. *King-Emperor*[1], what I appreciate to be the object of S. 139A, namely, that it was to substitute a test of whether there was any reliable evidence in support of the opposite party's claim for the test which the courts had gradually come to impose, whether the accused's claim was *bona fide*—a test which had proved very unsatisfactory.

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*Cr. Ref. 790 of 1931

Approaching this case from the point of view, then, not whether the opposite party had finally established that there was no right of way but from the point of view whether there was any reliable evidence, I find that there was a considerable body of evidence as set out in the judgment of the learned Sessions Judge which should have given the Magistrate pause and disposed him to act under Sub-Section (2) of Section 139A.

In the reported case to which I have referred I have spoken of the discretion which is given to the Magistrate, and manifestly he has a discretion; but it is equally manifest that it is a discretion which must be judicially exercised, and in the present case I have stated the reasons which dispose me to hold that he entirely overlooked S. 139A, and applied the wrong test to the evidence. In view of the nature of the evidence as set out in the order of the learned Judge referring this case, I am satisfied that proceedings should have been stayed, and I accordingly set aside the order of the Magistrate and direct that under Section 139A, Sub-section (2) proceedings be stayed until the matter of the existence of the public right of way has been decided by a competent civil court.

Let a copy of this judgment be sent to the Magistrate.

Order set aside

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[1] 1929 A. L. J. 385

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Nov. 20

Lord Thankerton

Lord Salvesen

Sir George Lowndes

PRIVY COUNCIL

MANMATHA NATH MULLICK (*Plaintiff*)

versus

HEDAIT ALI AND OTHERS (*Defendants*)*

Transfer of Property Act, Secs. 6(e) and 130—Lease—Lessee agreed to pay Government revenue—On failure of lessee to do so, lessor paid revenue—Later lessor assigned his right to recover the revenue paid—Whether assignee entitled to sue.

Under a lease the lessee agreed to pay the lessor a yearly rent and, in addition, the Government revenue, cesses and other public demands. On failure of the lessee to pay the Government revenue the lessor paid the sums due. Later the lessor executed a deed of assignment in favour of the appellant by which he assigned his right to recover the amount (with interest) of the revenue paid by him. *Held,* that what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with the lessor to repay to him, and this would be an actionable claim to which Sec. 130 of T. P. Act would apply.

APPEAL from a decision of the High Court of Judicature at Patna.

L. De'Gruyther, K.C. and *B. Dube, K.C.* for the appellant.

The other side was not represented.

The following judgment was delivered by

Lord Salvesen

LORD SALVESEN—This is an appeal from a judgment and decree dated December 21, 1928, of the High Court of Judicature at Patna, which varied a judgment and decree dated June 30, 1927, of the Subordinate Judge of Cuttack.

The facts of the case which are not in dispute may be shortly stated as follows:—One Nani Mohan Banerji was an owner of two *taluks,* which may be shortly described as Narendrapur and Krishnapur. These properties were mortgaged for a total sum of Rs.1,49,000 and the appellant also held two postponed mortgages over the same properties for a sum of Rs.35,500. On December 9, 1914, Banerji executed a lease of his two *taluks* in favour of the first defendant. Under this lease the lessee agreed to pay the lessor a yearly rent and, in addition, the Government Revenue, cesses and other public demands. The lease also contains the provision that in case of any breach of the covenants to be observed by the lessee he should be liable in damages.

In 1917 the first mortgagees brought a suit to enforce their claims under the mortgages they held. As the result the two *taluks* were sold in execution to the appellant in 1924. The appellant purchased Narendrapur on January 26, 1924, and Krishnapur on May 17, 1924. The lessee continued in possession of the two *taluks* until the expiry of his lease on September 9, 1924, when he gave up possession. He has since died and his representatives are the respondents, who have not appeared.

During the currency of the lease the obligations of the lessee were duly performed until 1923, when he failed to pay the revenue instalment

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*P. C. A. 13 of 1930

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due in November in respect of *taluk* Narendrapur. He similarly failed to pay the revenue and cesses due in April, 1924, on the said *taluk*, and also the instalment of revenue and cesses due in April, 1924, in respect of *taluk* Krishnapur. In order to save the *taluks* from sale the appellant paid these instalments and certain penalties to the Collector in respect of their not having been paid at the due dates. Although in the suit these penalties are sued for, Mr. De'Gruyther in the course of the hearing stated that in respect of the small amount involved he limited his claim to the instalments actually paid.

In November, 1923, when the first instalment of revenue which is sued for in respect of *taluk* Narendrapur became due, Banerji and not the appellant was the owner of the two *taluks*, and the same applies to the instalment of the revenue claimed to meet the arrears of Government Revenue in respect of *taluk* Krishnapur. As regards the other sum claimed, it became due after the appellant had purchased Narendrapur but during the currency of the lease which expired in September thereafter.

Both the courts have held that the appellant is entitled to recover from the respondents the instalment of Government Revenue due in April, 1924, in respect of Narendrapur after he purchased the property. The Subordinate Judge held that he was equally entitled to recover the other two instalments which fell due during the ownership of Banerji, and he accordingly gave decree for payment of all three instalments along with the penalties which the appellant had been compelled to pay.

The High Court took a different view and came to the conclusion that while Banerji could have recovered these sums from the lessee in respect of the contract between him and the lessee, the appellant could only recover the revenue instalment which became due after his purchase of the properties in question. The effect of this judgment is, in the circumstances now to be narrated, to discharge the lessee of the obligations which he had undertaken in the lease and which, as a matter of course, devolved on his representatives, the respondents.

The appellant, on the other hand, maintains that as a mortgagee at the time when the instalments in question became due, he was entitled to intervene by paying the Government Revenue on the failure of the lessee to do so, as unless he had done so the properties over which his mortgage extended might have been brought to sale in execution. In point of fact, it would appear that Banerji in effect paid these instalments because they were deducted from the purchase price paid by the appellant. In addition, however, the appellant founded on a deed of assignment executed by Banerji in his favour on July 28, 1924, by which Banerji assigned his right to recover the instalments in question with interest thereon at the rate of 12 per cent per annum from the respective dates of payment to the date of commencement of the suit. The deed also constitutes the appellant Banerji's attorney and empowers him to sue for the amount of the instalments with interest at 12 per cent and on receipt of the same to grant valid and sufficient receipts and discharges, and on non-payment to institute suits for the recovery thereof and to grant sufficient receipts and discharges for the same.

The Subordinate Judge decided that in respect of the assignment the appellant was entitled to recover the two instalments which Banerji, as the then owner of the properties, would have been entitled to recover from his lessee. On appeal the High Court held that the plaintiff was entitled to recover the revenue and cesses for the instalment of April, 1924, in respect of Narendrapur. They say:—

> By his purchase on January 26, 1924, the plaintiff stepped into the shoes of the defendant No. 2 (Banerji) and he acquired the status of the lessor under the lease. He could, therefore, enforce all the rights which the original lessor could enforce as against the defendant No. 1. The claim of the plaintiff, therefore, for the recovery of the revenue and cesses paid by him for the instalment of April, 1924, must be allowed.

They further held that the penalty paid by the plaintiff to the Collector which had been allowed by the Subordinate Judge should be disallowed, but as the appellant does not now insist on this part of his claim it is not necessary for their Lordships to decide this point.

As regards the other instalments, the High Court held that these could not be recovered by the appellant either in respect of his interest as a mortgagee to preserve the property or under the assignation. The ground of judgment is thus stated so far as the latter point is concerned:—

> What was assigned by the defendant No. 2 to the plaintiff was his right to recover damages from the defendant No. 1 on account of the latter's default in payment of the Government Revenue and cesses. The right to recover damages is a mere right to sue and such a right cannot be transferred under the law.

The clause in the Transfer of Property Act on which the judgment is based is Section VI, Sub-section (*e*), which is in these terms:—

> A mere right to sue cannot be transferred.

Their Lordships are clearly of opinion that this clause has no application to the facts of the present case. In their Lordships' opinion what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This would, their Lordships think, be an actionable claim to which Section 130 of the Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages within the meaning of the clause in the lease on which the High Court found, but to a claim for reimbursement of the precise sum which the landlord had disbursed to meet the obligation. This is the view on which the High Court proceeded in allowing the claim for payment of the instalment paid by the appellant after he became owner of the property in respect of which it was levied by Government, and their Lordships find it difficult to understand why the same principle was not applied to the right of Banerji to recover from his lessee the two previous instalments. This right having been assigned by a formal deed to the appellant, who has moreover been constituted by the same deed Banerji's attorney to recover the instalments in question, there is on both heads a clear answer to the contention which the High Court sustained that he had no title to sue

Their Lordships are accordingly of opinion that in so far as the High Court judgment disallows the claim for payment of the instalment of Rs.3,444 with interest at 12 per cent to January 15, 1926, and the instalment of Rs.5,583 with interest at 12 per cent from July 14, up to January 15, 1926, the judgment of the High Court must be reversed as well as the order as to costs. In strictness the appellant would have been entitled to interest at 12 per cent up to February 8, which was the actual date of the institution of the plaint, but as he has limited his claim to January 15, 1926, in his plaint in respect of all three instalments, he cannot now be allowed to claim a larger sum.

In substance the decree of the Subordinate Judge falls to be sustained, but it must be varied in so far as it allows the penalties paid by the appellant to the Collector which are not now insisted on. In form, therefore, it is necessary to recall the judgments both of the Subordinate Judge and of the High Court, and to grant a decree against the respondents as the heirs of Sheikh Haider Ali for the sum of Rs.15,452.8 and for the sum of Rs.1,681, being the amount of the costs awarded to the appellant by the Subordinate Judge with interest on these sums at 6 per cent from January 30, 1927, until the date of realisation. The appellant is also entitled to the costs of the suit both in the High Court and before this Board. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed

Watkins and Hunter—Solicitors for the appellant.

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1931
Nov. 19
Lord Thankerton
Lord Salvesen
Sir George Lowndes

RASHID AHMAD AND ANOTHFR (*Plaintiffs*)

versus

ANISA KHATUN *alias* ANIS FATIMA AND OTHERS (*Defendants*)*

*Mohammedan Law—Hanafi school—Sunnis—*Talak *addressed to absent wife by name, and repeated three times—Whether constitutes an immediately effective divorce—*Talak *pronounced under compulsion or in jest—Whether valid and effective.*

Among Sunni Mohammedans governed by the Hanafi law, words of divorce addressed to the wife by name, though she is not present, and repeated three times by the husband, constitute an immediately effective divorce, and the validity and effectiveness of the divorce is not affected by the husband's mental intention that it should not be a genuine divorce. A *talak* actually pronounced under compulsion or in jest is valid and effective.

Once a divorce is proved, the fact that for fifteen years after the divorce the husband treated the woman as his wife and his children born after the divorce as legitimate, could not undo its effect or confer legitimacy on the children.

APPEAL from a decision of the High Court of Judicature at Allahabad.

S. *Hyam* for the appellants.

H. R. Majid for the respondents.

The following judgment was delivered by

Lord Thankerton

LORD THANKERTON—This is an appeal from a decree of the High Court at Allahabad, dated February 1, 1927, which reversed a decree of the Court of the Subordinate Judge of Bijnore at Moradabad, dated December 15, 1923.

The dispute relates to the succession to the estate of Ghiyas Uddin, a

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*P. C. A. 86 of 1929

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Lord Thankerton

Mohammedan, who died on April 4, 1920, leaving considerable movable and immovable property.

The appellants are plaintiffs in the suit, which was instituted on June 28, 1922, and are a brother and sister of Ghiyas Uddin, and, along with respondents Nos. 10 to 12, who were impleaded as *pro forma* defendants, would be heirs to Ghiyas Uddin according to Mohammedan law, if the respondents Nos. 1 to 6 (who were defendants Nos. 1 to 6), are unable to establish their claim to be the widow and legitimate children of Ghiyas Uddin.

The main controversy turns on four stages in the matrimonial history of Anis Fatima, respondent No. 1, viz.: (1) her marriage to Manzur Husain in 1901; (2) her divorce by Manzur Husain early in 1905; (3) her marriage to Ghiyas Uddin on August 28, 1905; and (4) her divorce by Ghiyas Uddin on or about September 13, 1905.

It is admitted that Anis Fatima was married to Manzur Husain in 1901, but the respondents maintain that the marriage was invalid on the ground that both parties were minor at the time. The Subordinate Judge held the marriage to be valid on the ground that Anis Fatima was then adult and Manzur's marriage was contracted through his mother as his guardian, and this conclusion appears to have been accepted by the High Court.

The alleged divorce by Manzur Husain early in 1905 was challenged by the appellants on the grounds that it was not proved, and that, even if proved, it was invalid in respect that Manzur had not then attained the age of discretion. Manzur himself was the only witness as to the fact of divorce, and his evidence was rejected by the Subordinate Judge, but was accepted by the High Court as proving the fact. On consideration of the conflicting evidence as to Manzur's age, the Subordinate Judge held that he had not then reached the age of discretion, but the High Court reached the opposite conclusion.

The Subordinate Judge held that the marriage of Ghiyas Uddin to Anis Fatima was not proved, but this finding was reversed by the High Court, and the appellants acquiesced in the decision of the High Court, and merely maintained the invalidity of this marriage in the event of it being held that Anis Fatima was then the undivorced wife of Manzur.

The fourth stage was the alleged divorce by Ghiyas Uddin in September, 1905. The appellants' case was that on September 13, 1905, Ghiyas Uddin pronounced the triple *talak* of divorce in the presence of witnesses, though in the absence of the wife, and that the latter received Rs.1,000 in payment of her dower on the same day, for which a registered receipt is produced; there was also produced a *talaqnamah,* or deed of divorce, dated September 17, 1905, which narrates the divorce, and which is alleged to have been given to Anis Fatima. The respondents denied the fact of the divorce, and, in any event, they challenged its validity and effect for reasons which will be referred to later. They maintained that the payment of Rs.1,000 was a payment of prompt dower, and that the deed of divorce was not genuine, in that it was not written or signed by Ghiyas Uddin.

There are concurrent findings by the Courts below that Ghiyas Uddin did pronounce the triple *talak* of divorce, and that the deed of divorce is genuine, and their Lordships have seen no reason to depart in this case from their usual practice of not disturbing such findings.

The Subordinate Judge held that Ghiyas Uddin irrevocably divorced Anis Fatima, and that she was, therefore, not his wife at the date of his death in 1920, and also that respondents Nos. 2 to 6, who were admittedly their offspring, but all born after the date of divorce, were not legitimate. The High Court came to the contrary conclusion on the ground that the divorce was fictitious and inoperative, because it was a mock ceremony performed by Ghiyas Uddin to satisfy his father, but without any intention on his part that it should be real or effective.

As it was obvious that, in the event of their Lordships agreeing with the conclusion of the Subordinate Judge on this stage of the case, consideration of the earlier stages of the case would be rendered unnecessary, counsel were requested to confine their arguments to this stage in the first instance, and, after full consideration of these arguments, their Lordships are of opinion that the decision of the Subordinate Judge was right, and, therefore, it will be sufficient to deal with this stage alone.

There is nothing in the case to suggest that the parties are not Sunni Mohammedans governed by the ordinary Hanafi law, and, in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R. K. Wilson, in his Digest of Anglo-Mohammedan Law (5th edition) at p. 136, as follows:—

> The divorce called *talak* may be either irrevocable (*bain*) or revocable (*raja*). A *talak bain*, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talak bain* may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:—
>
> (*a*) Once, followed by abstinence from sexual intercourse, for the period called the *iddat;* or
> (*b*) Three times during successive intervals of purity, i.e., between successive menstruations, no intercourse taking place during any of the three intervals; or,
> (*c*) Three times at shorter intervals, or even in immediate succession; or
> (*d*) Once, by words showing a clear intention that the divorce shall immediately become irrevocable.
>
> "The first-named of the above methods is called *ahsan* (best), the second *hasan* (good), the third and fourth are said to be *bidaat* (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid.

In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas Uddin as follows:—"I divorce Anisa Khatun for ever and render her *haram* for me," which clearly showed an intention to dissolve the marriage. There can be no doubt that the method adopted was the third above described, and this is confirmed by the deed of divorce, which states that the three divorces were given "in the abominable form," i.e., *bidaat*. The learned Judges of the High Court have erred in treating the divorce as in the *ahsan* form, instead of the *bidaat* form.

The *talak* was addressed to the wife by name, and the case is not affected by the decision of the High Court of Calcutta in *Furzund Hossein*

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v. *Janu Bibee*[1] where the words of divorce were alone pronounced. In the *bidaat* form the divorce at once becomes irrevocable, irrespective of the *iddat* (Baillie's Digest, 2nd edn., p. 206). It is not necessary that the wife should be present when the *talak* is pronounced *Ma Me* v. *Kallander Ammal*[2], *Ful Chand* v. *Nazab Ali Chowdhry*[3] and *Asha Bibi* v. *Kadir Ibrahim Rowther*[4] though her right to alimony may continue until she is informed of the divorce.

Their Lordships are of opinion that the pronouncement of the triple *talak* by Ghiyas Uddin constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas Uddin's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A *talak* actually pronounced under compulsion or in jest is valid and effective (Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. 2, p. 518; Hamilton's Hedaya, vol. 1, p. 211).

The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas Uddin treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant No. 1 and respondent *pro forma* No. 10, who are brothers of Ghiyas Uddin, but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.

While admitting that, upon divorce by the triple *talak*, Ghiyas Uddin could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgment of their legitimacy by Ghiyas Uddin, subsequent to the divorce raised the presumption that Anisa Fatima had in the interval married another, who had died or divorced her, and that Ghiyas Uddin had married her again, and that it was for the appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*[5]. Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of a Mohammedan marriage by acknowledgment of a son as a legitimate son, is as follows (p. 120ft) :—

> It must not be impossible upon the face of it, i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact,

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[1] [1878] I. L. R. 4 Cal. 588

[2] [1926] 54 Ind. App. 61 at 65

[3] [1908] I. L. R. 36 Cal. 184

[4] [1919] I. L. R. 33 Mad. 22 at 23

[5] [1921] 48 Ind. App. 114

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and not *juris et de jure,* it is, like every other presumption of fact, capable of being set aside by contrary proof.

The legal bar to re-marriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anisa Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption, but not otherwise.

Their Lordships are therefore of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed

Barrow, Rogers and Nevill—Solicitors for the appellants.
Francis and Harker—Solicitors for the respondents.

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Nov. 27
VISCOUNT DUNEDIN
LORD BLANESBURGH
SIR JOHN WALLIS

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF EAST GODAVARI DISTRICT (*Plaintiff*)

versus

SANNIDHIRAJU SUBBARAYUDU AND OTHERS (*Defendants*)*

Riparian Rights—Riparian owner—Has inherent right to take water from river for domestic use and irrigation—Irrespective of ownership of soil of stream—When river belongs to Government—Madras Irrigation Cess Act (VII of 1865), Sec. 1, Proviso—Interpretation of.

A person who owns land abutting on a stream has an unrestricted right to take water from the stream for domestic use, and a restricted right to take water for other uses connected with the land, of which irrigation of the lands which form the property is one—in the latter case the only limitation is that the amount taken shall not be so much as to hurt the right of the lower owner to have the stream passed on to him practically undiminished. The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of that stream. This right is a natural right and not in the strict sense of the word an easement, and it is not capable of being lost *non utendo. McCartney* v. *Londonderry and Lough Swilly Railway Company,* [1904] A. C. 301.

A river only belongs to the Government when the solum of the stream belongs to the Government. This will happen either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable.

Where riparian property passes, the property, being riparian, has inherent in it, without special mention in the conveyance, the riparian rights, and the riparian owner is entitled to the protection of the proviso to Sec. 1 of the Madras Irrigation Cess Act.

APPEAL from a decision of the High Court of Judicature at Madras.

A. M. Dunne, K.C. and *B. Dube, K.C.* for the appellant.

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*P. C. A. 34 of 1931

L. De'Gruyther, K.C. and *K. V. L. Narasinham* for the respondents.

The following judgment was delivered by

VISCOUNT DUNEDIN—The original plaintiff in this suit is dead and the suit is continued by his legal representatives. The plaintiff owned land abutting on a branch of the Godavari called the Chilapa Kalva. From that in exercise of what he considered his riparian rights, he took water. The Government, through the Collector of Godavari, charged a water-cess of Rs.8-5-8 for his use of the water. He paid under protest and then raised the present suit against the Government to recover the money so paid.

The sole question, therefore, is whether the water-cess was legally levied. The cess bore to be levied in virtue of the provisions of the Madras Irrigation Cess Act, No. 7 of 1865. The preamble of the Act is in these terms:—

> Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land: and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works.

Then follow the words of the Act which, so far as material to the present case, are to be found in the first section:—

> 1.—(*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to or constructed by Government,
>
> * * * * * *
>
> it shall be lawful for the Government before the end of the Revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied: and alter or amend the same from time to time:
>
> Provided that where a *zamindar* or *inamdar* or any other description of land-holder not holding under *ryotwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more:

Now the facts which have not been a matter of dispute may be thus stated:—

1. The plaintiff's land is bounded by the river.
2. At the place where he has taken the water there are Government lands on the opposite side of the stream.
3. He only uses the water he takes for the purpose of the irrigation of his own property.
4. The river at this place is tidal.

There are also two disputed facts:—

First, the plaintiff originally averred that he had taken the water at this place from time immemorial. The Government said he had only taken the water recently. The latter was found to be the case both by the Judges of the inferior court and the Court of Appeal, and consequently

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it cannot be and has not been argued to the contrary by the respondents in this appeal. Secondly, the Government aver that the river at the place where the water is taken being tidal is also navigable. The District *Munsif* before whom the case depended found that the river was navigable by big boats for six or seven months and by fishing boats for the remainder of the year. He therefore found that it was navigable as well as tidal. Upon that ground and the ground that the Government owned land on the other side of the river, he held that the river belonged to the Government. Riparian rights to be good against the Government, he decided, must be customary immemorial rights, and as he had found the fact of long user against the plaintiff, he decided that the cess was duly levied and dismissed the suit. On appeal to the Subordinate Judge he confirmed the judgment of the Munsif on substantially the same grounds. Appeal being taken to the High Court in Madras, they reversed the judgment and decreed the suit.

As to the river being navigable, they were not satisfied that the evidence tendered was sufficient. They considered that navigability must extend during all the year and, as the character of the fishing boats had been left dubious, they would have been prepared to remit the case for further evidence on the point had it been necessary for them to do so, but, in their opinion, the case could be disposed of upon the assumption that the river did in terms of the section "belong" to the Government, and they accordingly proceeded on that assumption. The judgment of the Court was decided by Ramesam, J., and the deciding passage may be found expressed as follows:—

> A riparian right is a natural right and is not acquired by immemorial user. It exists by law, it may be lost by the adverse enjoyment of another but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river and stream. I therefore think in this case the plaintiff is entitled to draw water from the Addarapu *kalva* in exercise of his rights as a riparian owner and so long as he does not exceed those rights he is not liable to water-cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt.

There have been in the Madras Courts a considerable number of cases dealing with the Act of 1865. The judgments pronounced in them, and still more the dicta contained in the judgments, are exceedingly contradictory. In their Lordships' view, it would serve no good purpose to go through the cases and pick out the different dicta with which they do or do not agree. They prefer, therefore, to lay down quite shortly the various propositions in law which suffice for the determination of the present case.

The first question that presents itself is obviously whether the river in the phraseology of the Act "belongs" to the Government. Now the word "belong," easily applicable to works, etc., is obviously ill-suited to be applied to a river. Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it. So that literally no "river" could belong to the Government unless it was a river which from the source to the sea was within Government lands, or tidal and navigable so that it was always Government property. But clearly the

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word "belongs" cannot be so restricted. The idea, therefore, must be that the river belongs to such person or persons as have the ownership of the water for the time being at the place at which it is taken. Belonging points to exclusive belonging. It therefore seems to follow that within the expanded meaning a river only belongs to the Government when the solum of the stream belongs to the Government. This will happen eiher when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. So much for the expression as it was used in 1865. But when there is the Act of 1905. That Act with its general and sweeping enactments has certainly the effect that in future when there is a contest as to the right of *water,* the opponent of the Government will be put to prove his title. He will not be able, as he otherwise would have been when attacked by the Government, to put them to prove their title. But counsel for the Government did not argue that the Act of 1905 made the *river* belong to the Government, and as the natural rights of persons are expressly excepted it can have no effect on the riparian rights of the parties in the present case.

The result is that in this case the river only belongs to the Government if the river is both tidal and navigable. Their Lordships, without deciding, will assume, as the High Court did, it is so; for if it is not, the right to levy cess is gone. They will therefore assume that it is. Now come the following considerations:—

1. A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum.* But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the solum of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an *opus manufactum* in the bed of the stream even if from the point of view of navigation or diversion of the direction of the flow it was unobjectionable, for the land is not his, but his rights to take water remains. In *Lyon* v. *The Fishmongers' Company*[1], in the judgments of Lord Chancellor Cairns, Lord Chelmsford and Lord Selborne will be found clearly laid down these two propositions:—

(*a*) A riparian owner has the same rights in a tidal and navigable river as he has in a river which is not tidal and navigable.

(*b*) The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream.

2. The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one.

But there is a difference in degree between these primary and secondary rights. The whole matter was carefully explained by Lord Cairns in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*[2]. At p. 704 Lord Cairns says:—

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[1] 1 A. C. 662

[2] L. R. 7 E & I. 697

> Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum,* whatever portion of the water may be thereby exhausted, and may cease to come down by reason of that use. But, further, there are uses, no doubt, to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before.

The same views were expressed by Lord Macnaghten in the more recent case of *McCartney* v. *Londonderry and Lough Swilly Railway Company*[8]. At p. 317 he says:—

> In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary, but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.

Now, in speaking of the returning of the water it must be remembered that both Lord Cairns and Lord Macnaghten were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

3. Further, the right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement. In particular, it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. It is not the only right of this class—analogous to an easement and yet not strictly an easement. The right of support, that is to say the natural right of support as distinguished from the easement of enhanced support, is another example. It is probably a confusion as to this that led the lower courts in this case astray.

Applying these principles, it follows that the plaintiff had absolute right to take the water and use it for irrigation of his property, for there is no complaint at the instance of a lower proprietor that too much has been taken, and he uses it for his own property alone. But then comes the Act, and although the plaintiff is within his rights in taking, yet on the hypothesis that the water comes from a river belonging to the Government, he is liable in cess unless he can have resort to the proviso. In *Kan-*

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[8] [1904] A. C. 301

dukuri Balasurya Row v. *Secretary of State for India in Council* (the *Urlam* case)[4], which has been so often cited and so often commented on, Lord Parker puts the point quite clearly at p. 172:—

> If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

The case that Lord Parker is here putting is where there is no more than the naked fact that the taker of the water takes it in respect of either a natural or of an easement right. Lord Parker did not go on to decide in terms the question he had raised. He did not do so because there was something more to be considered in the case before him, viz., the effect of the *sanad* arranged at the time of the permanent settlement. Nor does the *Urlam* case actually decide the present case, because the rights of the *zemindar* in question were easement rights. The actual decision necessarily shows this, because the enjoyment was limited by the size of the channels and cuts which brought the water.

Nevertheless in the present case their Lordships think that what was clearly laid down in that case decided the point. It was obviously possible to argue that by engagement was meant an engagement which specially dealt with the supply claimed, but this argument was rejected. On p. 173 Lord Parker says:—

> Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entited shall be free from anything in the nature of a future tax.

And then the judgment goes on, after a review of history as to the permanent settlement and an argument which need not be quoted, to find in terms that the Government *sanad* permanently fixing the *jumma* for the property (which, it may be added, was accompanied by the Zemindar's *kabuliyat* or counterpart engaging with Government for the payment of the permanently settled *jumma*) may be such an engagement, though it makes no mention of water rights. In other words, if the water rights claimed are within the property which was, so to speak, enfranchised by the *jumma* fixed at the permanent settlement, then the *sanad* which fixed the *jumma* is an engagement within the meaning of the Act. Of course, the permanent settlement was dealing with the Government right to a payment which represented and replaced the *melvaram* of more ancient times, but the test is the same as the test which would be applied to a conveyance. In a conveyance you ask what passed. In the case of the permanent settlement you ask what was the extent of the property that was settled. In the *Urlam* case the water rights in question passed because they were existing water rights enjoyed by way of easement at the time of the settlement. Here what passed was the property, and the property, being riparian, had inherent in it without special mention the riparian rights. While it must

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[4] 44 I. A. 166

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be understood that their Lordships must not be held to concur in each and all of the expressions used in the judgment of the High Court, they are of opinion that the result arrived at by them was right.

An observation is not out of place that, although it is well settled that an enactment cannot be cut down in its meaning by the preamble, yet it is at least satisfactory to feel that the present judgment is in accordance with the express intention of the preamble when a judgment to the opposite effect would have been a flagrant overstepping of it.

Their Lordships will humbly advise His Majesty to dismiss the appeal, with costs as between solicitor and client, in accordance with the terms upon which the Government obtained special leave to appeal in this case.

Appeal dismissed

Solicitor, India Office—Solicitor for the appellant.

Hy. S. L. Polak—Solicitor for the respondents.

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1932

Feb. 10

BANERJI, J.
KING, J.

HIGH COURT

BISHAMBHAR NATH (*Defendant*)
versus
THE AGRA ELECTRIC STORES, LIMITED THROUGH LIQUIDATOR (*Plaintiff*)*

Companies Act (VII of 1913)—Schedule I, Table A, Art. 28, and Limitation Act, Art. 115—Company—Share—Unpaid calls—Forfeiture—Art. 28 of Table A creates special contract on forfeiture—Limitation—Three years from date of forfeiture.

On failure of a shareholder to pay the calls due on his share, the company forfeited the share. Subsequently the Company went into liquidation, and within three years from the date of forfeiture, the liquidator instituted the present suit for recovery of money in respect of unpaid calls with interest up to the date of the institution of the suit. *Held,* (1) that under Art. 28 of Table A of the Companies Act the cause of action for the present suit arose when the share was forfeited, and Art. 115 of the Limitation Act applied to the present suit, which was within time (*Habib Rowji* v. *The Standard Aluminium and Brass Works Ltd.,* I. L. R. 49 Bom. 715 *relied on*); (2) that under Art. 14 of Table A of the Companies Act the liquidator was entitled to interest at 5 per cent per annum on the unpaid calls up to the date of forfeiture. but no interest was claimable from the date of forfeiture to the date of suit, in the absence of any provision of law or contract.

SECOND APPEAL from a decree of J. N. DIKSHIT ESQ., Additional Subordinate Judge of Agra, modifying a decree of BABU KISHORI LAL, Munsif.

N. P. Asthana, K. N. Katju, B. Malik and *G. Agarwala* for the appellant.

S. K. Dar and *Gopi Nath Kunzru* for the respondent.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a defendant's appeal in a suit by a liquidator of a private limited liability company for recovery of money for certain calls on shares which were not fully paid up.

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*S. A. 258 of 1930

The Agra Electric Stores Ltd. was a private limited liability company and the defendant was a signatory to the Memorandum of Association and he was a subscriber of one share of Rs.2,000. On November 10, 1924 he paid a sum of Rs.500. The balance of Rs.1,500 he was called on to pay on allotment and on two calls made by the company, that is by March 2, 1925, Rs.1,500 ought to have been paid by the defendant-appellant on his share.

On March 22, 1926 the directors of the company forfeited the appellant's share. Eventually, on May 9, 1928 Parshotam Das Agarwal was appointed a voluntary liquidator of the company by a resolution of the company and on November 3, 1928 certain powers are alleged to have been given to the liquidator. The defendant not having paid the money due, the liquidator instituted the present suit on March 16, 1929 for recovery of the sum of Rs.1,500 and interest.

Various pleas were raised in defence, but the learned munsif repelled the contention of the defendant and decreed the suit for a sum of Rs.1,500 with interest at 5 per cent per annum up to the date of forfeiture.

The defendant thereupon appealed to the lower appellate court and the plaintiff filed cross-objection. The appeal was dismissed but the cross-objection was allowed. Hence the present appeal by the defendant before us. The learned advocate for the appellant has argued before us five points. In our opinion there is no force in any of them except the fifth, which was that the cross-objection of the plaintiff in the court below should not have been allowed.

The first point taken is that the suit is barred by Art. 112 of the Limitation Act. It was contended by the learned advocate that as on March 2, 1925 the money on all the calls had become due, the suit ought to have been instituted within three years from the date when the amount became due. The courts below have held that the forfeiture of the share having been made on March 22, 1926, the suit of the plaintiff was within time. The court below repelled the contention of the defendant following the case of *Habib Rowji* v. *The Standard Aluminium and Brass Works Ltd*[1].

The learned advocate for the appellant has submitted that the articles of association in the Bombay case were different from the articles of association in the present case. We have therefore to see whether Art. 28 of Table A of the Indian Companies Act, which is applicable to this case, gives the liquidator of a company the right to sue within three years from the date of the forfeiture. We have examined the articles of association in the Bombay case and we find that there is really no difference between the provision of Art. 28 of Table A attached to the Indian Companies Act and the articles in the Bombay case. We are of opinion that the point raised by the appellant has no force as the present suit was instituted within three years from the date of the forfeiture and Art. 115 of the Limitation Act applies.

The next point that is raised here is that the liquidator had no right to sue inasmuch as in the resolutions of November 3, 1928, no power was given to the liquidator to institute suits. It was urged that all that the liquidator could do was to sell the assets of the company within one month. It seems to us that this point raised by the learned advocate does not take into account the provisions of the Indian Companies Act. Section 207 of the Indian Companies Act lays down the consequences of voluntary winding up of a company and the powers of a liquidator appointed. We find that in the resolution referred to by the learned advocate for the appellant there is no express prohibition laid down against instituting suits. It is true there is no express power given to bring suits, but we do not think that it was necessary for the liquidator to have express powers to exercise powers which the law gives him under the Indian Companies Act. We are therefore of opinion that the liquidator was not restricted from instituting the present suit and there is no force in the plea.

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[1] I. L. R. 49 Bom. 715

The third point taken is that one of the directors of the company having written a letter to the liquidator on March 21, 1929, the liquidator could not institute the suit, it being necessary for him to obtain the consent of the directors before he could institute the suit. We find that on March 6, 1929 the liquidator wrote a letter to one of the directors. He waited for ten days for an answer. He instituted the present suit on March 16, 1929 and it was not till March 21, 1929 that one of the directors wrote the letter referred to by the defendant. In our opinion, the effect of the letter cannot be to take away the statutory rights of the liquidator to institute the present suit.

The fourth ground taken is that it was the duty of the directors to take steps to sell the forfeited share and reduce the liabilities of the defendant and that as the company was working at a profit in 1926, the directors should have sold the shares. In our opinion, there is no force in this contention and we cannot allow it to be raised for the first time in second appeal.

Lastly it is urged that the court below should not have allowed interest from the date of forfeiture to the date of suit. We are of opinion that there is substance in this plea. There was no contract or claim upon which the claim for interest is based. In our opinion the court of first instance was right in holding that no interest was claimable after the date of forfeiture and before the suit, in the absence of any provision of law or contract. The lower appellate court has held that under Art. 14, Table A, interest was payable, but in our opinion interest that is payable under Art. 14 is interest as a share-holder and the defendant ceased to be a shareholder of the company on the date when the share was forfeited. See also *Stocken's Case*[2].

We therefore modify the decree of the lower appellate court and restore the decree of the court of first instance. Parties will pay and receive costs in proportion to failure and success, in this Court and the lower appellate court.

Decree modified

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[2] [1868] L. R. 3 Ch. Ap. 412

Civil

1932

Jan. 8

Mears, C. J.
Sen, J.

GULAB SINGH (*Applicant*)
versus
RAGHUBIR SARAN AND OTHERS (*Opposite party*)*

Civil Procedure Code, Or. 21, R. 90 and Or. 21, R. 69(1)—Reasons of adjournment of sale not recorded in writing—Whether constitutes material irregularity.

Where, on the date fixed for sale of property, in execution of a decree on a mortgage, the sale officer verbally announced to those present that the sale was to take place on the following day but he did not record his reasons in writing for the adjournment nor notify the hour when the sale was to take place, nor was there any mention in the sale proclamation of any incumbrance upon the property although it was subject to a prior incumbrance, and the property, which had been once purchased by the decree-holder himself, in 1918, for Rs.10,000, was eventually sold in 1931, for Rs.2,700, *held*, that the property was sold for an inadequate consideration as a result of material irregularity in publishing and conducting the sale.

FIRST APPEAL from an order of B. D. KANKON, Subordinate Judge of Moradabad.

P. L. Banerji and *Shabd Saran* for the appellant.

S. K. Dar and *B. Mukerji* for the respondents.

The judgment of the Court was delivered by

Mears, C. J.

MEARS, C. J.—This is an appeal by the decree-holder and is directed against an order of the learned Subordinate Judge of Moradabad, dated May 9, 1931, refusing to set aside an auction sale on the petition of the decree-holder under O. 21, Rule 90 of the Code of Civil Procedure.

Gulab Singh held a decree against Rup Basant Singh and others in enforcement of a mortgage, dated August 18, 1923. In execution of this decree, the zemindari property of the judgment-debtors was advertised for sale and July 21 was fixed for sale. On that date, the officer conducting the sale had no time to put up this property to sale. He continued the sale on July 22, 1930 and the property was knocked down to Raghubir Saran for Rs.2,700. Gulab Singh made an application for setting aside this sale on the ground that there was material irregularity in publishing and conducting the sale and that the property had been sold for a grossly inadequate value. The lower court repelled these contentions of Gulab Singh and dismissed the application; hence this appeal.

Under Order 21, Rule 90 C. P. C. three points have got to be determined:—(1) Whether there has been a material irregularity in publishing and conducting the sale, (2) Whether the property has been sold for an unreasonably low price? and (3) Whether the injury to the judgment-debtor or the decree-holder has resulted in consequence of the material irregularity?

The decree-holder complains that the sale officer did not record his reasons in writing for the adjournment of the sale from July 21 to July 22. Under Order 21, Rule 69(1) C. P. C. a statutory duty was cast upon the officer conducting the sale that in the event of his adjourning the sale he must record his reasons for such adjournment. No reasons for the ad-

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*F. A. F. O. 128 of 1931

CIVIL

1932

GULAB SINGH
v.
RAGHUBIR SARAN

Sears, C. J.

journment were recorded in writing. We are of opinion that this constitutes a material irregularity.

Thakur Bijaipal Singh, the officer conducting the sale has been examined in this case on behalf of the auction-purchaser. He has stated that he verbally announced to those persons present that the sale was to take place on the following day. The court below has believed him and we do not see any reason for discrediting him. The fact however remains that he did not record any reasons in writing. It is also in evidence that he did not notify the hour when the sale was to take place. He states that it was customary with him to hold the sale every day at 2-30 P.M. He left it to the persons assembled before him to infer from this circumstance that the sale would take place the following day at the usual hour, namely, at 2-30 P.M. This procedure seems to us to be irregular and clearly opposed to Order 21, Rule 69 C. P. C. Apart from these irregularities we find that in the sale proclamation there is no mention of any incumbrance upon this property. We have been told however that this property was subject to a prior incumbrance dated January 3, 1918. This was another irregularity which seriously vitiates the sale proclamation. Considering all the circumstances we hold that there was material irregularity in publishing and conducting the sale.

The property which is the subject-matter of dispute was purchased by Gulab Singh under a sale deed dated October 2, 1918 for Rs.10,000. On August 18, 1923, Gulab Singh sold this property to Rup Basant Singh for Rs.20,000. Out of the consideration, the vendee was not in a position to pay Rs.6,000 to Gulab Singh and so the mortgage bond in suit was executed in his favour. The Government revenue of the property in dispute is said to be Rs.77. We have got no clear evidence before us to come to any conclusion as regards the real value of this property or why it increased so markedly in value in 1923. The property has been sold for Rs.2,700. It appears to be a curious circumstance that the property which was purchased by Gulab Singh for Rs.10,000 on October 2, 1918, could have depreciated so much as to be of the value of only Rs.2,700 on July 2, 1931. We are of opinion that the property has been sold for an inadequate consideration. Considering all the surrounding circumstances, we have no doubt in our mind that the depreciation in value has resulted by reason of material irregularity in publishing and conducting the sale. We therefore allow the appeal, set aside the order of the Subordinate Judge, dated May 9, 1931 and remand the case to the trial court with direction to execute the decree after a fresh proclamation in due course of law. We make no order as to costs.

Appeal allowed

Civil
1932
Jan. 20
Mears, C. J.
Sen, J.

SIDH NATH TEWARI (*Decree-holder*)
versus
TEJ BAHADUR SINGH (*Decree-holder*) AND OTHERS (*Judgment-debtors*)*

Civil Procedure Code, Sec. 73—'Where assets are held by a court'—Meaning of—Judgment-debtor deposits a certain sum to secure postponement of sale—Whether money so lying in court is an 'asset' available for rateable distribution.

The first seven words in Sec. 73 C. P. C., viz., *where assets are held by a court,* must be given the plain and ordinary construction, and the word 'assets' is not confined to 'assets' realised by sale or otherwise in execution of a decree.

The property of a judgment-debtor was about to be put up for sale at the instance of a decree-holder when the judgment-debtor deposited a certain sum in court in order to secure the postponement of the sale. Thereupon another decree-holder, who had, before the above-mentioned payment by the judgment-debtor, made an application to the court for the execution of his decree for the payment of money passed against the same judgment-debtor, claimed to have a rateable distribution of the aforesaid sum held by the court; *held,* that the money so lying in court was an 'asset' available for rateable distribution. *Noor Mohamed* v. *Bilasiram,* I. L. R. 47 Cal. 515 *relied on.*

Civil Revision against the order of the Subordinate Judge of Allahabad.

A. P. Pandey for the applicant.

Banke Behari Lal for the opposite parties.

The judgment of the Court was delivered by

Mears, C. J.

Mears, C. J.—On the Civil Revision being opened Mr. Bankey Behari Lal referred the court to the decision of *Lachmi Dayal* v. *Sri Kishan Das*[1] and also to Section 295 of the Civil Procedure Code of 1882 and contended that as there was an undoubted remedy by suit in respect of matters of which Mr. Pandey sought revision, the proper practice for this Court is not to hear the revision. Mr. Pandey brought to our notice the case of *Lila* v. *Mahange*[2] and the observations of Mr. Justice Sulaiman in that case. The position today with regard to revisions is that there is no hard and fast rule about the matter and when it manifestly appears to be right and convenient and proper that this Court should decide a revisional application in preference to allowing the parties to embark on long and expensive litigation, it is within the competence of the court so to decide the revisional application. In each case it is a matter for the Judge to exercise his discretion but it is undesirable that there should be a flood of revisions or that there should be a general departure from the rule of long standing. We however regard this as a case which raises in a very neat form a point of law which has not come before the Allahabad Bench since 1908 at which date the legislature made what we regard as important alterations in Section 73. The facts of the case from which this application arises are that a debtor by name Sarju Pershad Narain Singh had three decrees against him one of December 14, 1923 being Moti Lal's decree, the second of August 18, 1925 being Tej Bahadur Singh's decree and the last of August 30, 1927 being the decree of Pandit Sidh Nath. All of the decree-holders were seeking recourse to the property of the judgment-debtor and execution proceedings were taken on November 20, 1928 by Tej Bahadur Singh, on July 1, 1929 by Sidh Nath and on July 8, 1930 by Moti Lal. The property was about to be put up for sale at the instance of Tej Bahadur Singh when on April 10, 1930 the judgment-debtor deposited Rs.500 in order to secure the postponement of the sale. Thereupon on May 9, 1930, Sidh Nath asked that he might be allowed to have rateable distribution of that money as between himself and Tej Bahadur Singh. Later on a date not given to us, a thousand rupees was paid by the judgment-debtor apparently to secure some further concession from Tej Bahadur Singh but as that money was never received by the court, Mr. Pandey raises no point about any right of Sidh Nath to participate in that sum but he does contend that his client had put himself, by May 9, 1930, in a position in which he was entitled to demand rateable distribution from the court. His complaint is that the Court never really considered this matter or exercised any discretion or judicial determination and that the Subordinate Judge wiped off his claim for rateable distribution on the grounds, that the sum of Rs.500 was not part and parcel of any sale proceeds, that the sum was deposited and paid by the judgment-debtor for and on account of Tej Bahadur Singh alone and that the application of May 9, 1930 was presented on a date subsequent to the deposit and payment. We must now examine each of those propositions. The first was that the sum of Rs.500 was not part and parcel of any sale proceeds. Now there is no doubt that if Mr. Maheshwar Prasad had been deciding this case in accordance with Section 295 of Act XIV of 1882 his decision would have been in conformity with the authorities of this Court. The authority which we have been specially referred to is *Gopal Dei* v. *Chunni Lal*[3] but in the year 1908 as we have mentioned there came into existence the remodelled Section 73 and it is to be noticed that at this date there had been conflicting decisions in the Indian Courts. Some of the Indian Courts attributed to the words "or otherwise" in Section 295 a much wider significance than was given to them by other Courts and therefore Section 73 was drafted with these introductory words "where assets are held by a Court." It has been argued before us that the assets to be held by the court must be part and parcel of some sale proceeds. We do not agree with this construction and we think that the case of *Noor Mohamed Dawood* v. *Bilasiram Thakursidass*[4] has given the right and proper interpretation to this matter. The judgment of Mr. Justice Rankin at page 519 and onwards gives what, in our opinion, is the true ground of interpretation of this Section and we must give to the first line of Section 73 the plain and ordinary construction "Where assets are held by a court." The court undoubtedly did receive on April 10 Rs.500 paid by the judgment-debtor in part satisfaction of a decree and the court held that money. That money, in our opinion, was an asset and we cannot hold that the word "assets" is to be confined to "assets" realised by sale or otherwise in execution of a decree. If we do

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*Civ. Rev. 38 of 1931

[1] 2 A. L. J. R. 370

[2] 1931 A. L. J. R. 974

[3] I. L. R. 8 All. 67

[4] I. L. R. 47 Cal. 515

then we revert at once to the language of Section 295 which has been deliberately abandoned by the incorporation of much wider words in Section 73 of the Civil Procedure Code of 1908. The second reason given by the learned Judge is that the sum was deposited and paid for the use and benefit of Tej Bahadur Singh alone. So it was in the sense that the Rs.500 was paid as a bargain between Tej Bahadur Singh and the judgment-debtor that the judgment-debtor could buy a certain amount of time from Tej Bahadur Singh by the deposit of that money in satisfaction of his decree. The judgment-debtor is not injured because whatever happened to the Rs.500 he would still get the time for which he bargained. The decree-holder is not injured because every decree-holder must know perfectly well that if by his exertions assets are received by and are held by the court there is always the possibility that another decree-holder may come in and bring himself within the necessary status for being given rateable distribution and the original decree-holder has to see part of the assets obtained through his exertions pass into the hands of a rival decree-holder. The third point that the application made on May 9, 1930 was presented on a date subsequent to the deposit and payment can only, we think, have arisen from a misreading of Section 73. Section 73 does not say that before the receipt of such assets an application must be made to the court. The first step that is necessary in these cases is that there must be assets held by the court. The next step is that there must be a decree-holder who has a decree for the payment of money passed against the same judgment-debtor. That decree-holder must not have obtained satisfaction and he must have made an application to the court for the execution of his decree before the receipt of the aforesaid assets. Having satisfied all those conditions he can then claim to come in and have a rateable distribution of assets held by the court. We agree that Sidh Nath had fulfilled all these conditions at the date when he made the application. We are of opinion that the application should have been granted and that the Judge should have exercised the jurisdiction vested in him and have made the order. We therefore set aside the decision of the Subordinate Judge and declare that in respect of the Rs.500 deposited by the judgment-debtor in favour of Tej Bahadur Singh on April 10, 1930, Sidh Nath is entitled to rateable distribution. As it was extremely doubtful whether this revisional application was likely to be heard, we think that the proper order to make is that no costs to either party shall be given.

HARNAM CHANDAR (*Defendant*)
versus
RUP CHAND AND OTHERS (*Defendants*)*

Civil
1932
Jan. 26
Mukerji, J.
Bennet, J.

Provincial Insolvency Act, Sec. 28 (2)—"Commence any suit or other legal proceeding"—Meaning of—Appeal—Relief—Declaratory decree that certain property was not attachable be set aside—Whether Sec. 28 barred appeal.

The sons of a judgment-debtor sued for and obtained a declaration that certain property was not saleable or attachable under a decree against their father. Prior to the passing of the decree the father was adjudged an

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*F. A. 34 of 1929

CIVIL

1932

HARNAM CHANDAR *v.* RUP CHAND

insolvent. The decree-holder appealed to the High Court (and although he did not in the first instance implead the official receiver, he was given time to do so when the appeal came on for hearing) without obtaining permission of the insolvency court; *held*, that all that the appellant asks is that the declaratory decree should be set aside, so that the property be attachable under the decree of the appellant, and that would not be a remedy against the property of the insolvent within the meaning of Sec. 28 and that section did not bar the present appeal.

FIRST APPEAL from a decree of MAULVI SHAMSUL HASAN, First Subordinate Judge of Saharanpur.

P. L. Banerji and *G. S. Pathak* for the appellant.

Binod Behari Lal, Nanak Chand, P. M. L. Verma and *Vishwa Mittra* for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a first appeal by defendant No. 1 who is a creditor who holds a decree against defendant No. 4, one Shib Singh. The plaintiffs in the suit were four sons of Shib Singh and they sued for and obtained a declaration that certain property was not saleable or attachable under certain decrees one of which was the decree of the appellant against Shib Singh. The decree of the court of first instance was made on September 15, 1928, and prior to that date on August 24, 1928 Shib Singh was adjudged an insolvent. The appellant has named Shib Singh as one of the respondents, and he has not made the official receiver a party. A preliminary objection is taken on behalf of certain respondents, firstly to the effect that the appellant had not had the permission to bring this appeal and, secondly, that the official receiver should be made a party as representing the estate of Shib Singh. In regard to the first objection learned counsel for respondents argues that Section 28(2) of the Provincial Insolvency Act stated that

> on the making of an order of adjudication no creditor shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the court on such terms as the court may impose.

Learned counsel argued that this appeal was a legal proceeding and as the appellant had not got the permission of the insolvency court, therefore the appellant was not entitled to commence this appeal. We consider, however, that the words "commence any suit or other legal proceeding" must be read in conjunction with something else in the Sub-section, for if they were read independently, they would prevent a creditor from indulging in any litigation at all. The expression in the Sub-section which must govern this clause is "have any remedy against the property of the insolvent in respect of the debt." The present appeal is not an appeal of that nature. All that the appellant asks is that a declaratory decree should be set aside. That declaratory decree was that property was not attachable under the decree of the appellant. The effect of the appeal being allowed would be a declaratory decree that the property was attachable under the decree of the appellant. That we consider would not be a remedy against the property of the insolvent within the meaning of Section 28. No doubt, if the appellant having obtained a decree on appeal from this Court proceeded to apply for execution, then he might possibly be met with the bar of Section 28(2), but that Section does not bar the present appeal

The next point which was urged was the second objection that the official receiver should represent the estate of the insolvent Shib Singh as a respondent. We consider that this objection is sound and, as the learned counsel for the appellant has undertaken to apply today to make the official receiver a party, we adjourn this appeal for a sufficient period for the official receiver to be brought on the record. Costs will abide the result of the appeal.

CIVIL
1932
HARNAM CHANDAR v. RUP CHAND
Bennet, J.

IN THE GOODS OF R. V. A. STOCK*

CIVIL
1932
Feb. 15
MEARS, C. J.
SEN, J.

Succession Act (XXXIX of 1925), Sec. 369—Executor—Liability of—Funds in his hands remain uninvested—Liability to payment of interest.

No one is bound to become an executor but if he does accept the position he must act with the ordinary care and the prudence of a reasonable and diligent business man. He must make the funds in his hands productive and in order to do this he must invest them in interest bearing securities. If he fails to do this, he will be liable for the consequent loss.

O. M. *Chiene* for the applicant.

The judgment of the Court was delivered by

Mears, C. J.

MEARS, C. J.—Mr. R. V. A. Stock died on August 4, 1928. He left a widow and a minor daughter. By his will dated October 14, 1927, he appointed Mr. H. L. Stringer executor. The estate consisted of Rs.11,741-12-0 in the Provident Fund, about Rs.700 realised from the sale of furniture and a sum of over Rs.13,000 odd as Lee Commission dues. There were said to be other assets also; the proceeds derived from the sale of a motor car and some balances outstanding in the Allahabad Bank Ltd., Calcutta and the Eastern Bank Ltd., Calcutta.

Mr. Stringer took over the duties of executor and made little or no attempt to carry out these duties. On February 2, 1929, he applied in the Benares Court for probate and that application was granted. On November 4, 1929, he came into the possession of Rs.11,741-12-0 and in breach of his duty as executor he failed to invest it in any interest bearing security and it has in fact laid in the bank unproductive from November 4, 1929 until the date of our order passed on January 4, 1932. On August 30, 1930, the probate granted by the Benares court was revoked but that revocation did not in any way affect the antecedent duty of Mr. Stringer to invest the money that came into his hands. He applied to the High Court for probate which was granted on February 9, 1931. Mr. Stringer in an application of December 8, 1931, disclosed that there were Rs.14,608-8-0 deposited in the Imperial Bank of India and Rs.200 in the Post Office Savings Bank and upon inquiry it transpired that the large sum of Rs.14,000 odd had been lying, as we have said, uninvested. We therefore passed the order of December 14, requiring Mr. Stringer to explain his position. He appeared before the court on Monday January 25, 1932 and was perfectly frank about the matter. He

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*Testamentary Case 32 of 1930

CIVIL

1932

R. V. A. STOCK *in re*

Mears, C. J.

said that he had no knowledge of business and that the task of an executor was thankless and that he did not know he had to invest the money. The value of these replies was somewhat lessened by his stating in answer to a question that if he received a legacy of Rs.11,000 he would at once go to the Bank, obtain advice, and invest the money in interest bearing securities. He agrees that on the very lowest showing the estate has lost at the least a sum of Rs.1,000 by his negligence. He says that he has spent Rs.200 on necessary journeys to Benares and elsewhere and giving him credit for this, the net result is that the estate, by his negligence, has lost Rs.800. Logically, we should order him to make good to the estate every penny which has been lost to it through his negligence. No one is bound to become an executor but if he does accept the position he must act with the ordinary care and the prudence of a reasonable and diligent business man. As is said in Agnew's "Law of Trust in British India", 2nd Edition at page 163, he "must make the fund productive and in order to do this he must invest it in some form of security". If he fails to do this he will be liable for the consequent loss. The consequent loss here is at least Rs.800, but as we are of opinion that Mrs. Stock ought to have interested herself in this matter and made inquiries, we limit the amount which Mr. Stringer must pay to the estate to Rs.500. There is not of course the slightest suggestion that Mr. Stringer has been in any way dishonest but he has acted with great negligence and must make good his default.

There is a further question as to the failure of Mr. Stringer to collect the Lee Commission money. We think he has been negligent in this respect; and but for the fact that some delay may have been occasioned by the revocation of the Benares probate, we should have held him liable for this also.

We remove Mr. Stringer from the office of executor. Notice of this judgment is to be given to the Administrator General who will then, in accordance with the Rules, make application for Letters of Administration.

We order Mr. Stringer to pay to the Registrar on behalf of the estate the sum of Rs.500 in monthly instalments of Rs.50. The first instalment is to be paid on April 1, 1932 and the succeeding nine instalments on the 1st day of each succeeding month. They are to be paid direct to the Registrar and if any one instalment is unpaid by the end of the 7th day of any one month, the whole amount then outstanding is thereupon immediately to become due and the Registrar is to put the case in the list for an order to Mr. Stringer to show cause why execution should not issue.

All sums of money received by the Registrar are to be paid over to the Administrator General, who will, by April 1, 1932, have obtained from the court the necessary formal order of appointment which is in consequence with the wishes of Mrs. Stock.

CIVIL

1932

Feb. 3

SULAIMAN, J.
MUKERJI, J.
BOYS, J.

GOBARDHAN DAS (*Judgment-debtor*)
versus
DAU DAYAL (*Decree-holder*)*

Civil Procedure Code, Sec. 48, and Or. 20, R. 11—'Subsequent order'—Meaning of—Must be an order of the court which passed the decree—'Subsequent order' not confined to orders passed under Or. 20, R. 11—Civil Procedure Code, Sec. 47—Whether execution court empowered to substitute a compromise between the parties for the decree originally passed—Tenancy Act (III of 1926), Sec. 253—Revisional powers of High Court—Not governed by Sec. 115 C. P. C.—But confined to Sec. 253.

The execution court has no power to vary the terms of the decree under execution. The "subsequent order" in Sec. 48 C. P. C., which provides a fresh starting point for limitation, must be an order of the court which passed the decree, and not an order of the court executing the decree. *Jurawan* v. *Mahabir,* I. L. R. 40 All. 198 *approved.* The 'subsequent order' in Sec. 48 is not confined to orders passed under Or. 20, R. 11.

While an application for execution of a decree for money was pending and a warrant for the arrest of the judgment-debtor had been issued, the decree-holder and the judgment-debtor came to terms that the decretal amount be paid in nine instalments spread over four years. When the compromise was filed the execution court passed the following order:—"Parties have come to a compromise. Warrant may be cancelled". The court allowed the compromise to be placed on the record. Eight instalments were regularly paid. The decree-holder refused to accept the last instalment as the balance of the amount due was not paid in full, and the day after the expiry of the date fixed for payment he made an application for execution by attachment and sale of property. This application was made after the expiration of twelve years from the date of the original decree. *Held,* (1) that the order of the execution court amounted to an order substituting the compromise for the decree originally passed; (2) that the execution court had no power to pass such an order; (3) that the parties could not extend the period of limitation under Sec. 48 C. P. C. by means of a compromise, and it was open to the judgment-debtor to plead that the decree-holder's application was barred by limitation. *Kristo Komel* v. *Hurree Sirdar,* 13 W. R. 411, *East India Company* v. *Oditchurn Paul,* 5 Moore's I. A. 43 at 70 *followed;* (4) that the action of the judgment-debtor in pleading limitation did not amount to fraud within the meaning of Sec. 48(2)(*a*) C. P. C.

Per BOYS, J.—The order of the execution court that a compromise has been arrived at and the warrant may be cancelled did not amount to an order substituting the compromise for the decree originally passed.

Sec. 115 C. P. C. is inapplicable to revenue cases, and the revisional power of the High Court is restricted to Sec. 253 of the Tenancy Act (III of 1926), and the High Court has therefore no jurisdiction to interfere in revision with an order of the District Judge passed by him in a revenue appeal, but the High Court has power to revise the order of the first court if it is open to any of the three objections mentioned in Sec. 253, and if it does so revise it, the order of the District Judge in appeal has to be assumed to be a nullity by implication. *Badami Kuar* v. *Dinu Rai,* I. L. R. 8 All. 111; *Ram Adhin* v. *Ram Bharose,* 22 A. L. J. 1041 *relied on.*

*L. P. A. 11 of 1930

Civil

1932

Gobardhan Das
v.
Dau Dayal

By Sec. 248(3) of the Agra Tenancy Act (III of 1926) an appeal lies to the District Judge from an order of the revenue court passed in proceedings in execution of a decree for profits, but by Sec. 249 no further appeal is allowed, and no second appeal therefore lies to the High Court from the order passed by the District Judge in the execution appeal before him.

APPEAL under Section 10 of the Letters Patent, from a judgment of HON'BLE JUSTICE SIR B. J. DALAL.

The following is the Referring Order:—

SULAIMAN, A. C. J. and BAJPAI, J.—This is a Letters Patent Appeal arising out of an execution proceeding. A simple money decree was passed on February 10, 1915. On March 21, 1923, an application which was in accordance with law had been filed for execution praying for attachment and sale and in the alternative for the arrest of the judgment-debtor. In the course of the execution proceedings the parties appear to have come to terms, the judgment-debtor agreeing to pay the decretal amount in instalments extending over several years, the last date being January 15, 1928. All the instalments except the last one were paid. On January 10, 1928, the judgment-debtor sent Rs.57-3-0 by money order which was refused by the decree-holder who appears to have claimed Rs.222 in all.

The decree-holder filed an application for execution on January 16, 1928, for recovery of the balance claimed by attachment and sale of the property of the judgment-debtor. He admitted that the last application for execution was for the arrest of the judgment-debtor which had been struck off on August 2, 1923 on a compromise having been entered into between the parties for the payment of the amount by instalments.

An objection was taken that the application was barred by Section 48 of the Code of Civil Procedure. The court of first instance held that the conduct of the judgment-debtor amounted to fraud which saved limitation. The lower appellate court was inclined to the view that when the compromise was entered into the judgment-debtor honestly intended to pay and has proved his *bonafides* by paying eight instalments. It did not find that there was fraud committed by him. It however held that the original execution case was still pending and the court had the right to re-open it at any time and pass fresh orders.

On appeal to this Court a learned Judge of this Court relying on the case of *Lalta Prasad* v. *Suraj Kunwar,* 20 A. L. J. 185, thought that the action of the judgment-debtor in putting off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years rule. He has also pointed out that the subsequent order referred to in Section 48, Clause (1) (*b*) can only be passed within six months of the passing of the decree under Article 175 of the Limitation Act.

The first question that arises in this case is whether a compromise can be validly entered into in an execution proceeding and be treated as a decree capable of execution.

Another question is whether the conduct of the judgment-debtor who originally intended to abide by the compromise can be said to amount to fraud because the result of his default is to bar an execution.

The third question is whether when a new relief is claimed in an application it can be treated as one for revival.

Another question may be whether the subsequent order referred to in Section 48, Sub-section (*i*) (*b*) can apply to an order accepting such a compromise in an execution proceeding irrespective of any plea of limitation.

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As these are substantial questions of law of some importance, we direct that this appeal may be laid before the Chief Justice for the consultation of a higher bench.

G. S. Pathak for the appellant.

S. B. Johari for the respondent.

The following judgments were delivered:—

SULAIMAN, J.—This is a judgment-debtor's appeal arising out of an execution proceeding. A decree for money was passed on February 10, 1915. While an application for execution dated March 21, 1923, was pending and a warrant for the arrest of the judgment-debtor had been issued, the parties entered into a compromise and a written application was filed in court on August 29, 1923, signed both by the judgment-debtor and the decree-holder. They agreed that the decretal amount should be paid in nine instalments spread over four years. The eighth instalment was to be paid on July 15, 1927 and the whole of the balance due under the decree was to be paid as the ninth instalment on January 15, 1928. The court ordered that the parties had come to a compromise and the warrant be cancelled. The judgment-debtor paid the first eight instalments in due time. On January 10, 1928 he sent a money order for Rs.57-3-0 which was refused by the decree-holder on January 16, 1928 with the endorsement that it was short. On the same date the decree-holder filed the present application for execution claiming Rs.222. The judgment-debtor objected that the application was not according to law and that it was time-barred. The first court held that the conduct of the judgment-debtor amounted to a fraud and the limitation was saved by Section 48 (2) C. P. C. The District Judge was inclined to the view that the judgment-debtor honestly intended to pay the money and had proved his *bona fides* by paying eight instalments. He however held that the execution file had not been completed in 1923 and was still pending and must have been pending until the amount was paid off in full. He accordingly overruled the objection. On appeal to the High Court a learned Judge of this Court held that the present application could not be treated as a revival of the previous application because the earlier application was based on the original decree and was for the arrest of the judgment-debtor while the latter one was based on the agreement of 1923 and was for execution by attachment. Relying on the authority of *Jorawan* v. *Mahabir*[1] he further held that a subsequent order within the meaning of Section 48 (1) (*b*) can be passed by the court only within six months of the passing of the decree under Article 175 of the Limitation Act and not after. He however held that the decree-holder was entitled to a cessation of the period of limitation on the ground of fraud. He relied on *Lalta Prasad* v. *Suraj Kumar*[2] for the view that fraud in Section 48 should not be interpreted in a narrow sense, and held that any action of the judgment-debtor which puts off the decre-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years rule. On this finding he dismissed the appeal (reported in 124 I. C. 43). The Letters Patent appeal came up for disposal before a Bench of which I was a member. The case was referred to a larger Bench because it involved questions of law of some importance.

[1] I. L. R. 40 All. 198

[2] 20 A. L. J. R. 185

One of the questions mentioned in the referring order was whether, when a new relief is claimed in an application for execution, it can be treated as one for the revival of a previous application.

The appeal as an appeal must fail on a ground which was neither brought to the notice of the learned single Judge of this Court, nor was it suggested before the Bench which referred the case to us, nor has it been pressed before us on behalf of the respondent. That ground is that no appeal lay to the High Court at all, and consequently we cannot interfere with the decree of the District Judge in this Letters Patent Appeal. As the point involves a question of jurisdiction it can be taken up in the Letters Patent Appeal even for the first time.

The original decree was one for profits passed by a revenue court. Under Section 177 of the old Tenancy Act of 1901 appeals were allowed from decrees only and not from orders. The controversy was set at rest by the pronouncement of the Full Bench in *Zobra* v. *Mangla*[3] where it was held that an order passed in execution by a revenue court was not a decree within the meaning of Section 2 C. P. C. and that no appeal lay from it to the District Judge.

Although the decree in this case was passed in 1915 the present application for execution and the order thereon were made after the coming into force of the new Tenancy Act. A right of appeal from an order in execution has been conferred by Section 248 (3) and the appeal lies to the court which can hear an appeal from the decree in the suit. But that section is under the heading "appeals from order" and its language also makes it clear that the order under Section 47 C. P. C. is merely an order and not a decree. Whether it be treated as laying down a rule of procedure or conferring a substantive right of appeal the new Act applied. The appeal accordingly lay to the District Judge. But Section 249 provides that no appeal shall lie from any order passed in appeal. Accordingly no second appeal lay to the High Court from the order passed by the District Judge in the execution appeal before him. The single Judge of this Court could not but dismiss the appeal before him. Accordingly we have no power to interfere with the order passed by the District Judge on appeal.

It is however urged before us that the appeal should be treated as a revision. There was room for argument under the Old Tenancy Act that a civil revision could be entertained from an order passed by the District Judge even in a revenue appeal. Such a view is not now possible under the New Tenancy Act. It was pointed out by a Bench of which I was a member in *Jagdeo Singh* v. *Kesho Prasad Singh*[4] that under Section 264 of the Tenancy Act only selected provisions of the Civil Procedure Code are made applicable to cases under this Act, and list I of the Second Schedule clearly excludes the provisions of Section 115 C. P. C. Both Section 264 and the heading in list I of the Second Schedule show that Section 115 is not applicable to suits and other proceedings under this Act. As provisions for appeals are to be found in the Act itself there can be no doubt that the appeal before the District Judge was a proceeding under the Act. This conclusion is further strengthened by the language

[3] I. L. R. 28 All. 753

[4] I. L. R. 51 All. 1020

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of Section 230 under which the exception is confined to "appeal or revision as provided in this Act". It is, therefore, quite clear that Section 115 C. P. C. is wholly inapplicable to revenue cases, and has been entirely replaced by Section 253 of the Act. The High Court has no power of revision outside the scope of the latter Section.

As pointed out in *Jagdeo Singh's* case, the High Court can call for the record of only a subordinate *revenue* court, and revise the order of such subordinate *revenue* court. According to the definition of 'revenue court' in Section 3(12) of the Act read with Section 4(8) of the Land Revenue Act, the District Judge cannot be a revenue court. It follows that the High Court has no power to revise orders passed by a District Judge however *ultra vires*, irregular or illegal it may be. This is an unfortunate result calling for the attention of the legislature. There seems to be no good reason why the legislature should not allow a revision from an order of the District Judge passed in a revenue appeal. It was observed in *Jagdeo Singh's* case that if the order passed by the trial court is open to objection it can be revised. The learned advocate for the respondent contends that it would be anomalous to allow revision from the order of the original revenue court which has been affirmed by the District Judge, when the High Court has no power to interfere with the order of the District Judge. But such an anomaly has not stood in the way of permitting revisions under Section 115 C. P. C. *Badami Kunwar* v. *Dinu Rai*[5] and *Vuppuluri Atchayya* v. *Sri Kanchumarti Venketa Sutharamachandra Rao*[6]. Section 253 allows a revision from an original revenue court only where an appeal lies to the District Judge, and therefore contemplates a case where an appeal might have been actually filed. Indeed, if the contrary view were upheld, the result for all practical purposes may be to nullify the provisions of the Section, for the High Court may very well decline to entertain a revision when a remedy by way of appeal to the District Judge is open and may feel helpless when such an appeal has been filed and disposed of. In cases where the first court acted with illegality or material irregularity and the District Judge in appeal rectified that mistake, the High Court would in the exercise of its discretion refuse to interfere. If the order of the District Judge proceeds on grounds which do not appeal to the High Court, it may inspite of that order set aside the order of the first court if it is open to any one of the three objections mentioned in the section. It therefore seems to me that a revision from the order of the Assistant Collector lies if there has been a want of jurisdiction, a failure to exercise jurisdiction or illegality or material irregularity irrespective of the question whether an appeal has been filed before the District Judge.

This civil revision would have been ordinarily cognizable by a single Judge, but we also have jurisdiction to interfere in revision *suo moto*. The attention of Dalal, J. was not called to the fact that no appeal lay to him, and that he might interfere in revision. This is therefore not a case where a single Judge has in his discretion declined to interfere, but one where he has not at all considered the matter. There is accordingly nothing to prevent us from interfering.

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[5] I. L. R. 8 All. 111 (F.B.)

[6] I. L. R. 39 Mad. 195 (F. B.)

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As will be pointed out later the revenue court failed to record any finding that there was any fraud of the judgment-debtor which prevented the execution of the decree at some time within 12 years immediately before the present application for execution and yet applied Section 48 (2) (*a*) to the case. The failure to apply its mind to the provisions of that Section and to record a finding required by that Section was a material irregularity because the Section prohibits the making of any order upon the application unless the conditions laid down in it are fulfilled. The District Judge, on the other hand, made out a new case that the old execution proceeding was still pending.

The decree-holder in his present application admitted that the previous application of 1923 was for the arrest of the judgment-debtor and had been struck off. In the present application his prayer was for attachment and public sale of the property of the judgment-debtor and not for his arrest. The first court did not suggest that the previous application also was for attachment and sale. Nor was there any such suggestion in the judgment of the District Judge. As a matter of fact the record of the execution proceedings of 1923 does not appear to have been sent for in the District Judge's court. Similarly that previous record was not before the single Judge of this Court. It was taken for granted before the learned Judge that the previous application of 1923 was only for the arrest of the judgment-debtor. Indeed he emphasised this fact and made it the basis of his decision. Even before the Bench which heard this appeal first there was no suggestion that the prayers in the earlier and the later applications were substantially the same. As mentioned above, one of the questions which the Bench considered would arise in the case was "whether when a new relief is claimed, the present application can be treated as one for revival of the old one". After dictating the order, the Bench by way of precaution directed that the old execution record should be sent for. On its arrival it was discovered that the original application dated August 29, 1923 was for the attachment and public sale of the property of the judgment-debtor and in case the decretal amount could not be realised in that way for his arrest. But the record further disclosed that the decree-holder did not file any list of the properties of the judgment-debtor which he wanted to get attached, nor deposited the expenses for such attachment. He deposited only the expenses for the issue of a warrant which the court ordered to be issued. According to his own application the occasion for arrest would have arisen only when the decretal amount could not be realised in the other way. It is possible to argue that the record gives an indication of the prayer for attachment having been abandoned by the decree-holder and the relief confined to arrest, as admitted by the decree-holder in his present application. In the present execution proceeding, a list of the properties of the judgment-debtor was filed which had not been mentioned in the proceedings of 1923. It seems to have been conceded all along that the previous application was for arrest only. I am therefore of opinion that the decree-holder should not now be allowed to raise a new question of fact that there had been no abandonment of the relief for attachment which question had not been raised before the single judge of this court.

The present application for execution asks for attachment and sale of the judgment-debtor's property, and new properties have been specified which were never mentioned before. The application is not now for the arrest of the judgment-debtor. It does not purport to be an application for a revival of the previous application and there is no suggestion in it that the previous application is still pending. On the other hand it is admitted that that application was struck off. The present application is based on the fact of the compromise for the payment of instalment. Although a decree-holder need not be tied down to the form of his application, the circumstances mentioned above make it quite clear that the present application which asks for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceeding. When the character of the present application is different from that of the previous one, it can hardly be treated as a continuation.

I find it most difficult to hold that the conduct of the judgment-debtor amounted to fraud. The proposition that any action of the judgment-debtor which puts off the decree-holder from executing his decree at once must be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years' rule, is much too broadly stated. In the present case the terms of the compromise were known to both the parties and the decree-holder was in a position to find out their legal consequences. There was no concealment of any fact, nor any misrepresentation on the part of the judgment-debtor. Indeed, the fact that the judgment-debtor paid the eighth instalment even after the expiry of 12 years and attempted to pay the ninth instalment also shows that he had no intention in 1923 to stop payment as soon as 12 years expired. I think the District Judge was right in not accepting the first court's view that his conduct amounted to fraud. Section 48 (2) (*a*) is therefore inapplicable.

The learned Assistant Collector has remarked that the parties filed a compromise 'and on the strength of that compromise the decree-holder agreed to accept the moneys by instalments 'Now when the last date of payment is over the J. D. takes up the plea of limitation which means a fraud on his part'. But the plea of limitation was taken after the expiry of the period of limitation, and the mere taking of such a plea cannot be a fraud. The trial court did not record any definite finding that at the time of the compromise the judgment-debtor had the dishonest intention of pleading limitation after the 12 years had expired. As pointed out above such an inference was impossible.

The learned advocate for the decree-holder supports the decree of the learned Judge of this Court on the ground that there was a subsequent order for the payment of money at certain dates within the meaning of Section 48 (1) (*b*).

The learned single Judge of this Court has naturally followed the Divisional Bench ruling in *Jorawan* v. *Mahabir*[7] where it was laid down that a subsequent order directing payment of money in Section 48 (1) (*b*) means a subsequent order made by the court which made the decree and acting as that court, and not an order of a court executing the decree.

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[7] I. L. R. 40 All. 198

The learned Judges added that in all probability the Section contemplates orders made under Order 20, R. 11. They could not have intended to say that a subsequent order in Section 48 is confined to orders passed under the last mentioned rule. Section 48 contains the substantive provision of the Code, whereas Order 20, R. 11 can be altered by High Courts, and other similar provisions can also be added in the rules. Furthermore, the last mentioned rule applies only to decrees for payment of money, whereas Section 48 (1) (*b*) covers decrees for the delivery of properties also. Section 48 is accordingly of a wider scope, and there is no reason to confine it to the particular orders passed under Order 20, R. 11. The view taken in *Jorawan's* case that Section 48 contemplates a subsequent order passed by the original court and not the execution court has been followed by other courts as well.

On the other hand, in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced, and various efforts have been made to find a legal basis for upholding it.

The Bombay High Court in *Apte* v. *Trimal Hanumant*[8] expressly dissented from the view taken in *Jorawan's* case and held that the expression 'any subsequent order' cannot be limited to orders passed by the court which passed the decree, but means any order made by a competent court. In one sense this view is sound because the words 'subsequent order' are general in their meaning. As will be shown later, the fallacy lies in the supposition that an execution court is competent to pass every kind of order, provided it is based on a compromise between the decree-holder and the judgment-debtor.

In some cases the courts have gone so far as to hold that the original decree can be altogether superseded by a new arrangement entered into in the execution department, enabling the decree-holder to execute the substituted decree, *Hridoy Mohan* v. *Khagendra Nath*[9]. I would say with great respect that such a position is utterly untenable. The original decree cannot be altered or varied by the parties even with the sanction of the court. In the absence of interference in appeal, revision, review or under Section 152 C. P. C. the original decree becomes final and the court itself is *functus officio*. As provided in Order 20, R. 3 the judgment cannot afterwards be altered or added to, and as directed in R. 6 the decree must agree with the judgment. In *Debi Rai* v. *Gokul Prasad*[10] a Full Bench of this High Court laid down that a decree altered by agreement of parties cannot be executed as a new decree, and the acquiescence of the judgment-debtor in such execution cannot estop him from objecting to further execution of it. The function of an execution court is to execute the decree as it finds it and not to substitute a new decree therefor, even though the substitution may be with the consent of the parties. Such an agreement may be a binding contract between the parties enforceable by a separate suit, but it cannot take the place of the original decree and become itself capable of execution.

In other cases it has been suggested that a compromise can be entertained in the course of execution proceedings much in the same manner

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[8] I. L. R. 49 Bom. 695 [9] 1929 A. I. R. Cal. 687 [10] I. L. R. 3 All. 585

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as in a regular suit, and authority for it has been sought for in *Mohammad Sulaiman* v. *Jhukki Lal*[11], Vide *Ram Prasad* v. *Hari Das*[12] and *Hirdoy Mohan* v. *Khagendra Nath*[13]. But the Allahabad case was based on an interpretation of Sections 375 and 647 of the old code, and reference was also made to Section 257A of the Code of 1882, for which there is no corresponding provision in the new Code. The general observations made by the learned Judge were in the nature of an *obiter dictum*. In view of the opinion expressed by their Lordships of the Privy Council in *Thakur Prasad* v. *Faqir Ullah*[14] the explanation added by Act No. 6 of 1892 to Section 647 of the old Code has been deleted from the present Section 141. Now Order 23, R. 4 makes R. 3 of that Order inapplicable to execution proceedings, and there is therefore no obligation on an execution court to record a compromise as it would have to do in a pending suit. It is not correct to say, as was done in *Chaudhri Jagdish Misir* v. *Chaudhri Sureshwar Misir*[15] that the word 'suit' in Order 23, R. 3 was used 'in a broad sense as including not only the stages of suit to its termination by the decree of the first court but as including its appellate stage and proceedings in execution of the decree made in the suit'. In that case a compromise was entered into in the proceedings relating to the setting aside of a sale. Without holding that the word 'suit' includes an execution proceeding, Order 23, R. 3 might well have been applied with the help of Section 141 C. P. C. In like manner Section 107(2) would apply to proceedings in appeal.

The line of reasoning adopted in some cases is that a compromise in an execution court is in the nature of an adjustment within the meaning of Order 21, R. 2 and that, if certified, it can be enforced by the execution court. But an adjustment within the meaning of that rule should be a transaction which extinguishes the decree as such in whole or in part and results in its total or partial satisfaction. A transaction by which parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution or vary the time when the decree becomes executable would really be a transaction attempting to vary the terms of the decree. *Mallamma* v. *Venkappa*[16] and *Ladd Govindoss* v. *Ramdoss*[17] followed in *Azizpur Rahman* v. *Ali Raja Chaudhri*[18]. The adjustment referred to in Order 21, R. 2 is one which completely or partially extinguishes the decree and cannot mean a compromise to give effect to the terms of which a new decree at variance with the original decree would have to be created, which will again have to be executed. An execution court has no power to alter or vary the decree under execution, and to substitute a new decree for it. A mere consent of the parties cannot confer such a jurisdiction on the execution court.

Another line of reasoning adopted in some other cases is that a compromise for the payment of the decretal amount by instalment or for delivery of property is not at all a variation of the decree for money, but merely fixes a mode of satisfaction. It has therefore been assumed that where the parties agree, the execution court has an inherent power to accept such a compromise and pass a new decree in terms of it. But the original decree which fixes no deferred date for payment or for delivery of property is executable immediately. Where the compromise fixes new dates for payment or delivery it undoubtedly alters the time of satisfaction and therefore varies the decree. It is not a mere case of postponement of execution which the court under special circumstances recognised by the Code of Civil Procedure can order. It is in effect the substitution of a new decree in place of the old decree which new decree will itself become capable of execution.

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[11] I. L. R. 11 All. 228

[12] 97 I. C. 768

[13] 1929 A. I. R. Cal. 687

[14] I. L. R. 17 All. 106

[15] 6 Pat. L. J. 253

[16] I. L. R. 8 Mad. 277

[17] 28 I. C. 376

[18] 1928 A. I. R. Cal. 527

It is quite obvious that the legislature does not contemplate the prolongation of execution proceedings by successive compromises of this type being entered into at long intervals. Authority has been conferred by Order 20, R. 11 C. P. C. for directing payment by instalment. But unless passed at the time of the passing of the decree such an order can be passed only on the application of the judgment-debtor with the consent of the decree-holder. Article 175 of the Limitation Act places a limitation on the period during which such an application can be made, which must be within six months of the decree. It is the duty of the execution court not to entertain any such application for the payment of the amount of the decree by instalment, if made after the expiry of that period, even though the decree-holder is agreeable to it. Had the legislature intended that the court has always an inherent power to accept a compromise of this kind entered into between the parties, the short period of limitation would not have been prescribed.

In some cases the difficulty has been attempted to be got over by the supposition that where the decree directs that money be recoverable only on some failure, it is open to the plaintiff to ask the court for a declaration that the failure has taken place and for an order directing payment in consequence. *Nawab Shujaul Mulk Bahadur* v. *Amirul Umra Bahadur*[19]. But where the decree is self-contained, the mere fact that the contingency mentioned in it has occurred subsequently would not justify the making of a fresh executable order by the court, which had become *functus officio*, after the passing of the decree. Without such a fresh declaratory order, the execution court is competent to execute the decree when such contingency has happened.

In other cases the enforcement of a compromise between the parties has been based on the principle of estoppel. No doubt a judgment-debtor can in certain circumstances be estopped from going behind his own agreement. But no one can contract himself out of the statute of limitation. Estoppel cannot be placed against a statutory bar of limitation. Similarly, as the Code by Section 48 prohibits the court from making any order upon an application presented after the expiration of 12 years, the statutory obligation of the court cannot be got rid of on account of any private contract to the contrary. It will be the duty of the court to ignore the private agreement and to give effect to the statute. As was pointed out by the Full Bench in *Debi Rai* v. *Gokul Prasad*[20] the agreement may give rise to a separate suit, but cannot estop the judgment-debtor from objecting to the further execution of the decree. In the words of Sir Barnes

[19] I. L. R. 48 Mad. 846

[20] I. L. R. 3 All. 585

Peacock in *Kristo Komal* v. *Hurree Sirdar*[21] quoted in *Raghunath Prasad* v. *Kashi Prasad*[22] ' a man may bind himself not to execute a decree within a certain period, but he cannot, by binding himself not to execute the decree for a certain period add to the time which the law allows him to execute it'.

On the contrary, in some cases it has been suggested that if an order purporting to have been passed under Section 210 corresponding to Order 20, Rule 11 has been passed on an application filed more than six months after the decree, it cannot be treated as an order under that section 'inasmuch as the court on that date had no jurisdiction to pass an order under that section more than six months having elapsed from the date of the decree'. *Banarsi Das* v. *Ramzan*[23]. I am not sure whether the learned single Judge of this Court has not taken the same view when remarking that 'a subsequent order for payment by instalment can be passed by the court which gave the decree within six months and not after'.

The correct position appears to be that although the court should not entertain an application for payment of the decretal money by instalment under Order 20, R. 11, if made after the expiry of six months from the date of the decree (Article 175), the order if actually passed on such a time-barred application is not a nullity. Just as a decree passed in a suit which was time-barred is binding on the parties, and the question of limitation is by implication deemed to have been decided against the defendant, so an order for payment by instalment is binding on the judgment-debtor. It must be assumed that the court by oversight decided the question of limitation wrongly. But a wrong decision, whether express or implied on a question of limitation does not oust the jurisdiction. Limitation is a question of procedure and not one of jurisdiction. *Nathu Ram* v. *Kallan Das*[24]. The court was seized of the case and was competent to pass orders on the application. The mere fact that it overlooked the bar of limitation or acted wrongly in not applying it, would not make the order without jurisdiction. So long as it has not been set aside, the order is binding on the judgment-debtor, and cannot be challenged by him on the ground that it was passed on a time-barred application. When the court prevents the judgment-debtor from impugning such an order it is not giving effect to any contract to get out of the law of limitation, but is enforcing the principle of *res judicata* against him. When the decree-holder takes advantage of such an order he is not trying to extend the period fixed in Section 48 by any contract between the parties, but he is merely urging that there is in existence a subsequent order binding on the parties, although it so happens that that order had been passed on a time-barred application without any objection. A somewhat similar, though not exactly the same, view was expressed in *Banarsi Das* v. *Ramzan*[25], when reversing the judgment of the single Judge mentioned above. It is no doubt the duty of the court to see that no such order is passed when the application is beyond time. But when such an order has been passed

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[21] 13 W. R 411

[22] 72 I. C. 477=1924 A I R Lah 3·2

[23] 13 I. C. 88

[24] I. L R 26 All 522

[25] 73 I. C. 671

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and remains unreversed, the judgment-debtor cannot be allowed to ignore it.

Although the words in Section 48 C. P. C. are more general, the order under Order 20, R. 11 C. P. C. can be passed by the original court only. Where the execution court happens to be the same court which made the decree, one need not be too technical in insisting that the order must have been passed by the original court acting as such and not acting in the execution department. What is essential is that the intention must have been to pass an order under Order 20, R. 11 on the application of the judgment-debtor and with the consent of the decree-holder. Where the courts are not different, it would hardly matter how the court actually describes itself, but the order must be intended to be an order under that rule. On the other hand, if an execution court merely records a compromise entered into between the parties, it does not necessarily pass an order of its own. 'Order' is defined in Section 2(14) C. P. C. as the formal expression of any decision by a civil court which is not a decree. It must therefore be the formal expression of a decision, i.e., an adjudication between the parties, and not merely a mechanical recording of something which the parties want to be noted. The order must be intended to be one passed by the court imposing an obligation capable of enforcement by that court. We have therefore to see whether the court intended to make any order under O. 20, R. 11 and made one.

As pointed out above, when the compromise was filed in 1923, the court merely ordered that the warrant should be cancelled. The record appears to have been consigned to the record room. If the decree-holder's relief had by that time been confined to one for arrest only, that prayer was obviously disallowed, at any rate for the time being. There can also be no doubt that the court took cognizance of the original compromise which had been filed and allowed it to be placed on the record. In that sense it tacitly accepted it and even acted upon it; but in my opinion such an order was not made under O. 20, R. 11 and cannot be treated as a subsequent order made by the court itself directing the payment of the decretal amount by instalment within the meaning of Section 48(1)(*b*). The decree-holder is therefore not entitled to count 12 years from this date.

As the operative portion of the judgment of Dalal, J. was correct, I would dismiss the appeal; but in the exercise of my revisional jurisdiction, I would set aside the order of the Assistant Collector on the ground of material irregularity, and dismiss the application for execution for the reasons given above.

Mukerji, J.

MUKERJI, J.—The facts involved in this case briefly are these. A suit for profits was decreed in favour of the respondent Dau Dayal and against the appellant Gobardhan Das in 1915, by the revenue court. After some applications for execution had been made from time to time, an application was made on March 21, 1923. The prayer was that the property of the judgment-debtor was to be attached and in case it was not found possible to realise the money in that way, he might be arrested. No list of properties to be attached was filed with the application, nor was it stated that the movable property in the possession of the judgment-debtor, as pointed out by the decree-holder on the spot, should be attached.

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Instead of attachment of property warrants for arrest of the judgment-debtor were issued from time to time, and ultimately parties agreed, on August 29, 1923, that the whole of the decretal amount then due should be paid by the judgment-debtor in several six monthly instalments of certain fixed amounts and that on January 15, 1928 the judgment-debtor should pay up the balance of the decretal amount. When this compromise was filed the Assistant Collector executing the decree passed the following order:—"Parties have come to a compromise. Warrant may be cancelled".

The instalments were regularly paid, and on January 10, 1928 the judgment-debtor sent by money order a sum of Rs.57-3-0 to the decree-holder as the balance of the amount due to the latter. The decree-holder refused to accept this amount on the ground which was correct, that it was insufficient and the day after the expiry of the date fixed for payment he made an application for execution. This application was presented on January 16, 1928 and prayed that the amount due might be realised by attachment and sale of property.

The judgment-debtor thereupon pleaded limitation as contained in Section 48 of the Civil Procedure Code.

The learned Assistant Collector held that the judgment-debtor by raising the plea of limitation was guilty of fraud and that on that account the decree-holder's application was taken out of the purview of the twelve years' rule of limitation. He accordingly dismissed the objection and allowed the execution to proceed.

The judgment-debtor appealed to the District Judge. The appellate court did not agree with the court of first instance as to its view of fraud but held that the application for execution made in 1928 might be treated as a continuation of the application of 1923 and that the latter must be deemed to have been still pending. The District Judge accordingly dismissed the appeal, and thereupon the judgment-debtor filed a second appeal to this Court.

The appeal came before Dalal, J., and that learned Judge dismissed the appeal holding that, although the District Judge was not right in treating the application of 1923 as still pending, the case fell within the exception created in the case of fraud on the part of the judgment-debtor. The learned Judge relied on the case of *Lalta Prasad* v. *Suraj Kunwar*[20] and said:

> Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud if the result thereof is to bar the execution of the decree under the twelve year's rule. By making an agreement he (judgment-debtor) derived an advantage and when he is not prepared to fulfil the agreement his conduct amounted to fraud.

The second appeal was dismissed and the present Letters Patent appeal has been filed by the judgment-debtor. At the outset, it seems to be clear to me that no second appeal lay to the High Court, as the case arose out of a suit for profits heard by a revenue court. The Agra Tenancy Act of 1926 by Section 249 disallows an appeal from an appellate order. By Section 248 of the Agra Tenancy Act, an appeal to the District Judge is allowed in the case of an execution of a decree for profits, but by Section 249 no further appeal is allowed. By Section 264 of the Tenancy Act 1926 the Civil Procedure Code is to apply to the revenue courts with certain exceptions, and one of the exceptions is "provisions inconsistent with anything in this Act, so far as the inconsistency extends". To allow a second appeal from the order of the District Judge in this case, on the ground that the order passed by the District Judge was a decree within the meaning of Section 2 of the Civil Procedure Code, would be inconsistent with the clear provision of Section 249. I hold, therefore, that no second appeal lay to this Court.

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[20] 20 A. L. J. R. 185

The learned counsel for the appellant has asked us to take up the matter in revision.

The revisional jurisdiction of this Court over the revenue courts is conferred by Section 253 of the Tenancy Act. It says that in cases where an appeal lay to the District Judge, the High Court may call for the record of any suit which has been decided by a subordinate revenue court and in such cases may pass such orders as it thinks fit. In this case an appeal did lie to the District Judge and, therefore, where a case falls within any of the Clauses (*a*), (*b*) and (*c*) of Section 253, a revision would be maintainable.

On behalf of the respondent it was argued that the order of the Assistant Collector having been confirmed by the District Judge, unless we are able to set aside the order of the District Judge also, we are not competent to interfere with the order of the Assistant Collector.

It does appear that the High Court has no jurisdiction to interfere in revision with the order of a District Judge passed by him in a revenue matter, on appeal. This is due no doubt to an oversight, but the fact is there. Section 264 of the Tenancy Act made Section 115 of the Civil Procedure Code inapplicable to "all suits and other proceedings" under the Tenancy Act and, therefore, an appellate order of the District Judge is exempted from the operation of Section 115 of the Civil Procedure Code. This was held to be the case in *Bhagwat Das* v. *Chhedi Koeri*[27] and also in *Jagdeo Singh* v. *Kesho Prasad Singh*[28]. The result is that where a revenue court passes a right order and on appeal the District Judge passes a wrong order and the District Judge's order is otherwise capable of being revised by this Court, the District Judge's order cannot be touched.

It, however, does not follow that because the District Judge's order cannot be touched in revision, the order of the subordinate revenue court cannot be touched simply because it has been affirmed by the District Judge on appeal. Section 253 of the Tenancy Act does not say that to enable the High Court to interfere, it is necessary that there should be no appeal from the order of the revenue court. All that is needed is that the matter before the revenue court should be appealable to the District Judge.

In numerous cases decided by this Court it has been held that the High Court could interfere with the order of the first court, although the same may have been affirmed by the lower appellate court, in the exercise of the High Court's revisional powers under Section 625 of the Old Act and Section 115 of the New Act of 1908 (C. P. C.). One of these cases

[27] 24 A. L. J. R. 537 (F.B.)

[28] I. L. R. 51 All. 1020

is a Full Bench decision of this Court and will be found reported in *Badami Kuar* v. *Dinu Rai*[29]. Another case and a more recent one is *Ram Adhin* v. *Ram Bharose*[30]. I hold that a revision is maintainable.

The next question is whether the matter before us is a fit one in which we should interfere, in other words, whether the case falls within any of the Clauses (*a*), (*b*) and (*c*) of Section 253 of the Tenancy Act. In my opinion the case falls under Clause (*c*). The learned Assistant Collector has not found as a fact that at any time prior to the lapse of twelve years from the date of the decree the judgment-debtor by fraud prevented the execution of the decree. If he had found on evidence however flimsy that such was the case, there would have been no case for the High Court for interference. But what the Assistant Collector found was that the very act of raising the plea of limitation was a fraud on the part of the judgment-debtor. If it was, that act was committed more than twelve years after the date of the decree. There can, therefore, be no doubt that the Assistant Collector acted with material irregularity in the exercise of his jurisdiction and, therefore, his order is liable to revision.

Now I come to the question whether the compromise which was entered into by the parties on August 29, 1923 was in the nature of a "subsequent order" within the meaning of Clause (*b*) of Section 48 of the Civil Procedure Code. By Section 48 no application for execution shall be entertainable by a court executing a decree, if it was made more than twelve years after the date of the decree or more than twelve years after the date fixed for payment by the decree or by any subsequent order.

But before I take up this question I would like to say one word about an argument which prevailed before the learned District Judge and was reiterated before us. The question is whether the application of the decree-holder made on January 16, 1928 can in any way be treated as a continuation of the previous application of August 29, 1923. I have already pointed out that the previous application, although it was for attachment of property and arrest, did not contain any list of property to be attached and was continued and prosecuted as an application for arrest. No less than four warrants for arrest were issued one after another and that on the filing of the compromise, the proceedings were allowed to be dropped. In his present application, dated January 16, 1928, the decree-holder stated that his previous application of August 29, 1923 was one for the arrest of the judgment-debtor. This was a correct statement of the circumstances, and it is not right on his part now to say that he made a misstatement of fact.

Before going back to the question what is meant by a "subsequent order" as the expression is to be found in Section 48, I might dispose of another small point, namely, whether we are to treat or not the order of August 29, 1923 as an order accepting the compromise and thereby directing payment of money on certain dates. On this point I am of opinion that, although the learned Assistant Collector does not in so many terms say that the judgment-debtor is to pay the decretal amount on the date fixed in the compromise, yet when he accepted the compromise and

[29] I. L. R. 9 All. 111

[30] 22 A. L. J. R. 1041

cancelled the warrant, he tacitly, at any rate, directed that the terms of the compromise should be carried out.

Now I go back to the interpretation of the expression "subsequent order".

The principal question that arises is whether an order, passed by an execution court as such, by which it accepts, as in the present case, a compromise and directs that the terms of the compromise should be carried out and orders the judgment-debtor to pay the decretal amount on the dates fixed, amounts to or not a subsequent order within the meaning of Section 48. On principle it is abundantly clear that an execution court cannot go behind the decree and cannot alter it. By the provisions of Order XX, Rule 3, a judgment, when once pronounced and signed, cannot be afterwards altered or added to except as provided by Section 152 or on review. The action of the executing court cannot come within the provision of Order XX, Rule 3 and, therefore, it is not competent to alter the terms of a decree. Where the decree says that a certain sum of money is to be paid at once, it will not be open to an executing court to say that the decretal amount shall be paid in a different way, i.e., by instalments and on dates convenient to the judgment-debtor. Even where the decree-holder and the judgment-debtor come to terms, neither of them has the power to so contract as to supersede the rule of limitation or to extend it. The judgment-debtor, in the case of a contract otherwise valid, may be estopped. I do not decide that he is estopped from pleading that he is not bound by the compromise. But where the result of a compromise is that the limitation provided by the law is extended, it is open to the judgment-debtor to plead that the decree-holder's application is barred by limitation. This was held in *The East India Company* v. *Oditchurn Paul*[81]. See observations at page 70.

On general principles, therefore, an executing court as such cannot make an order which would operate as a 'subsequent order directing payment of the decretal amount on a certain date.'

One illustration of a "subsequent order" mentioned in Section 48 will be found in the provision of Order XX, Rule 11, Sub-rule (2) by which, after the passing of a decree for payment of money, the court, on the application of the judgment-debtor and with the consent of the decree-holder, may direct the payment of the decretal amount by instalments. But for the purpose of such an order, the parties must go to the court which passed the decree and within six months of the making of the decree, as provided by Article 175 of Schedule I of the Limitation Act. It may be that where the parties approach the court which passed the decree after six months and the delay is overlooked by the parties and the court and then an order as contemplated by Order XX, Rule 11 is passed and is not set aside on appeal the order will be binding on the parties on the ground of *res judicata;* but that is not the case here. In this case it cannot be pretended that the parties were approaching the court to exercise its powers under Order XX, Rule 11 of the Civil Procedure Code, even if we assume that the Assistant Collector's court was the very court which had made the decree for profits in 1915.

[81] 5 Moore's I. A. 43

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I am of opinion, therefore, that on principle the subsequent order must be an order made by the court which passed the decree and not an order made in the course of execution.

The view taken by me is the view that has always been held in this Court with some exceptions which were due to the existence in the Code of Civil Procedure of 1882 a section, namely, 257(*a*) and to the fact that at one time execution applications were treated as miscellaneous applications to which rules as to trial of suits applied. But Section 257(*a*) is no longer the law, and Order XXIII, Rule 4 clearly states that the rule as to withdrawal and adjustment of suits do not apply to proceedings in execution of a decree or order. The decision of Mahmood, J. in *Muhammad Sulaiman* v. *Jhukki Lal*[32] is one of the few exceptions I have in mind. On the other hand, the cases in *Debi Rai* v. *Gokal Prasad*[33] and *Jurawan Pasi* v. *Mahabir Dhar Dube*[34] show that the view taken by me was the view that prevailed in this Court.

No useful purpose will be served by examining the cases decided by other courts, but it will be enough to examine two cases which were decided after the passing of the Civil Procedure Code of 1908.

One of these cases is *Hridoymohan Sanyal* v. *Khagendra Nath Sanyal*[35]. With all respect I am unable to agree with the view laid down in the case. It seems to have been held there that by a compromise entered into in the execution department a decree is substituted for the original decree, and the so-called substituted decree may be executed as if it were the decree originally passed.

The second case is *Apte* v. *Tirmal*[36]. In this case the learned Judges do not give sufficiently convincing reasons for holding that an order passed by an execution court may be a subsequent order within the meaning of Section 48 of the Civil Procedure Code.

Before leaving the case, I might notice the last argument of the learned counsel for the respondent, namely, in the case of a decree directing delivery of property what would be a subsequent order within the meaning of Section 48, if it be not an order made in the execution department. For reasons already given, I am clear that an order made in the execution of a decree cannot be "a subsequent order" within the meaning of Section 48. Section 151 of the Code of Civil Procedure allows the court to make such orders as may be necessary in the ends of justice, and it is conceivable that there may be a case in which, in the exercise of its inherent jurisdiction, as recognised by the said Section 151, a court may direct a certain property to be delivered at a date other than the date already fixed by the decree passed. Then again the court is always entitled and authorised to correct clerical and arithmetical mistakes in judgments and decrees, and a decree when properly corrected may fix a date for delivery of property other than the date originally contained in the decree. These are possible cases that occur to me now and there may be other cases.

In the result, I would set aside the judgment of Dalal, J., on the ground that he had no jurisdiction to hear the appeal, upholding his

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[32] A. W. N. 1889, 53

[33] I. L. R. 3 All. 585 (F.B.)

[34] I. L. R. 40 All. 198

[35] A. I. R. 1929 Cal. 687

[36] I. L. R. 49 Bom. 695

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decree dismissing the appeal to the High Court, take up the case in revision and setting aside the order of execution passed on the respondent's application of January 16, 1928, would direct the said application to stand dismissed. In the circumstances of the case, I would direct that the parties should pay their own costs throughout.

BOYS, J.—I have had the advantage of seeing the judgment of my brother Mr. Justice Mukerji, and as I am in practical agreement with him, it is not necessary for me to discuss every point. The facts are very fully set out in the judgment of my brother, and there is only one further fact to which I shall have to refer later.

On the first point that no appeal lay to this Court I agree.

On the next point as to whether a power of revision is limited to S. 253 of the Tenancy Act, or whether we can also act under S. 115 of the Code of Civil Procedure, I agree that our powers are limited to S. 253. This is not a conclusion which can be regarded as satisfactory, but the difficulty arises from the wording of S. 253, and oversight by the Legislature. To apply S. 253 literally and excluding S. 115 of the Code of Civil Procedure involves three undesirable results:—

Firstly, treating the section literally, it is applicable to all cases where an appeal lies to the District Judge, whether an appeal has actually been filed or not. Where an appeal has in fact been filed, the section gives us no power to revise the order of the District Judge, but does give the High Court power to revise the order of the subordinate revenue court, in this case, the Court of the Assistant Collector. If we exercise that power and find ground within Clauses (*a*), (*b*) or (*c*) to set aside the order of the Subordinate Revenue Court, we cannot set aside the order of the District Judge in appeal. It has to be left in the air and assumed to be a nullity by implication. While this is unsatisfactory, it cannot perhaps be said to do much harm.

Secondly, where the trial court was wrong within the meaning of Clauses (*a*), (*b*) or (*c*) of S. 253, but the District Judge deciding the case on different grounds was right his reasoning being unassailable. Here logically the subordinate court's order being the only one which we could consider, and being one which ought to be set aside, it cannot be set aside without also automatically rendering the order of the District Judge a nullity. This difficulty might be avoided by refusing to exercise the revisional power, which is discretionary. But this could hardly be regarded as a satisfactory solution.

The third difficulty that arises is more serious. A case can easily be imagined where the subordinate revenue court was absolutely right and its decision has been set aside in appeal—the District Judge being hopelessly wrong. We can, on the hypothesis we are considering, set aside the order of the trial court; but it is right and does not require to be set aside, while we cannot touch the order of the District Judge though it is very wrong, wrong actually within Clauses (*a*), (*b*) or (*c*) of S. 253.

I have endeavoured to state these difficulties in their degrees of increasing gravity. Taken as a whole, the result, in my view, should be to incline the court strongly, if there was room for the view, to hold that it had power to act under S. 115 of the Code of Civil Procedure; but that power is excluded by S. 264 and Schedule II, list 1 of the Tenancy Act, for it is impossible, without undue straining of language, to hold that an "appeal" is not a "proceeding". No other view, therefore, is possible than that our revisional power is restricted to S. 253 of the Tenancy Act; and further it is clear that we have power to revise under S. 253 the order of the Assistant Collector, and if we did so revise it, the order of the District Judge in appeal can only be treated as a nullity.

As to whether there are grounds for our interference, I agree with my brother that the Assistant Collector did not in fact find that any fraud was committed within the period of 12 years. It is clear that the point did not occur to him. He uses the phrase: "The decree-holder never knew that the judgment-debtor will in the end take such a plea". The words "never knew" clearly refer to the point of time at which the compromise was being entered into. The words "will in the end take such a plea" clearly refer to a point of time after the lapse of the 12 years. No other view, then, is possible but that he did not in fact find fraud to have been committed before the lapse of 12 years.

As to the order of the Assistant Collector of August 29, 1923, which states that a compromise has been arrived at and the warrant may be cancelled, I would hold that this did not amount to an order substituting the compromise for the rights which the decree-holder had under the decree standing by itself. The order is itself ambiguous, and I think that as we shall be holding in this case that the execution court has no power to vary the terms of the decree, we should not assume that the Assistant Collector was passing an order which he had no power to pass, unless his action is capable of no other interpretation. In the present case the essential thing, so far as he was concerned, was that he was being asked to withdraw the warrant. It may well have been his attitude, and the subordinate courts have not too much time for debating refinements, "Very well, if you both say you have compromised I am prepared to withdraw the warrant." I do not think that the facts or the language of the order justify us in holding that he considered himself to be substituting, or can be held to have substituted, the compromise for the decree. I think, therefore, that he did not pass any order, and the question whether he would have power to pass such an order so as to extend the period of limitation under S. 48 of the Code of Civil Procedure does not arise. But I would add that if it be treated as an order, I agree that the execution court has no power to pass such an order.

There is only one further point to which I need briefly refer, and that is the question whether the proceeding of January 16, 1928, was merely a continuation of the original application of March, 1923, or whether that application had finally terminated on August 29, 1923, and the application of January 16, 1928, was an entirely new proceeding. I should be disposed to hold that the second was a continuation of the first application, and I would not hold the decree-holder too literally bound by the phraseology of the application of January 16, 1928. But it is unnecessary for me to consider this point further because while it has been urged before us, it does not appear to have been ever hinted at by the decree-holder at any earlier stage of the proceedings.

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I agree with the order proposed by Mr. Justice Mukerji.

BY THE COURT—We dismiss the appeal, but in the exercise of our revisional jurisdiction we set aside the order of the Assistant Collector dated February 24, 1928, and dismiss the application for execution. In the circumstances of this case we direct that the parties should bear their own costs throughout. *Appeal dismissed*

Civil 1932 Jan. 29 Mears, C. J. Sen, J.

BANDHAN SINGH (*Plaintiff*)
versus
DAULATA KUAR AND ANOTHER (*Defendants*)*

Hindu Law—Reversioner—Acts of waste by life-tenant—Remote reversioner not entitled to challenge—Act II of 1929—Effect of—Sisters and sisters' sons of last male-holder—Precedence in order of succession over distant collaterals.

Under the Hindu Law the person entitled to challenge any acts of waste or alienation by a life-tenant like a Hindu mother is the next presumptive reversioner on the date of the suit. By operation of Act II of 1929, sisters and sisters' sons obtained a precedence in the order of succession over distant collaterals and therefore a remote reversioner is not entitled to sue for an injunction restraining the mother of the last male-holder and her transferee from committing acts of waste unless he satisfies the court that the nearest reversioner has colluded with the life-tenant or has otherwise done acts precluding him from maintaining an action.

LETTERS PATENT APPEAL from the judgment of the HON'BLE JUSTICE SIR S. M. SULAIMAN.

S. N. Verma for the appellant.

Shiva Prasad Sinha for the respondents.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by the plaintiff and arises out of a suit for an injunction restraining the defendants from committing certain acts of waste. Baijnath was the last male holder of this property. He died before the year 1924 leaving a mother of the name of Musammat Daulata Kuar.

The plaintiff claims to be a reversioner of this property as being a distant collateral of Baijnath. The suit was resisted by Mst. Daulata and her transferee upon the ground that the plaintiff was not the next presumptive reversioner of Baijnath. The defendants contend that the nearer heirs were Mst. Satraji, Mst. Sabhraji and Mst. Chabraji who were sisters of Baijnath and also three sisters' sons. Prior to the passing of Act II of 1929, under the Hindu law as administered in these provinces, sisters were no heirs at all. Sisters' sons were heirs but they were not entitled to inherit the property till all the collaterals of the last male holder were exhausted. The effect of Act II of 1929 was to grant a right of inheritance to sisters and to place sisters and sisters' sons in the list of heirs immediately after the father's father and before the father's brother. Act II of 1929 received the assent of the Governor General on February 21, 1929. It has been provided in Section 5 (1) of the General Clauses Act (Act X of 1897) that where any Act of the Governor-General in Council is not expressed to come into operation on a particular day, then it shall come into operation

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*L. P. A. 13 of 1931

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on the day on which it receives the assent of the Governor-General. Under the Hindu law the person entitled to challenge any acts of waste or alienation by a life tenant like a Hindu mother is the next presumptive reversioner on the date of the suit. By operation of Act II of 1929, sisters and sisters' sons obtained a precedence in the order of succession over distant collaterals like the plaintiff. Under the circumstances the plaintiff's claim was bound to fail. A mere remote reversioner is not entitled to sue unless he satisfies the court that the nearest reversioner has colluded with the life tenant or has otherwise done acts precluding him from maintaining an action. We are of opinion that the view taken by Mr. Justice Sulaiman was perfectly correct and was the only possible view. We therefore dismiss this appeal with costs.

Appeal dismissed

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KING, J.

A. U. JOHN AND OTHERS
versus
SURAJ BHAN*

Court Fees Act, Schedule I, Art. I—Appellants seek to establish priority of their debentures over plaintiff's claim—Ad valorem *court-fee payable on value of debentures or decretal debt, whichever is less.*

Plaintiff's suit for recovery of a certain amount from a company and from certain debenture-holders of that company, and for a declaration that the amount was recoverable in priority over the debentures, having been decreed, the debenture-holders appealed to the High Court for modification of the decree by refusing the declaration that plaintiff's claim had priority over the debentures. *Held*: that the appellants sought to establish the priority of their debentures—in other words, they sought to exonerate the property which was security for their debentures from liability to satisfy the decretal debt—and the court-fee was payable *ad valorem* on the decretal debt, or on the value of the debentures whichever was less. *Moti Begam* v. *Har Prasad*, 16 A. L. J. R. 81.

Ram Nama Prasad for the appellants.

The following judgment was delivered by

KING, J.—This is a reference under S. 5 of the Court Fees Act, 1870. *King, J.*
The suit was for recovery of Rs.37,246 from the Agra United Mills Ltd. and from certain debenture-holders of that Company, and for a declaration that the amount is recoverable in priority over the debentures in favour of defendants 2 to 7.

The debenture-holders have appealed to the High Court to modify the decision of the trial court by refusing the declaration that the plaintiff's claim has priority over the debentures. The appeal is valued at Rs.37,246 and a court-fee of Rs.10 only has been paid. The question is, what is the proper court-fee payable on the memorandum of appeal?

The Stamp Reporter contends that an *ad valorem* fee on Rs.37,246 amounting to Rs.1,055 is payable. The appellants' learned advocate contends that the appeal challenges nothing more than the declaratory portion of the trial court's decree and the court-fee is governed by Art. 17 (*iii*) of the 2nd Schedule.

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*Stamp Ref. in F. A. (?) of 1931

In my opinion, Art. 17(*iii*) has no application to the facts of this case. That provision applies to a memorandum of appeal *in a suit* "to obtain a declaratory decree where no consequential relief is prayed." The present suit was of a very different nature. It was primarily a suit for money. It is true that a declaration was also prayed for, as a further relief, but the suit was obviously not for a mere declaration without consequential relief, so Art. 17(*iii*) cannot apply. Moreover, the relief claimed in this appeal is not a mere declaration but a modification of the trial court's decree, which is a substantial relief.

The appellants rely upon *Chunia* v. *Ram Dial*[1], *Moti Singh* v. *Kaunsilla*[2], *Bagala Sundari Debi* v. *Prosanna Nath Mukerjee*[3] and *Shrimant Sagajirao* v. *Smith*[4], but they are quite beside the point. They refer to the court-fee payable on the *plaint* in a suit which is held to be for a declaration pure and simple. *Nekho Tewari* v. *Kishun Prasad Pandey*[5] is also cited. The suit was for a declaration and for consequential relief in the form of a temporary injunction pending the disposal of the suit. A decree was granted for the declaration only. The court-fee on the defendants' appeal against this declaratory decree was held to be governed by Art. 17 Schedule II as the temporary injunction was granted at an early stage of the suit and thereafter the suit was reduced into a mere suit for a declaration and it was tried as such. This ruling therefore is also clearly distinguishable upon the facts.

As Art. 17(*iii*) does not apply, and there is no suggestion that the memorandum of appeal is otherwise specially provided for, I think it follows that the court-fee is payable *ad valorem* under Schedule I Art. 1 upon the amount or value of the subject-matter in dispute in the appeal. The appellants seek to establish the priority of their debentures. In other words, they seek to exonerate the property which is security for their debentures (to the extent of the value of their debentures) from liability to satisfy the decretal debt. I think the court-fee is payable *ad valorem* on the decretal debt, or on the value of their debentures, whichever is less.

This conclusion is supported by a decision of this Court in *Moti Begam* v. *Har Prasad*[6]. That was a suit for sale upon a mortgage and one of the defendants Moti Begam, claimed priority for a mortgage executed in her favour to secure her dower debt. The court held that the plaintiff's mortgage was prior in date. Mst. Moti Begam appealed for a declaration that she had a prior charge for the amount of her dower debt and that the property could duly be sold subject to her prior charge. The facts are therefore similar to those of the present case. The Taxing Judge repelled the contention that the court-fee was payable as in a suit for a mere declaration, and held that it was payable on the amount of the prior charge.

I am also supported by the following decisions of other High Courts. *Venkappa* v. *Narasimha*[7], *Kesavarapu Ramakrishna Reddi* v. *Kotta Kota Reddi*[8], *Jugal Pershad Singh* v. *Parbhu Narain Jha*[9] and *Premsukh Das* v. *Shah Gopi Saran*[10].

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[1] I. L. R. 1 All. 360

[2] I. L. R. 16 All. 308

[3] 21 C. W. N. 375

[4] I. L. R. 20 Bom. 736

[5] I. L. R. 3 Pat. 640

[6] 16 A. L. J. 81

[7] I. L. R. 10 Mad. 187

[8] I. L. R. 30 Mad. 96 (F.B.)

[9] I. L. R. 37 Cal. 914

[10] 4 Patna L. J. 323

The Madras Full Bench decision lays down that where the appellant in an appeal against a mortgage decree does not dispute the amount decreed but disputes the liability of certain properties for the decretal amount, then the court-fee is payable on the value of the properties, or on the decretal amount, whichever is less. The other rulings are consistent with this view and I think the same principles are applicable to the present case.

I therefore hold that the court-fee is payable *ad valorem* on the decretal amount, or on the value of the debentures, whichever is less.

SABIR HUSAIN AND ANOTHER (*Plaintiffs*)
versus
FARZAND HASAN AND OTHERS (*Defendants*)*

Civil
1932
Feb. 16
King, J.

Court Fees Act (VII of 1870), Schedule I, Art. 1—Appeal—Valuation of—Dispute about liability of certain properties for the decretal amount—Value of such properties or decretal amount, whichever is less, is the proper valuation.

Where the trial court entirely excluded the assets of one S in the hands of defendants 2 to 5 from liability for the decretal amount, and in the appeal from the decree of the trial court the plaintiffs asked that the suit may be decreed against the assets of S in the hands of defendants 2 to 5, *held*, that *ad valorem* court fee was payable on the liability sought to be imposed or the value of the assets of S in the hands of defendants 2 to 5, upon which the liability was to be imposed, whichever was less.

STAMP REFERENCE in first appeal from the decision of the Subordinate Judge of Moradabad.

A. M. Khwaja for the appellants.

The following judgment was delivered by

KING, J.—This is a reference under S. 5 of the Court-fees Act, 1870. King, J.

The suit was for Rs.8,333-5-4 as the plaintiffs' share of the dower of their deceased daughter who was married to defendant No. 1. Rs.2,994-0-8 were also claimed as interest. The trial court decreed the plaintiff's suit for Rs.8,333-5-4 against the person and personal property of defendant No. 1 but refused to pass a decree against the assets of Sibte Hasan in the possession of defendants 2 to 5. The claim for interest was dismissed.

The plaintiffs in this appeal claim a further sum of Rs.2,166-10-8 on account of interest. They also ask that the suit may be decreed against the assets of Sibte Hasan in the hands of defendants 2 to 5. An *ad valorem* court-fee has been paid on the amount of interest claimed. In respect of the relief that the suit be decreed against the assets of Sibte Hasan in the hands of defendants 2 to 5, a court-fee of Rs.10 only has been paid.

The Stamp Reporter contends that the court-fee in respect of this relief is payable *ad valorem* on the value of the assets of Sibte Hasan and that there is a deficiency of Rs.345 in the court-fee paid.

The appellants' counsel urges that he only seeks a declaration that the assets of Sibte Hasan in the hands of defendants 2 to 5 shall be made liable for the decretal amount, and if a court-fee is payable on the value of such assets, then it is impossible to put a money value upon the assets and therefore a court-fee of Rs.10 is sufficient under Art. 17 (*vi*) of the Second

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*Stamp Ref. in F. A. 256 of 1930

CIVIL

1932

SABIR HUSAIN v. FARZAND HASAN

King, J

Schedule.

I am unable to accept the appellants' contention. They seek to make defendants 2 to 5 liable for a sum of Rs.10,500 to the extent of the assets of Sibte Hasan which may be in their possession. The value of the subject-matter in dispute in this appeal therefore should, in my opinion, be held to be the value of the assets of Sibte Hasan in the possession of defendants 2 to 5, or the sum of Rs.10,500 claimed by the appellants, whichever is less.

The appellants have relied upon *In re Ujagar Lal* v. *Mohan Kunwar*[1]. In that case, the plaintiff claimed to recover a certain sum by enforcement of a mortgage upon two immovable properties *P* and *K*. The trial court decreed the plaintiff's claim for a certain sum, but annexed a condition that the property *P* be first proceeded against and only in the event of its not satisfying the decretal amount, recourse may be had to property *K*. The plaintiff appealed claiming *inter alia* that the condition in the decree be set aside and that he be allowed to proceed against both the properties at once. The court held that in respect of this relief, a court-fee of Rs.10 only was payable, apparently on the ground that it was not possible to estimate this relief at a money value. I think this ruling can be clearly distinguished upon the facts. In that case, both the properties mortgaged were made liable for the satisfaction of the decretal amount, the only restriction imposed upon the decree-holder being that he should proceed first against the property *P* before having recourse to property *K*. In the present case, the trial court has entirely excluded the assets of Sibte Hasan in the hands of defendants 2 to 5 from liability for the decretal amount. The appellants now seek to make this property liable. If they succeed, then they could recover the whole amount of Rs.10,500 from defendants 2 to 5 to the extent of the assets of Sibte Hasan in their possession. In these circumstances, I think the decision in *Kachera* v. *Kharag Singh*[2] which follows the Full Bench ruling of the Madras High Court in *Kesavarapu* v. *Kotta Kota Reddi*[3] and the decision in *Jugal Pershad Singh* v. *Parbhu Narain Jha*[4], *Amir Chand* v. *Kanhaya Ram*[5] and *Ramasami* v. *Subbusami*[6] are applicable. I take the correct view to be, in accordance with these rulings, that so far as the appellants seek to render the property in the hands of defendants 2 to 5 liable, the court-fee is payable *ad valorem* on the liability sought to be imposed, namely, Rs.10,500 or the value of the assets of Sibte Hasan in the hands of defendants 2 to 5, upon which the liability is to be imposed, whichever is less. I am quite unable to accept the view that Art. 17(*vi*) applies. It may be difficult to make an exact estimate of the value of the assets, but it is clear that the assets have a money value and this clause cannot apply to the case of property which clearly has a money value, although it may be difficult to estimate such value correctly. The appellants should be required to state the value of such assets and this valuation will govern the amount of the court-fee payable in the first instance. The court-fee payable on this relief will be in addition to the *ad valorem* court-fee which has already been paid in respect of the interest claimed by the appellants both against defendant No. 1 and against the assets in the hands of the other defendants.

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[1] [1886] A. W. N. 312

[2] I. L. R. 33 All. 20=7 A. L. J. 842

[3] I. L. R. 30 Mad. 96

[4] I. L. R. 37 Cal. 914

[5] 16 I. C. 777

[6] I. L. R. 13 Mad. 508

CIVIL

1932

Jan. 15

MUKERJI, J.
BENNET, J.

BHAGWATI PRASAD, RAIS, ALINAGAR, GORAKHPUR— IN THE MATTER OF*

Income-tax Act, Secs. 30 and 23 (4)—Assessment under Sec. 23 (4)—Appeal by assessee—On the ground that case did not fall within Sec. 23 (4)—Appeal not admitted without hearing assessee or his counsel.

An assessment under Sec. 23 (4) of the Income-tax Act of 1922 having been made against the assessee, he filed an appeal before the Assistant Commissioner contending that the Income-tax Officer was not justified in treating the case under Sec. 23, Sub-sec. 4. The Assistant Commissioner, after scrutinizing the order and the memorandum of appeal behind the back of the assessee or his counsel, came to the conclusion that the order had been rightly made and refused to admit the appeal. *Held,* that the Assistant Commissioner must satisfy himself on hearing the assessee or his counsel and not by an *ex parte* examination of the record in his chambers, that the case fell within the purview of Sec. 23 (4), and was, therefore, not open to appeal.

REFERENCE submitted by the Commissioner of Income-tax.

K. N. Katju and *A. Sanyal* for the applicant.

U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is a reference by the learned Commissioner of Income-tax, made in pursuance of an order of this Court, dated June 19, 1931.

It appears that an assessment under Section 23 (4) of the Indian Income-tax Act of 1922 was made against the assessee, one Babu Bhagwati Prasad of Gorakhpur. He filed an appeal before the Assistant Commissioner and one of his contentions was that the income-tax officer was not in the circumstances justified in treating the case as one falling under Section 23, Sub-section (4).

The Assistant Income-tax Commissioner scrutinized the memorandum of appeal and the assessment order of the Income-tax officer, but he did so behind the back of the assessee or his counsel. He came to the conclusion that the order under Section 23 (4) had been rightly made, in the circumstances of the case. He refused to admit the appeal and directed that the appellant, the assessee, should be informed of the fact. The assessee went before the Commissioner of Income-tax, and he contended that the Commissioner should state the case before this Court. The Commissioner having declined, the assessee came to this Court and he obtained the order, dated June 16, 1931.

The two questions that really arose in the case were indicated in the order of this Court and were:

(1) Was the assessee entitled to be heard before the Assistant Commissioner in order to show that in the circumstances of the case the Income-tax Officer was not justified in making an assessment under Section 23, Sub-section (4)?

(2) Was the notice issued under Section 22, Sub-section (4) rightly issued, although an inquiry into the assessment had started?

The learned Commissioner in stating the case has framed the ques-

*Mis. Case 58 of 1931

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1932

BHAGWATI PRASAD *In re*

Mukerji, J.

tion No. (2) but in framing the question No. (1) has missed the point that really arose for decision.

It has been held in this Court in two cases, and that opinion has been followed by the Bombay High Court, that it is open to a High Court to resettle the issues arising in the case and to answer them. The cases decided in this Court are *Shiva Prasad Gupta* v. *Commissioner of Income-tax, U. P.*[1], *Kajori Mal Kalyan Mal of Generalganj, Cawnpore—In the matter of*[2]. The Bombay case is *The Commissioner of Income-tax, Bombay Presidency, Bombay* v. *The National Mutual Life Association of Australasia, Limited*[3].

We consider that in this case we ought to resettle the first issue and answer it. It is obvious that if the issue No. (1) be answered in the affirmative, the issue No. (2) will not require any answer, nor will the issue No. (3) as framed by the learned Commissioner.

The contention of Dr. Katju on behalf of the assessee is that the mere fact that the Income-tax Officer quoted Section 23, Sub-section (4) in his assessment order, was not enough to preclude an appeal. To shut out an appeal there must be a genuine case under Section 23, Sub-section (4). The Assistant Commissioner in hearing an appeal must satisfy himself, on hearing the assessee or his counsel, and not by an *ex parte* examination of the record in his chambers, that the case fell within the purview of Section 23, Sub-section (4) and was therefore, not open to appeal. The learned Government Advocate has argued that Section 27 furnishes the real remedy of the assessee and that instead of appealing he should follow the procedure laid down in Section 27.

We are of opinion that Section 27 is applicable to the particular cases noted therein, and the present case does not fall within the purview of Section 27. Further, where Section 27 is applicable, it may still be open to the assessee, if he has a good case, to file an appeal and to show that the order under Section 23, Sub-section (4) was not justified.

Our view is supported by two Full Bench decisions of the Patna and Punjab High Courts respectively and they are *Kunwarji Ananda* v. *Commissioner of Income-tax, Bihar and Orissa*[4] and *Duni Chand* v. *the Commissioner of Income-Tax*[5].

Our answer to the issue No. (1) as resettled above, is that the Asssistant Commissioner should have heard the assessee or his counsel and then should have decided whether the case really fell under Section 23 (4) of the Income-tax Act.

As no other question arises, we direct that a copy of this judgment be sent under the seal of the Court to the Commissioner of Income-tax. The Government must pay the costs of this reference to the assessee. The Government Advocate is entitled to a fee of Rs.100 to which he will certify within the period allowed by the rules of this Court. There was a previous hearing of this case on June 19, 1931, and we assess the fee of the learned Government Advocate for that day at the same figure of Rs.100. The gentleman, who officiated as the Government Advocate on that day, will on receipt of the fee certify within the prescribed period.

[1] A. I. R. 1929 All. 819

[2] Mis. Case 6 of 1929=28 A. L. J. R. 78

[3] I. L. R. 55 Bom. 637

[4] A. I. R. 1931, Pat. 306

[5] I. L. R. 10 Lah. 596

CIVIL

1932

Jan. 22

SULAIMAN, J.
YOUNG, J.

NATHU RAM (*Opposite party*)
versus
MADAN GOPAL (*Objector*)*

Provincial Insolvency Act, Secs. 68 and 4—Attachment by official receiver in pursuance of court's order—Application challenging attachment made more than 21 days after attachment—Sec. 68 inapplicable—Court entitled to decide question of title under Sec. 4.

The official receiver attached certain property alleged to belong to the insolvent *under an order of the insolvency court.* Later on the objection of the son of the insolvent the insolvency court decided that the house belonged to the son, and released it from attachment. The objection was made more than twenty-one days after the attachment by the receiver. *Held,* that Sec. 68 did not apply and the objection was not barred by time. The objector was not challenging the act of the receiver, but the order of attachment passed by the court *ex parte,* and it was open to the court, acting under Sec. 4, to enquire into the question of title and adjudicate upon the rights of the objector.

Bhairon Prasad v. *S. P. C. Das,* 17 A. L. J. R. 787 and *Husaini* v. *Muhammad Zamir Abedi,* 74 I. C. 802 *distinguished.*

SECOND APPEAL from an order of G. O. ALLEN ESQ., District Judge of Agra.

S. N. Seth and *Raj Narain Singh* for the appellant.

Nanak Chand for the respondent.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an appeal arising out of an insolvency proceeding. On an application made by a creditor the insolvency court ordered the official receiver to take possession of certain property alleged to belong to the insolvent. The official receiver, in pursuance of the said order, attached this property on June 8, 1929. On July 2 the son of the insolvent applied to the insolvency court alleging that the property was his own property. The insolvency court decided that the house belonged to the son, and released it from attachment. In that court no objection was taken that the application to the court had been made more than 21 days after the attachment by the receiver.

An appeal was preferred to the District Judge, before whom it was urged that the application having been made more than 21 days after the date of the attachment, it should not have been entertained.

The learned Judge has overruled this contention, and in our opinion rightly. The house was attached under an order of the insolvency court, and not by any independent decision of the official receiver. The actual attachment was a mere ministerial act done in pursuance of the order of the court. The objector was not challenging the act of the receiver, who had no voice in the matter, but the order of attachment passed by the court *ex parte.* It seems to us that it was not an act or decision of the receiver within the meaning of Section 68. On the other hand, it was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title, and it fell within the scope of Section 4 of the

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*S. A. F. O. 3 of 1931

Civil

1932

Nathu Ram v. Madan Gopal

Sulaiman, J.

Provincial Insolvency Act. It was open to the court to enquire into the question of title and adjudicate upon the rights of the objector. The learned District Judge is not wrong in holding that the application was not barred by time.

The learned advocate for the appellant relies on the case of *Bhairon Prasad* v. *S. P. C. Dass*[1] and *Husaini* v. *Muhammad Zamir Abedi*[2]. But in those cases there was not any order of the court directing attachment, but the act complained against was an act of the receiver himself. Those cases are, therefore, distinguishable.

It is further urged that owing to some misapprehension on the part of the counsel for the appellant, he did not press all the points in the grounds of appeal before the District Judge and confined the argument to this question of limitation only. The learned District Judge in refusing to rehear the case has pointed out that he does not believe that there was any misunderstanding. After arguments had been heard the case was put down for delivery of judgment, and not for further hearing on the next date. In these circumstances, if the counsel did not advance any arguments on some of the grounds of appeal, it must be assumed that he had abandoned them. The appeal is accordingly dismissed with costs.

Appeal dismissed

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[1] 17 A. L. J. R. 787

[2] 74 I. C. 802

Civil

1932

Jan. 29

Sulaiman, J.
Young, J.

SRIDAT (*Applicant*)
versus
MOHAR SINGH AND ANOTHER (*Opposite party*)*

Civil Procedure Code, Or. 21, Rule 92 and Sec. 151—Whether sale can be set aside outside the provisions of Order XXI—Auction-purchaser under honest mistake—That amount for which property was knocked down included mortgage money also—Whether court can set aside sale.

Where the court set aside a sale on the ground that the auction-purchaser was under an honest mistake that the amount for which the property was knocked down included the mortgage money also, and the auction-purchaser was not misled by anything done or said by the sale officer, *held*, that there is no inherent jurisdiction in a court to set aside a sale outside the provisions of Order XXI, and the order of the court was *ultra vires*.

Where the Collector is appointed the sale officer by the court, it is he who has to sell the property and to declare the purchaser. *Jai Bahadur Jha* v. *Matukdhari Jha*, I. L. R. 2 Pat. 548 *not followed*.

Civil Revision from an order of I. B. Mundle Esq., District Judge of Saharanpur.

M. L. Agarwala for the applicant.

S. N. Seth for the opposite parties.

The judgment of the Court was delivered by

Sulaiman, J.

Sulaiman, J.—This is an application in revision by the judgment-debtor arising out of a proceeding relating to the sale of his property. Shiam Lal had a money decree against Shri Datt, in execution of which the zamindari property of the judgment-debtor was attached. The court,

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*Civ. Rev. 235 of 1931

Civil
1932
Sridat
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Mohar
Singh
Sulaiman, J.

acting under Chapter 4, Rule 11(2) of the General Rules (Civil), appointed the Collector as the sale officer to conduct the sale. The sale proclamation stated that the amount of the decree was Rs.3,300, the encumbrances on the property attached amounted to Rs.2,000 and the estimated value of the property was Rs.2,500. The property was put up at auction and several bids were made, including a bid by the decree-holder himself up to Rs.2,300 which was followed by a bid made by the respondent auction-purchaser for Rs.2,400. The property was knocked down to him. When asked to deposit ¼th of the sale price, the auction-purchaser expressed his astonishment and told the sale officer that he had thought that the amount for which the property was knocked down included the mortgage money also. The sale officer considered that the auction-purchaser was honest in his statement, and reported to the civil court that the property might be resold. On the receipt of the report of the sale officer, the court ordered: 'I agree with the sale officer. Let the property be sold again'. The judgment-debtor appealed from this order to the District Judge, who dismissed the appeal holding that the order had not been passed under O. 21, R. 92 and no appeal lay to him. The learned Judge thought that the court had in the exercise of its inherent jurisdiction under Section 151 C. P. C. set aside the sale.

In revision the judgment-debtor challenges the propriety of the order of the first court. There is no doubt that no material irregularity in the conduct of the sale was committed, because the sale officer correctly announced the price as given in the proclamation of sale. We may assume in favour of the auction-purchaser that he himself was under some misapprehension or mistake. The decree-holder who was following close with his bids could not have been under any such misapprehension. The learned advocate for the respondent has argued that under Or. 21, R. 84 no person can be declared to be the purchaser until the court itself has declared him to be the purchaser. He relies on the case of *Jaibahadur Jha* v. *Matukdhari Jha*[1]. That case, apparently proceeded on the special practice which prevails in Behar. We are not concerned with that in this case. Here the Collector was appointed the sale officer by the court, and it was he who had to sell the property and to declare the purchaser. It was the sale officer who had to demand the deposit of 25 per cent of the purchase money, under Rule 84. Previous to his making such a demand, he necessarily declared the respondent to be the purchaser. Under our Rules the declaration is not made by the court. If the respondent makes default, the property may have to be resold, and he would be liable to make good the deficiency, if any.

We are of opinion that the purchaser is not entitled to have the sale set aside on the ground of any misapprehension or mistake on his own part, when he was not misled by anything done or said by the sale officer. A unilateral mistake cannot avoid a contract. There appears to be no inherent jurisdiction in a court to set aside a sale outside the provisions of O. 21. There is an express provision in Rule 92 to the effect that where no application is made under Rules 89, 90 or 91, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute. This precludes the court from setting aside a sale on any other ground. We are, therefore, of opinion that the order of the court setting aside the sale after the property had been knocked down, and when there was no irregularity or fraud, was *ultra vires* and cannot be allowed to stand. The learned District Judge was right in holding that no appeal lay to him. We accordingly allow this application in revision, and setting aside the order dated May 1, 1930 passed by the Subordinate Judge, send the case back to him to proceed with it and dispose of it according to law. The applicant will be entitled to his costs of this revision from the respondent.

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[1] I. L. R. 2 Pat. 548

CIVIL
1932
Jan. 26
SULAIMAN, J.
BANERJI, J.
KING, J.

SWADESHI COTTON MILLS CO. LTD.—IN THE MATTER OF*

Stamp Act, Sec. 2(10) and Companies Act, Sec. 104—Deed of conveyance—Test of—Agreement to transfer business, good will, etc.—Agreement for allotment of shares in future—Duty to be paid.

If the parties choose to be satisfied with a mere contract for sale, without an actual deed of sale, stamp duty payable on a conveyance cannot be demanded. *The Commissioners of Inland Revenue* v. *G. Angus and Co.*, [1889] 23 Q. B. D. 579 at 593 *followed.*

The proprietors of a private firm called 'the vendors' of the one part and the Swadeshi Cotton Mills Co. Ltd. called 'the company' of the other part entered into an agreement which provided that the vendors shall sell all their business undertakings and assets, including good will, free-hold plant, etc., that the purchase was to be completed on such date as might be arranged mutually between the parties, and possession of the premises was to be given to the company on the completion of the purchase, that in the meantime the vendor was to carry on the business on behalf of the company, that part of the consideration be paid by allotment of shares in the company, and that the costs of all the documents required for the purpose of transferring the properties agreed to be sold were to be paid by the company. After the execution of this agreement a sale deed was executed by the vendors in respect of the immovable property but no subsequent deed of transfer was executed as regards the good will or the movable properties. The allotment of shares was made subsequent to the agreement which bore a stamp of eight annas only, and was filed with the Registrar of the Joint Stock Companies under Sec. 104 of the Companies Act (VII of 1913). *Held*: that the instrument in question could not be regarded as a deed of conveyance but was only an agreement for which the duty due under the Stamp Act was fully paid.

There is nothing in the provisions of Sec. 104 of the Companies Act which requires that a duty payable on a conveyance should be levied on an agreement for the allotment of shares by a company in future.

ORDER on reference submitted by the Junior Secretary, Board of Revenue.

K. N. Katju and *M. N. Kaul* for the Swadeshi Cotton Mills Ltd.
U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

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*Mis. Case 684 of 1931

Civil
1932
Swadeshi Cotton Mills Co. Ltd. In re
Sulaiman, J

SULAIMAN, J.—This is a reference from the Board of Revenue under the Stamp Act. The instrument in question is an agreement dated January 26, 1921 between Messrs. Horsman who were the proprietors of a private firm carrying on business under the name of Swadeshi Cotton Mills called "the vendors" of the one part and the Swadeshi Cotton Mills Co. Ltd. called "the company" of the other part. The vendors agreed to sell all their business undertakings and assets as from January 1, 1930, including good will, free-hold hereditaments, plants, machinery, etc., contracts, outstanding debts and other goods, with the exception of profits for a short period which had to be assessed on a certain basis and some furniture. The nominal capital of the Company was Rs.30,00,000 which was divided into 15,000 preference shares and 15,000 ordinary shares of Rs.100 each. Part of the consideration consisted of the allotment of all the shares with the exception of 33 ordinary shares, the consideration for the costs of stores, etc., was to be their market value, and as for the residue of the consideration the company was to pay all the outstanding debts.

The agreement stated:

> Now it is agreed and declared (that) the vendors shall sell and the Company shall purchase with effect as on and from January 1, 1920, etc.

It again recited that

> the purchase shall be completed on such date as may be mutually arranged between the parties hereto with effect as on and from the said January 1, 1920, possession of the premises shall be given to the Company on the completion of the purchase.

It was repeated that 'the possession of the said lands and premises shall be retained by the vendors up to completion' and in the meantime the vendors shall carry on the business as heretofore and shall be deemed to be carrying it on for and on behalf of the company as from January 1, 1920. The agreement further provided that all the necessary parties

> shall at the expense and cost of the company execute and do or cause to be executed and done, all such leases assurances and things for vesting the said premises in the company.

It also stated that the costs of

> all documents and things required for the purpose of transferring the properties hereby agreed to be sold to the company

shall be paid by the company.

After the execution of this document a sale deed dated November 8, 1922 was executed by the vendors in respect of the immovable property but no subsequent deed of transfer was executed as regards the good will or the movable properties. It however appears that this very agreement was filed with the Registrar of the Joint Stock Companies under Section 104 of the Indian Companies Act (No. 7 of 1913) after the allotment of shares had been made subsequent to the agreement.

The learned Government Advocate on behalf of the Board of Revenue contends that the agreement was in substance a deed of conveyance of movable properties as defined in Section 2(10) of the Stamp Act and a contract of sale in respect of the shares within the meaning of Section 104 of the Companies Act, and should therefore have been stamped as a deed of transfer. The instrument was stamped as a mere agreement and bore a stamp of eight annas only.

The language of the instrument as quoted above on the face of it, shows that it was a mere contract entered into between the parties, which was to be subsequently completed although the parties intended that when completed it should take effect from January 1, 1920. So far as the immovable properties were concerned there was a subsequent deed of transfer in pursuance of this agreement. So far as the movable properties were concerned, their transfer could take place by mere delivery and there was no necessity to execute a fresh deed of transfer. The only difficulty was about the good will which could not be 'delivered.' It seems to us that if the parties chose to be satisfied with a mere contract for sale, without an actual deed of sale, stamp duty payable on a conveyance cannot be demanded. By entering into a mere contract short of an actual conveyance they run a certain amount of risk. If either party resiles from the contract, the other party may have to institute a suit for specific performance of the contract. Trouble may also arise if the vendors subsequently convey the property to a *bona fide* transferee for value. But if in spite of this risk the parties refrain from getting an actual deed of conveyance prepared, they can successfully evade the payment of higher duty. As observed by Lord Esher in *the Commissioners of Inland Revenue* v. *G. Angus and Co.*[1].

> But it is said that if the appeal be decided against the Commissioners purchasers will rest satisfied with an agreement of which specific performance would be declared and will not go on to execute a conveyance, and so the Crown will lose the stamp duty and it is rather suggested that this would be cheating the Crown and committing a fraud. The Crown, however, must make out its right to the duty, and if there be a means of evading the stamp duty, so much the better for those who can evade it. It is no fraud upon the Crown, it is a thing which they are perfectly entitled to do. The Crown cannot have the stamp duty unless the parties to the sale chose to effectuate the transaction by an instrument which of itself conveys the property, and, if they chose to be satisfied with something less, the matter is not brought within Section 70 (of the Stamp Act of 1870).

It was also observed in the same case that even the good will of the business did not pass by the instrument, which was a mere contract to sell the business, premises and good will, etc. The learned Government Advocate relies on the Civil Reference under Section 46 of the Indian Stamp Act (I. L. R. 20 Bombay 432). But in that case, apart from the agreement to transfer the business, good will, assets, etc., there was an actual grant of the premises valued at Rs.1,50,000, which grant the other party confirmed. The learned Judges treated it as a conveyance of the premises for Rs.1,50,000 and the stamp duty was charged on this sum only. The agreement to transfer the business, goodwill, etc., was not treated as a deed of conveyance and duty on its value was not charged as on a conveyance. In this sense this case actually supports the company.

Having considered the agreement as a whole, we are of opinion that it cannot be regarded as a deed of conveyance, but is only an agreement for which the duty due under the Stamp Act has been fully paid.

It is not for us to consider whether the Registrar of the Joint Stock

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[1] [1889] 23 Q. B. D. 579 at 593

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Sulaiman, J.

Companies was right or wrong in accepting this agreement as a contract of sale under Section 104 of the Indian Companies Act. The allotments of shares were to be made after this agreement was executed. The allotments were in fact made subsequently. We do not think that there is anything in the provisions of Section 104 of the Indian Companies Act which requires that a duty payable on a conveyance should be levied on an agreement for the allotment of shares by a company in future.

This is our answer to the reference.

MAHABIR PERSHAD AND ANOTHER
versus
CHITTOO LAL AND OTHERS*

Civil

1932

Feb. 12

Sulaiman, J.
Young, J.

Pre-emption Act, Secs. 9 and 20—Sale of Sir land—Vendor becomes ex-proprietary tenant—Right of pre-emption accrues in favour of plaintiffs—Before institution of suit for pre-emption vendee sells property back to vendor—Whether Sec. 9 bars suit for pre-emption.

On a sale of *Sir* lands, the vendor became an ex-proprietary tenant, and a right of pre-emption under Sec. 11 of the Pre-emption Act accrued in favour of the plaintiffs against the vendee. Before the institution of a suit for pre-emption the vendee sold the property back to the vendor. The suit for pre-emption was instituted within one year of the original sale. *Held,* (1) that Sec. 9 did not apply, as it did not say that if property ultimately passed on to an ex-proprietary tenant the right of pre-emption previously acquired was automatically extinguished; (2) that Sec. 20 applied, and the suit was maintainable against the subsequent transferee who, being an ex-proprietary tenant, had no right of pre-emption equal or superior to that of the plaintiffs.

SECOND APPEAL from a decree of J. C. MALIK ESQ., Additional Subordinate Judge of Fatehpur, reversing a decree of N. P. SANYAL, Munsif.

S. N. Seth and *S. B. L. Gaur* for the appellants.

Kirpa Shankar Misir for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is a plaintiffs' appeal arising out of a suit for pre-emption. On July 5, 1927 Chittu Lal sold his *sir* rights to Madari with the result that he became ex-proprietary tenant of the plots. He transferred his entire proprietary interest and ceased to be a co-sharer. Subsequently on May 30, 1928 apparently on getting notice of the claim of pre-emption, Madari sold the property back to Chittu Lal. The suit for pre-emption was instituted on July 4, 1928, i.e., within one year of the original sale deed. In the plaint the plaintiffs mentioned the dates of both the documents and also stated that the cause of action arose on both the dates and they wanted a decree for pre-emption as against both the defendants. The claim was decreed by the first court but the lower appellate court has dismissed the suit holding that there has been a transfer to an ex-proprietary tenant within the meaning of Section 9 of the Agra Pre-emption Act and the suit is not maintainable.

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*S. A. 987 of 1929

There is no doubt that so far as the second sale of May 30, 1928 is concerned no right of pre-emption accrued on it. Section 9 makes it quite clear that no right of pre-emption accrues on a sale to an ex-proprietary tenant. Therefore if a suit had been brought more than one year after July 5, 1927, the plaintiffs would not have been entitled to pre-empt the property as against Chittu Mal on the strength of the transfer made to him on May 30, 1928. But there can also be no doubt that the right to pre-empt accrued under Section 11 of the Act on July 5, 1927 in favour of the plaintiffs against Madari, and Chittu Lal is a subsequent transferee and therefore a representative of Madari. The right of pre-emption thus accrued must subsist unless it has been extinguished. Section 9 does not say that if property ultimately passes on to an ex-proprietary tenant the right of pre-emption previously accrued is automatically extinguished. It only lays down that no right of pre-emption shall accrue on a sale to such a tenant. It is Section 20 which is applicable to a case where property is reconveyed by a vendee to another person before the institution of the suit. If the property is transferred to a person having a right of pre-emption equal or superior to that of the plaintiff then no suit shall lie. It is therefore obvious that a suit can be brought against Chittu Lal, who being an ex-proprietary tenant, has no right of pre-emption equal or superior to that of the plaintiffs. A right of pre-emption as defined in Section 4(9) means the right of a person on a transfer of immovable property to be substituted in place of the transferee by reason of such right. There is no explanation to Section 20 similar to that subsequently added to Section 12(3) which would justify the inference that an ex-proprietary tenant is to be deemed to have a right of pre-emption equal or superior to that of a co-sharer. Nor can any such inference be drawn from the language of Section 9. It seems to us that in view of the definition of the right of pre-emption given in the Act it is not possible to hold that an ex-proprietary tenant has a right of pre-emption equal or superior to that of a co-sharer. All that is provided is that no right of pre-emption shall accrue on a sale to him taking place, and not that a right of pre-emption which has already accrued shall be extinguished. We must accordingly hold that the plaintiffs' right of pre-emption subsists.

The lower appellate court has found that the correct sale price is Rs.208-3-3. We accordingly allow this appeal and setting aside the decree of the lower appellate court restore the decree of the court of first instance, and extend the time for payment by two months from this date. If the amount is deposited within the time allowed the plaintiffs will have their costs from the defendant Chittu Lal. If the amount is not deposited within the time allowed, the suit shall stand dismissed with costs in all courts.

CRIMINAL

1932

Feb. 16

SULAIMAN, J.
YOUNG, J.

NAZIRAN (*Applicant*)
versus
KING-EMPEROR THROUGH MUNICIPAL BOARD, AGRA
(*Opposite party*)*

Municipalities Act (Local Act II of 1916), Sec. 298H(e)—Bye-law under—Prohibits prostitutes from residing within the municipal limits except certain streets—Whether bye-law ultra vires.

Where a municipality frames a bye-law under Sec. 298H(*e*) of the U. P. Municipalities Act prohibiting public prostitutes from residing 'within the municipal limits' except certain streets, *held,* that having regard to the definition of 'municipality' in Sec. 2(9) of the Act, the municipality is itself an area the limits of which are defined and specified, and the bye-laws themselves show what the municipal limits are, and therefore the mention of such limits with the exception of certain parts of it, does amount to specifying a particular area within the meaning of Sec. 298H(*e*), and the bye-law is not *ultra vires.*

Where a municipality framed a bye-law prohibiting public prostitutes from residing 'within the municipal limits' except certain streets, but the exception permitted those who owned houses within the area other than the streets excepted, to continue to reside in such houses, *held,* that reading the whole bye-law together with the exception in it, there was no absolute prohibition against prostitutes residing within the specified area, and the bye-law was *ultra vires. Chanchal* v. *King-Emperor,* [1932] A. L. J. R. 28 *followed.*

CRIMINAL REFERENCE made by J. N. MUSHRAN ESQ., Sessions Judge of Agra.

The following is the Referring Order:—

BENNET, J.—This is a criminal reference by the learned Sessions Judge of Agra, forwarding an application in revision of one Mst. Nasiran, a prostitute, against a sentence of 8 annas fine per day passed on her under Section 299 of the Municipalities Act, U. P. Act II of 1916. She had been convicted of residing in Takeri Gali in Agra City on the complaint of the Municipal Board and of plying her trade as a prostitute there. The conviction was under a bye-law of 1917 made by the Municipal Board as follows:—

No public prostitute shall reside in any house or building or ply her trade within the municipal limits, excepting on both sides of the street beginning from shops Nos.3215 and 3096 in Phulatti Bazar down to Kinari Bazar up to shops Nos. 2007 and 4765 and from there on both sides of the street in Kashmiri Bazar down to Malka Bazar cross road shops Nos. 2723|II and 2175 on each side of the street."

This bye-law was framed by the board in virtue of the power given by Section 298H(*e*) of the U. P. Municipalities Act, Act II of 1916. This Section empowers a municipal board to make bye-laws for the following purposes among others.

"Prohibiting in any specified street or area, the residing of public prostitutes and the keeping of a brothel or the letting or other disposal of a house or building to public prostitutes or for a brothel."

The ground which has been taken in revision is that there is a decision of a learned single Judge of this Court dated May 18, 1931—*Mst. Muhammadi* v.

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* Cr. Ref. 718 of 1931

K.-E. through the Municipal Board of Agra, Criminal Revision No. 147 of 1931, in which it has been held that the bye-law in question is *ultra vires.* As I find that I cannot agree with this view of Section 298H(*e*), I therefore forward this criminal reference to the learned Chief Justice with a recommendation that this case should be laid down before a bench of two Judges.

The view of Section 298H(*e*) which I take is as follows:—The sub-section begins with the words "prohibiting, in any specified street or area, the residing of public prostitutes". The word which has to be interpreted is the word "area". In a municipality it appears to me that for the purpose of residence there are four units of area as follows:—

(1) Houses, (2) streets, (3) mohallas, (4) Municipality. It does not seem to have been previously argued that the word "municipality" can mean an area, but I find in Section 2(9) of the Act the definition of "Municipality" as follows: "Municipality" means any local *area* which is a municipality by reason of a notification issued under Section 3 or, subject to the provisions of the said Section, any local area which was a municipality at the time immediately preceding the commencement of this Act".

I consider therefore that the word "area" in Section 298H(*e*) must include the word 'area' used in Section 2(9), and therefore the municipality itself must be an area in regard to which the Municipal Board may prohibit the residence of public prostitutes. From this it would follow that a municipal board may either prohibit the residence of public prostitutes in any particular house or street or mohalla or any number of the above areas or in the municipal area itself, and if it may prohibit the residence of public prostitutes in the whole municipal area it may prohibit the residence of public prostitutes in the whole municipal area less any particular part. The reasoning in Criminal Revision No. 147 of 1931 is based entirely on the argument that the bye-law in question did not specify an area within which public prostitutes were prohibited from residing. This reasoning is based on the supposition that the words "within municipal limits", do not mean an area. I have pointed out that the definition of municipality in Section 2(9) shows that municipality does mean an area. There is therefore in the bye-law in question in the first clause a prohibition against public prostitutes residing in an area, that is within the municipal limits. The remainder of the clause excepts certain parts of the municipal area from the prohibition. I am not able to see anything in the bye-law which is beyond the powers granted to the municipal board by Section 298H(*e*).

A further argument was addressed to me by learned counsel to the effect that the bye-law was unreasonable. I consider that it would be necessary for the applicant in revision to prove by evidence that the bye-law in question was unreasonable, and there is no evidence on this point on the record. I note that the plea was put forward by learned counsel in Criminal Revision No. 147 of 1931 and was rejected, and in that case it was put forward on an oral statement by learned counsel as regards the facts of the exempted area. It is obvious that a matter of this nature must be proved by evidence and not by allegations of counsel on matters of fact. For the reasons noted above I forward this criminal revision to the learned Chief Justice.

Shiva Prasad Sinha for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This case has been referred to a Division Bench because a learned Judge of this Court differed from the opinion expressed in Criminal Revision of *Muhammadi* v. *King-Emperor*[1]. The Municipality of Agra made the following bye-law in 1917:—

> No public prostitute shall reside in any house or building or ply her trade within the municipal limits, except on both sides of the streets.

The accused is a public prostitute carrying on her trade and residing in a place not within the excepted streets. She had been fined thrice before and was found guilty of continuing her trade. Accordingly the magistrate convicted her again and imposed a fine of eight annas per day for the period during which it was found that she had broken the bye-law.

The learned Sessions Judge has referred the case to the High Court in view of the decision in the Criminal Revision referred to above.

Power has been conferred on Municipal Boards under Section 298H(*e*) of the U. P. Municipalities Act (Act No. 2 of 1916) for making a bye-law for the following purpose among others:—

> Prohibiting in any specified street or area, the residing of public prostitutes and the keeping of a brothel or the letting or other disposal of a house or building to public prostitutes or for a brothel.

The definition of 'Municipality' as given in Section 2(9) of the Act is as follows:—

> Municipality means any local area which is a municipality by reason of a notification issued under Section 3 or, subject to the provisions of the said Section, any local area which was a municipality at the time immediately preceding the commencement of this Act.

It is therefore clear as pointed out by Bennet, J. that the Municipality is itself an area the limits of which are specified, well-known and defined. The bye-law undoubtedly prohibits public prostitutes from residing 'within the Municipal limits' except certain streets. It seems to us that the bye-law does specify the rest of the area within the Municipal limits other than the excepted streets as the area in which public prostitutes shall not reside. We can see no force in the contention that the area in which residence is prohibited must be a smaller area and not a larger area of the town. There is no such restriction. It is however not necessary in this case to decide whether the word 'area' may not include the entire area within the municipal limits. It has been suggested that there can be no specification of an area unless a bye-law mentions or names or designates particular streets or parts of mohallas. But when the bye-laws themselves show what the municipal limits are, the mention of such limits with the exception of certain parts of it, does amount to specifying a particular area.

A new point has been urged before us which apparently was not discussed before the learned Judge who referred this case to us. The bye-law as quoted in the order of reference is not complete. The last portion of it is as follows:—

"Exception—Prostitutes owning houses in places other than these mentioned above may continue to reside in such houses, but future acquisitions of property shall not entitle them to live and carry on their profession there."

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[1] [1932] A. L. J. R. 15

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NAZIRAN v. KING-EMPEROR

Sulaiman, J.

It is quite clear that reading the whole bye-law together with the exception in it, there is no absolute prohibition against prostitutes residing within the area other than the streets excepted. One class of prostitutes, namely, those who own houses, are still allowed to carry on their trade within such area. This involves an invidious distinction between the two classes of prostitutes. As held in *Chanchal* v. *King-Emperor*[2] there should be no discrimination of this kind; the prohibition must be general and of universal application within the specified area, and must not make an exception in favour of any particular group or class of prostitutes.

In view of this last consideration we are of opinion that the bye-law, inasmuch as it failed to lay down an absolute prohibition within the specified area was *ultra vires*, and illegal.

The Municipal Board would be well advised to reconsider the bye-law so as to make it of a general application within specified areas where it intends that prostitutes should be prohibited from residing.

We accordingly accept this reference though on a ground different from that on which it was based, and setting aside the conviction of the accused acquit her of the offence with which she was charged.

Reference accepted
Conviction quashed

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[2] [1932] A. L. J. R. 28

CIVIL

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Feb. 25

SULAIMAN, J.
YOUNG, J.

THE OFFICIAL RECEIVER OF MORADABAD
versus
MURTAZA ALI AND OTHERS*

Provincial Insolvency Act (V of 1920), Sec. 28, and Tenancy Act (III of 1926), Sec. 264—Whether insolvency law applicable to suits and proceedings under the Tenancy Act.

Before the coming into force of the Tenancy Act of 1926 the law was that provisions of the insolvency law did not apply to proceedings in the revenue court. But that portion of Sec. 193 of the old Tenancy Act (II of 1901) which had the effect of making the insolvency law inapplicable to cases under the Tenancy Act has been deleted from the corresponding Sec. 264 of the new Act (III of 1926), and the bar has been automatically removed. *The Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the Tenancy Act.*

History of the law reviewed.

SECOND APPEAL from an order of D. C. HUNTER ESQ., District Judge of Moradabad.

S. N. Seth for the appellant.

Mushtaq Ahmad for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an appeal by the official receiver in insolvency from an order under Section 4 of the Provincial Insolvency Act. It appears that the respondent Murtaza Ali held a simple money decree for arrears of rent against Ahmad Ali, a thekadar. This decree was in execu-

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*S. A. F. O. 4 of 1931

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Sulaiman, J.

tion but before the property was attached the judgment-debtor was declared an insolvent on May 1, 1929. In spite of his insolvency, the decree-holder proceeded to attach certain zamindary properties belonging to his judgment-debtor, and they were put up for sale by the revenue court and sold at auction on March 25, 1930. When the sale was confirmed the official receiver moved the insolvency court under Section 4 of the Act for deciding the question whether any title had passed to the auction-purchaser by the revenue court's sale. The original insolvency court decided the point in favour of the official receiver holding that as a result of the insolvency of the judgment-debtor, his estate had become vested in the official receiver and no court other than the insolvency court was seized of the jurisdiction to sell the property. On appeal the learned District Judge came to a contrary conclusion. He pointed out that up to September 7, 1926, when the new Tenancy Act came into force, the law undoubtedly was that provisions of the insolvency law did not apply to proceedings in the revenue court. He then proceeded to ask himself the question whether the authors of the Tenancy Act really intended to alter the law which had stood for at least 30, if not 50, years, and whether the omission of all reference to the insolvency law was deliberate. He was also influenced in his view by a note in a certain pamphlet issued under the authority of the Government and by there being no reference to the alteration of the law in the reported debates held in the Legislative Assembly. He, therefore, came to the conclusion that it was very difficult to suppose that the legislature really intended that the law should be altered. He accordingly disallowed the application of the official receiver.

We agree entirely with the view taken by the learned District Judge that up to 1926 the law was as he has stated. We may briefly summarise the previous enactments, in order to make the point of view pressed by the District Judge clear.

Chapter 20 of the Code of Civil Procedure of 1877 (Act 10 of 1877) contained provisions relating to the insolvency of debtors. In the Rent Act of 1881 special procedure was laid down for suits between landlords and tenants, and the rules of civil procedure were applicable in some cases only. The Civil Procedure Code of 1882 (Act 14 of 1882), Chap. 20, dealt with insolvency proceedings. In Section 4, there was an express provision that nothing contained in the Code shall be deemed to affect any law prescribing special procedure for suits between landlords and tenants. Thus Chap. 20 of the Code dealing with insolvency matters was not applicable to suits between landlords and tenants. In the Tenancy Act of 1901, Section 193 in express terms made Chap. 20 of the Code inapplicable to all suits and proceedings under the Tenancy Act. It was accordingly held by a Full Bench of this Court in *Kalka Das* v. *Gajju Singh*[1] that the provisions of the Insolvency law did not apply to revenue cases. Section 56(2) of the Provincial Insolvency Act (Act 3 of 1907) expressly enacted that where in any enactment in force at the time of the commencement of the Act, reference is made to Chap. 20 of the Code of Civil Procedure of 1877 or of 1882, such reference, so far as may be practicable, shall be construed as applying to this Act. Under the same

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[1] 19 A. L. J. R. 439

Section Chap. 20 of the Code was repealed because the provisions relating to the insolvency of debtors were embodied in a separate Act. It, therefore, followed that the provisions of the Provincial Insolvency Act were inapplicable to cases under the Tenancy Act, in view of the exception contained in Section 193 of the latter Act. The new Code of Civil Procedure of 1908 did not alter the position in any way. The Provincial Insolvency Act (Act 5 of 1920) also contained Section 83, in which it was again provided that where in any enactment at the time of the commencement of the Act reference is made to Chap. 20 of the Code of Civil Procedure of 1877 or 1882, the reference shall, so far as may be practicable, be construed as applying to this Act. The result obviously was that the Insolvency Act of 1920, by virtue of the exception contained in Section 193 of the Agra Tenancy Act of 1901, remained inapplicable to cases in the revenue courts. The learned District Judge was, therefore, perfectly right in holding that this was the state of the law up to 1926 when the new Tenancy Act was passed.

But in order to interpret the provisions of the New Tenancy Act, when the sections themselves are clear, we cannot allow our minds to be influenced by the previous history of the law, and draw any inference as regards the supposed policy of the legislature. It is only in the case of ambiguity that previous legislation may be referred to in order to throw light on the interpretation of a particular section. But where the Act itself is clear, the presumption is that the legislature deliberately intended to alter the law, and we must interpret the sections as they now stand. If our interpretation in any way conflicts with the policy of the legislature, it is open to it to amend the Act.

Section 264 is the new section which in some ways corresponds to Section 193 of the old Act. It is the only section which makes the provisions of the Code of Civil Procedure of 1908 applicable to suits and proceedings under the Tenancy Act, subject to certain exceptions. The legislature had before it the previous provision in Section 193, under which Chap. 20 of the Code of Civil Procedure dealing with insolvency matters had been expressly excluded. But in enacting the new sections the legislature omitted any further reference either to that chapter of the old Code of Civil Procedure, or to the new Provincial Insolvency Act. Whether the omission was deliberate or accidental, it is not for us to speculate. The fact remains that that portion of Section 193 which had the effect of making the insolvency law inapplicable to cases under the Tenancy Act has been deleted from Section 264 of the new Act. The Provincial Insolvency Act is an Imperial Act and applies to all proceedings, except those which are excepted by it. Section 28 of the Act, which lays down that the property of an insolvent shall vest in the court or the receiver, as the case may be, itself contains an exception in Sub-section (5) as regards any property which is exempted by the Code of Civil Procedure, or "by any other enactment for the time being in force, from liability to attachment and sale in execution of any decree." There is no law in force which now makes the proceedings in insolvency inapplicable to a revenue suit or proceeding. The inapplicability of the Insolvency law to revenue cases depended mainly on the provision in Section 193 which made such

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law inapplicable. By deleting that provision from Section 264 of the new Act, that bar has been automatically removed. There is, therefore, nothing to prevent the applicability of the insolvency law to proceedings under the Tenancy Act. Whether the result is unfortunate or not, there can be no doubt that this is the result of the language of Section 264 as it now stands.

The learned District Judge himself felt this difficulty, and, therefore, suggested that "it is possible that Section 6 of the United Provinces General Clauses Act covers the point."

Sub-clause (*a*) of that section, which has been referred to, merely provides that when any Act repeals any enactment hitherto made, then, unless a different intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. This sub-section merely implies that a repealing Act does not bring into existence the previous Act which had been itself repealed by the repealed Act. For instance, the mere fact that the Tenancy Act of 1926 repealed the Tenancy Act of 1901 would not revive the Rent Act of 1881. The effect of the section in the General Clauses Act undoubtedly is that the fact of repealing the Tenancy Act of 1901 does not by itself revive anything not in force at the time when the repeal took effect. But the applicability of the insolvency law to revenue cases does not depend on the repealing Tenancy Act of 1926. The Insolvency Act applies, unless there is a bar to its application. It is that bar which has been removed in the new Tenancy Act.

We are, therefore, clearly of opinion that the Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the Tenancy Act because there is no bar to its applicability in existence. In this view of the matter, it is wholly unnecessary for us to consider what would be in accordance with public policy.

We are accordingly of opinion that the order passed by the original insolvency court was correct, and that the official receiver's application for a declaration that the auction sale held by the revenue court outside the insolvency proceedings did not pass any title to the auction-purchaser and that the sale proceeding was null and void as against him, should be allowed. We direct that the appellant shall have his costs from the respondents in all courts.

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1932
Feb. 18
NIAMAT-ULLAH, J.

MELA RAM GORWARA (*Applicant*)
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR, ALLAHABAD AND OTHERS
(*Opposite party*)*

Railways Act, Secs. 77 and 140—Suit for refund of over-charge—Not imperative to mention in plaint that refund had been demanded from railway—Notices purporting to be under Sec. 80 C. P. C. served on managers—Requirements of Sec. 77 complied with—Whether notices good.

There is nothing in Sec. 77 or 140 of the Railways Act which makes it imperative on a plaintiff to mention in the plaint that refund had been demanded from the railway administration in the manner required by law. If the fact is denied by the defendant but is proved from the evidence, the plaintiff's suit is not liable to be dismissed.

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*Civ. Rev. 551 of 1931

Where in a suit for refund of an over-charge in respect of goods carried by four state railways, it was proved that notices purporting to be those under Sec. 80 C. P. C. were served on the managers in the manner provided by Sec. 140, Railways Act and the notices substantially complied with the requirements of Sec. 77, Railways Act, *held*, that the mere fact that Sec. 80 C. P. C. was mentioned in the notices will not detract from their real character as demands made under Sec. 77 Railways Act.

CIVIL REVISION from an order of BABU KALI DAS BANERJI, Small Cause Court Judge of Allahabad.

Ajodhiya Prasad Verma for the applicant.

U. S. Bajpai for the opposite parties.

The following judgment was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This is an application for revision from the decree passed by the Judge of the court of Small Causes at Allahabad dismissing the plaintiff-applicant's suit for refund of over-charge realized from him by a Railway Company in respect of a consignment sent by him from Lohgara railway station to Ultadanga. The sole ground on which the suit was dismissed by the lower court was that no notice under S. 77, Railways Act, was given and the fact that such notice had been given was not mentioned in the plaint.

The suit was instituted against four defendants, namely: (1) Secretary of State for India in Council, (2) The G. I. P. Railway, (3) The East Indian Railway and (4) the Eastern Bengal Railway. The three railway administrations above mentioned are all State railways and were impleaded as the goods in question had to pass through them in transit. It is not disputed that notices, purporting to be those under S. 80, Code of Civil Procedure, were given by the applicant within six months of the delivery of the goods and of the levy of the overcharge (which occurred on the same day) and more than two months before the institution of the suit. The fact was recited in the 4th para of the plaint. The lower court apparently thought that the plaintiff should have stated that a notice under S. 77, Railways Act, had been given and that a reference to S. 80 C. P. C., was not sufficient. The learned Judge seems also to have been of the opinion that a notice under S. 80, C. P. C., cannot be accepted as one under S. 77, Railways Act.

It has not been denied before me, nor was it denied in the court below, that notices given by the plaintiff-applicant complied with the provisions of S. 80, C. P. C., in all respects. S. 77, Railways Act, debars a person from obtaining a refund of an over-charge in respect of goods carried by railways, unless his claim to the refund has been preferred in writing by him to the railway administration within six months from the date of the delivery of the goods. S. 140 of the same Act requires a notice or other document to be served on a Railway Administration to be served on the manager thereof in case that railway administration be the Government. In this case, notices under S. 80, C. P. C., were given to the managers of the Railways already mentioned. The notices given by the plaintiff-appli-

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL
Niamatullah, J.

cant substantially complied with the requirements of Ss. 77 and 140 of the Railways Act, and the mere fact that S. 80, C. P. C., was mentioned will not detract from their real character as demands made under S. 77. They were served in the manner provided by S. 140 of the Railways Act. There is nothing in either of the two sections which makes it imperative on a plaintiff to mention in the plaint that refund had been demanded from the Railway Administration in the manner required by law. If the fact is denied by the defendant but appears from the evidence, the plaintiff's suit is not liable to be dismissed. The requirements of S. 77 Railways Act, differ in this respect from those of S. 80, C. P. C., which expressly provides that the fact of the notice being given should be mentioned in the plaint. Even if it were otherwise, a mention in the plaint of notices under S. 80, C. P. C., would, in the circumstances of this case, be a sufficient compliance with such rule.

For these reasons, I am of opinion that the decree of the lower court dismissing the plaintiff's suit is erroneous and should be set aside. Accordingly, this revision is allowed, the decree of the lower court is set aside and the suit is remanded for disposal on the merits. The respondent will pay the costs of this revision.

Application allowed

CIVIL
1932
March 1
PULLAN, J.
NIAMATULLAH, J.

JITMAL RAM GOPAL THROUGH RAM GOPAL (*Decree-holder*)
versus
NATHU RAM (*Objector*)*

Provincial Insolvency Act, Secs. 31, 75 and 5(2)—Insolvency court refusing protection as regards all debts due from insolvent—Appeal—Only three creditors who contested application for protection in the first court impleaded—Protection granted—Other creditors entitled to execute decrees against insolvent.

The insolvency court having refused protection as regards all the debts due from the insolvent, he appealed to the District Judge impleading only the three creditors who had appeared in the first court to contest the insolvent's application for protection and obtained a protection order from the District Judge. Subsequently, the appellant, who was not one of the three creditors, took out execution of his decree praying for the insolvent's arrest. *Held*, that the order of the insolvency court of appeal though general in its terms, must be limited to the debts due to the three creditors, who had been impleaded and as against whom the order of the first court was set aside, but as regards the other creditors, including the appellant, the order of the first court became final, and the appellant was therefore entitled to execute his decree against the insolvent.

EXECUTION SECOND APPEAL from a decree of ALI AUSAT ESQ., District Judge of Aligarh, reversing a decree of MAULVI ZAMIRUL ISLAM KHAN, Munsif of Hathras.

B. N. Sahai for the appellant.

Panna Lal for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This appeal arises out of insolvency proceedings.

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*E. S. A. 848 of 1930

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JITMAL RAM GOPAL
v
NATHU RAM

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Niamat-ullah, J.

One Nathu Ram, respondent in this appeal, was adjudged insolvent. He applied under Section 31 of the Provincial Insolvency Act for a protection order. The Judge in insolvency refused to grant the protection order. Notice of the application had been given to all the creditors. Only three appeared to contest the application but the order was couched in general terms and refused protection as regards the debts due to all of the creditors. The insolvent appealed to the District Judge and impleaded the three creditors who had appeared in the court and who contested his application for a protection order. No notice of the appeal was issued to any of the other creditors. The District Judge allowed the appeal and granted an order for the protection of the insolvent from arrest or detention. Subsequently the appellant before us, who was not one of the three aforesaid creditors, took out execution of his decree and prayed for the arrest and imprisonment of the insolvent-judgment-debtor. The latter objected relying on the protection order granted by the insolvency court of appeal. The learned Munsif before whom the execution proceedings were pending overruled the objection holding that the protection order did not apply to the decree-holder before him. The learned District Judge took a different view holding that, as the protection order was unqualified, it should be deemed to apply to all the debts due from the insolvent. The decree-holder has preferred the present second appeal.

There can be no doubt that the order of the insolvency Court of original jurisdiction refused protection as regards all the debts due from the insolvent and as against every one of the creditors. The fact that only three of the creditors appeared to contest the application for the protection order will not detract from the effect of the court's refusal for an order of protection as regards all debts.

Section 5, Sub-section (2) of the Provincial Insolvency Act makes the provisions of the Civil Procedure Code applicable to all proceedings under that Act before the High Court and the district court exercising appellate jurisdiction. The insolvent should have impleaded all his creditors as respondents who were entitled to a notice of the appeal. Section 31(4) provides that "every creditor shall be entitled to appear and oppose the grant of a protection order." The order of the insolvency court of appeal, though general in its terms, was effective only so far that it set aside the order of the court of first instance as regards the three creditors, who were impleaded as respondents, and who had an opportunity of contesting the grant of a protection order. As regards the other creditors including the appellant before us, the order of the court of first instance became final. As between them and the insolvent it was the only operative order. It follows that the order of the insolvency court of appeal must be limited to the debts due to the three creditors, who had been impleaded and as against whom the order of the first court was set aside. In this view, the lower appellate court was not right in reversing the order of the first court which allowed process to issue in execution of the appellant's decree against the insolvent. Accordingly we allow this appeal, set aside the order of the lower appellate court and restore that of the court of first instance. The appellant shall have his costs from the respondent.

Appeal allowed

L. C. DeSOUZA, CAWNPORE—IN THE MATTER OF*

CIVIL

1932

Feb. 12

MUKERJI, J.
BENNET, J.

General Clauses Act, Sec. 27—Presumption as to service of notice—Rebuttable—Income-tax Act, Sec. 22(2)—Notice sent to assessee by registered post, acknowledgment due—Delivery taken by minor son of assessee—Whether service good.

On a true construction of Sec. 27 of the General Clauses Act the presumption as to service raised by "properly addressing, prepaying and posting by registered post" a notice (which an Act authorises to be served by post), is a rebuttable presumption.

Where a notice, issued by the Income-tax Officer, by registered post, acknowledgment due, under Sec. 22(2) of the Income-tax Act, was taken delivery of by his son without stating the name of the addressee for whom he purported to sign the receipt, and the son, though a minor, was possessed of ordinary intelligence and was living with his father and had on previous occasions received such notices on his father's behalf, *held,* that the service of the notice was a good service.

ORDER on reference submitted by the Commissioner of Income Tax, Ghazipur.

K. N. Katju for the applicant.

U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is a reference under Section 66(2) of the Income-tax Act by the learned Commissioner of Income tax under the following circumstances:—

The assessee, Mr. L. C. DeSouza, is a resident of Cawnpore. On May 29, 1930, the Income-tax Officer of Cawnpore, issued, by means of registered post, acknowledgment due, a notice under Section 22(2) requiring him to submit by July 2 or within 30 days of the service of the notice, a return of the income for the assessment year 1930-31. This notice was not complied with, although it was delivered by the postal peon to the assessee's son, Mr. J. DeSouza. There was another notice issued under Section 22, Clause (4) of the Income tax Act, and it was served on another son of Mr. DeSouza. At one time there was a controversy about the validity of this notice, but the Assistant Commissioner of Income-tax having held that this service was not good, we are not called upon to express any opinion on that point.

As no compliance had been made of the notices issued, an assessment was made on Mr. L. C. DeSouza under Section 23, Sub-section (4) of the Indian Income tax Act.

Mr. DeSouza, when a notice of demand was served on him, made an application under Section 27 of the Income-tax Act to have the assessment revised. He had to show sufficient cause for non-compliance with the notice and one of the points that were raised was that the service of notice issued on May 29, 1930 was not a proper service. Certain statements of facts were made by him, but those facts were not accepted by the Assistant Commissioner of Income-tax and we are not concerned with those facts.

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*Civ. Mis. 714 of 1931

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L. C. DeSouza *in re*

Mukerji, J.

The Commissioner of Income-tax has stated the following question for our answer:—

> In the circumstances of this case, did the fact that the postal acknowledgment receipt was signed by the assessee's son who was a minor and signed without stating the name of the addressee for whom he purported to sign, vitiate the service of the notice under Section 22(2) which was issued by registered post?

There are two contentions before us. On behalf of the assessee it is argued that the rule as to service by post in S. 63 of the Income tax Act has to be read along with Section 27 of the General Clauses Act, and in view of the language employed in Section 27, there is a rebuttable presumption as to the service effected through post. On behalf of the Crown it is argued that Section 27 of the General Clauses Act has two portions. One relates to the service being effected and the other relates to the time at which service is effected, and it is further argued that in respect of the service the presumption is conclusive when the notice has been posted, properly addressed and prepaid and in a registered cover.

We have considered the two arguments and are of opinion that the presumption raised by Section 27 is a rebuttable one. This appears from the language employed by Section 27 itself, and even if the language did not warrant any such conclusion, analogy of Section 4 of the Indian Evidence Act would lead to the same conclusion.

To consider Section 27 first we find the words "unless the contrary is proved" used. Those words refer both to the service and to the time. It is true that those words come just before the words "to have been effected at the time", but the whole import of the Section seems to be that the presumption holds good unless the contrary is proved. There is no reason to suppose that the first portion of the section containing the words "service shall be deemed to be effected" is to be taken as a completed sentence before we read the words "to have been effected at the time, etc."

Assuming that the words "unless the contrary is proved" as used in Section 27 do not apply to the words "shall be deemed to be effected", we may apply by analogy Section 4, Paragraph 2 of the Indian Evidence Act. It lays down:

> whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.

These words do not, in terms, apply to the General Clauses Act, but we find that the words used are "shall be deemed" as we have got the words "shall presume" in Paragraph 2 of Section 4.

Let us take an example which no doubt is an extreme case, but it will show what would be the consequence of the contrary conclusion. The example we have in mind is this. Suppose a notice is posted as laid down by Section 27 of the General Clauses Act and the notice is actually returned as undelivered by the Post Office. If the presumption is conclusive, or in other words, if the evidence afforded by "properly addressing, prepaying and posting by registered post" be conclusive evidence of service of notice, the fact that the notice has been returned as unserved, will not be admissible as evidence of the fact of non-service. This could hardly have been considered a right rule of law by the Legislature. We hold, therefore, that the presumption raised is a rebuttable presumption.

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Mukerji, J.

Now the question is whether the fact that the notice was delivered at the place of the assessee is a good service. For this purpose we have to look to the rules framed under the Post Office Act in the Postal Guide. According to Paragraph 113 relating to delivery of articles, "No registered article will be delivered to the addressee unless and until he or his agent has signed a receipt for it, etc." The service, therefore, of a notice will be good on the assessee if it is received either by him or by his agent.

This leads us to consider whether the assessee's son Mr. J. DeSouza was or not an agent for his father in the circumstances of this particular case.

We find, according to the finding of fact arrived at by the Assistant Commissioner of Income-tax, that Mr. J. DeSouza was technically a minor and was possessed of ordinary intelligence. This would mean that Mr. J. DeSouza was verging on the age of majority and was an intelligent man. We have further facts that he was living with his father and that when on previous occasions notices had to be served on Mr. DeSouza, the assessee, they were taken delivery of by his sons. The fact, that Mr. J. DeSouza was a minor, did not prevent him from being an agent of his father, for the purpose of accepting delivery of an article. Under Section 184 of the Contract Act as between principal, the father in this case, and third persons, any person may become an agent. It follows, therefore, that in proper circumstances, a minor son may be an agent of his father. We hold, in the circumstances, that the delivery of the postal article, namely, the notice, was a good delivery. It would follow, therefore, and we hold accordingly, that the service of the notice in the circumstances of this case was a good service. Let a copy of this judgment under the seal of the Court be sent to the Assistant Commissioner of Income Tax. As regards costs of this reference, the assessee must pay the same, and we assess the fees of the learned Government Advocate at Rs.100. He will certify to the payment of his fees within the prescribed period.

CHANDI RAM AND OTHERS (*Plaintiffs*)
versus
KUNJ BEHARI LAL AND OTHERS (*Defendants*)*

Civil
1932
March 3
Mukerji, J.
Bennet, J.

Costs—Suit decreed against three defendants—Interest of each defendant separately valued—Liability to costs—Proportionate.

Where a suit was decreed against three defendants, and the interest of each defendant was separately valued, each defendant should contribute to the costs in proportion to the property held by him out of the estate in suit.

SECOND APPEAL from a decree of J. R. W. BENNET ESQ., District Judge of Kumaun, Naini Tal, modifying a decree of BABU SADA NAND, Assistant Collector first class of Kashipur.

Iqbal Ahmad and *Mansur Alam* for the appellants.

M. L. Agarwala for the respondents.

The judgment of the Court was delivered by

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*S. A. 743 of 1930

Civil
1932
Chandi Ram v. Kunj Behari Lal
Mukerji, J.

MUKERJI, J.—This appeal raises an interesting question of law of contribution in the following circumstances:—

One Rani Durga Kunwar was in possession of her husband's estate. She granted a lease of a portion of the estate in favour of the plaintiffs one of whom has since died and has been succeeded by his legal representatives. She granted another lease in favour of the ancestors of the respondents the defendants in the case. One Kunwar Anand Singh claimed the entire estate in the hands of Durga Kunwar and her transferees on the allegation that he was an adopted son of the Rani's late husband. During the pendency of the suit Rani Durga Kunwar died. The suit succeeded ultimately and the decree that was made as regards costs was that a sum of Rs.3,400 should be paid to the plaintiff by the present parties and out of the estate, if any, of the late Rani Durga Kunwar. Rani Durga Kunwar left no property out of which any costs could be recovered. The present plaintiffs, thereupon, the entire costs having been realised from them by Anand Singh, sought to recover one-half of the costs recovered from them from the defendants.

The first court decreed the claim. There was an appeal by the defendants and the learned Judge reduced the claim to a sum of Rs.826. The argument that found favour with the learned District Judge was this. There were really three defendants against whom the suit had been decreed. The interest of each defendant was separate and was valued as follows:— The plaintiffs' interest was valued at Rs.17,319 being the value of the property in their possession; the defendants' interest was valued at Rs.21,540 being the value of the property in their possession; Rani Durga Kunwar's interest was valued at Rs.50,000 and odd, the total estate having been valued at Rs.88,930. The learned Judge held that each party should contribute to the costs in proportion to the property held by it out of the estate in suit. To calculate on that basis the plaintiffs were granted a decree for 2154|8893 out of Rs.3,400. In other words, the defendants were made liable for a portion of the costs proportionate to the amount of property held by them.

We think that the method adopted by the learned District Judge was correct. There were three parties liable for the costs and if one of them was unable, from poverty or otherwise, to pay the costs, it was no reason why that party's share or a portion of it should be recovered from any other party.

In the result, the appeal fails and is hereby dismissed with costs.

Appeal dismissed

CIVIL
1932
Jan. 29
MEARS, C. J.
SEN, J.

BALBHADDAR UPADHYA (*Defendant*)
versus
SHEO MANGAL AND OTHERS (*Plaintiffs*)*

Mortgage—Prior and subsequent mortgages—Prior mortgagee takes another mortgage—Part of mortgage consideration left with him to pay up his own mortgage and the subsequent mortgage—Subsequent mortgage not paid up—Suit for sale on subsequent mortgage—Whether prior mortgagee can use his paid up mortgage as a shield.

Where a mortgagee having a prior lien upon the property, takes another's mortgage of the property with a distinct stipulation with his mortgagor to discharge with the mortgage money left in deposit with him his own lien and that of another mortgagee (of a date subsequent to his own), and the mortgagee satisfies his own incumbrance but fails to discharge the other incumbrance, he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the suit of the subsequent mortgagee for sale. *Muhammad Sadiq* v. *Ghaus Mohammad*, I. L. R. 33 All. 101 (F.B.) and *Makhan Lal* v. *Nathi*, 21 A. L. J. R. 382 *relied on.*

LETTERS PATENT APPEAL against the judgment of the HON'BLE MR. JUSTICE SIR B. J. DALAL.

U. S. Bajpai for the appellant.

Haribans Sahai for the respondents.

The judgment of the Court was delivered by.

Mears, C. J.

MEARS, C. J.—This is a defendants' appeal and arises out of a suit for sale on a mortgage dated June 1, 1916. Lachhmi Narayan and others were possessed of 2 bighas 13 biswas of fixed rate holding in mouza Sipahi. On May 27, 1912 they made a usufructuary mortgage of this property in favour of Balbhaddar. On June 1, 1916 they made a simple mortgage of the said property in favour of Murlidhar, father of the plaintiffs for Rs.400. On August 30, 1921 they executed another simple mortgage of the same property in favour of Balbhaddar's grand-son in consideration of Rs.1,425. It has been found as a fact by the court below and the finding is not challenged in appeal that the real mortgagee under this document was Balbhaddar himself. The details of the mortgage consideration were as follows:—Rs.499 were left with the mortgagee for payment to himself on account of his prior mortgage dated May 27, 1912 and a sum of Rs.799 was left with him for payment to Murlidhar on account of the mortgage bond now in suit. On August 31, 1921 the mortgagors executed another simple mortgage in favour of Balbhaddar of the fixed rate holding and also a house.

The suit was resisted by Balbhaddar on the ground that he was entitled to hold as a shield against the plaintiff his prior mortgage, dated May 27, 1912. This plea was repelled by the court of first instance and the defendant-appellant has lost in all courts.

Under the contract, dated August 30, 1921, Balbhaddar had undertaken not only to pay up his own mortgage, dated May 27, 1912, but

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*L. P. A. 14 of 1931

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1932
BALBHADDAR UPADHYA v. SHEO MANGAL
Mears, C. J.

also to pay up the mortgage bond in favour of the plaintiff, dated June 1, 1916. He never paid this mortgage. Having regard to the nature and character of the transaction as embodied in the document, dated August 30, 1921, it is patently clear that it could never have been in the contemplation of Balbhaddar that he should use his mortgage bond, dated May 27, 1912, as a shield as against the plaintiff because the parties had agreed that both the mortgages of 1912 and 1916 should be completely wiped off. Whether a mortgage paid off is kept alive or extinguished depends upon the intention of the parties and ordinarily such an intention is to be presumed where it would be for the preservation or protection of one's contract against a third party. This is the settled law and is founded upon considerations of justice, equity and good conscience. But this rule is not to be extended to the case of a transferee, who has flagrantly failed to carry out his obligations in full under his contract with his transferor. Where a transferee of immovable property, having a prior lien upon the property, purchases the property with a distinct stipulation with his vendor to discharge with the purchase money left in deposit with him his own lien and that of another mortgagee (of a date subsequent to his own) and the transferee satisfies his own incumbrance but fails to discharge the other incumbrance, he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the latter. *Muhammad Sadiq* v. *Ghaus Mohammad*[1] and *Makhan Lal* v. *Nathi*[2]. We are of opinion that the view taken by the learned single Judge of this Court is perfectly correct. We accordingly dismiss this appeal with costs.

Appeal dismissed

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[1] I. L. R. 33 All. 101 (F.B.)

[2] 21 A. L. J. 382

CIVIL
1932
Feb. 18
SULAIMAN, J.
YOUNG, J.

MOHAMMAD AHMAD SAEED KHAN (*Defendant*)
versus
KISHORI LAL AND ANOTHER (*Plaintiffs*)*

Mohammedan Law—Waqf—Waqif reserved right to transfer property to pay off previous debts—Subsequent mortgage of part of waqf property—Mortgage valid.

Where the waqif expressly reserved to himself the right to transfer a part of the dedicated property in order to pay off the previous debts, and it was merely in exercise of that power that he subsequently mortgaged a part of the waqf property with a view to satisfy those debts, *held*, that the mortgage was valid.

FIRST APPEAL from a decree of PANDIT RUP KISHAN AGHA, Subordinate Judge of Etah.

T. A. K. Sherwani (for whom *N. A. Sherwani*) for the appellant.

U. S. Bajpai, Binod Behari Lal and *S. B. L. Gaur* for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed dated April 13, 1923 executed by the defendant in favour of the plaintiffs.

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*F. A. 173 of 1928

It appears that by the year 1922 the defendant was indebted to various creditors to the extent of about Rs.52,000. On October 1, 1922 he executed a deed of waqf which was a settlement in favour of his descendants, but made provision for the payment of the outstanding debts. The waqif laid down that he would discharge his previous liability, and reserved the right to transfer a part of the dedicated property in order to pay off the previous debts, if he was not able to discharge them otherwise. Such a power was expressly reserved in Clause 8(2) of the deed. Apparently he was not able to pay off the previous debts, and accordingly executed the mortgage deed in suit with a view to satisfy those debts. It is to be conceded that there was no fresh advance made by the mortgagees, but the deed was executed in order to pay off the previous debts, the payment of which had been provided for in the deed of waqf.

Under this deed of mortgage the mortgagor undertook to pay to the creditors the entire mortgage money *on demand* with interest at the rate of 0-10-6 per cent per mensem. It was further provided that interest would be paid by him half yearly, but if there was default, it would be added to the principal and would itself carry interest.

The claim was resisted on two grounds only. First, that in view of the previous dedication, the mortgage deed was not valid. Secondly, that there was a private agreement between the parties that the mortgage would be a usufructuary mortgage and not a simple mortgage.

There is obviously no force in the first contention. The waqif expressly reserved to himself the right to transfer the property in order to pay off the previous debts, and it was merely in exercise of that power that he mortgaged a part of the waqf property. We can see no ground for holding that the mortgage deed was invalid.

The second contention amounts to a plea that although, according to the terms of the registered mortgage deed, the whole of the mortgage money was payable on demand with interest, there was a contemporaneous oral agreement between the parties that the amount would not be payable on demand, but shall be accepted in instalments. The learned Subordinate Judge has rightly held that the defendnat cannot be allowed to prove any such contemporaneous oral agreement.

The learned advocate for the defendant puts forward two grounds on which such evidence, according to him, would have been admissible. He first urges that it is open to a party to prove the subsequent conduct of the opposite party, and Section 92 of the Evidence Act does not prevent such evidence. But subsequent conduct can only be circumstantial evidence of some fact which he wants to prove. The fact which he wants to prove is that of an alleged contemporaneous agreement, and not a subsequent oral agreement.

The second ground urged is that such evidence comes within the scope of Proviso No. 3 to Section 92. It must, however, be noted that the plea is not that the mortgage transaction itself was to be wholly inoperative and ineffective, unless a condition precedent was fulfilled; but the plea is that one of its terms was modified by the oral agreement entered into between the parties. The case, therefore, does not fall under Proviso 3, nor does it fall under Proviso 4, because it is not a case of a

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Mohammad Ahmad Saeed Khan
v.
Kishori Lal
Sulaiman, J.

subsequent oral agreement. Even if it had fallen under Proviso 4, the fact that the terms were entered in a registered document would preclude the defendant from proving a subsequent oral agreement. In our opinion, the case is covered by the express provisions of the substantive part of Section 92, under which it is not open to a party to a written contract to lead evidence to prove any oral agreement for the purpose of varying, adding to or substracting from its terms.

The learned Subordinate Judge, therefore, was perfectly justified in refusing to admit evidence of this sort.

The defence accordingly fails, and the appeal is dismissed with costs. We, however, extend the time for payment by six months.

Appeal dismissed

Civil
1932
Feb. 19
Mears, C. J.
Sen, J.

INAYAT HUSAIN (*Plaintiff*)

versus

BASHIR AHMAD AND ANOTHER (*Defendants*)*

Court Fees Act, Sec. 7(iv), Suits Valuation Act, Sec. 8 and Civil Procedure Code, Sec. 15—Valuation of suit—Contested—Court must determine value—Plaintiff cannot be allowed to over-value or under-value his claim with a view to choose his forum.

Where the valuation of the suit for purpose of jurisdiction is contested, the value must be determined by the court; and where the valuation can be ascertained correctly, the plaintiff cannot be allowed to put an arbitrary value upon his claim, nor can he be allowed to overvalue or undervalue his claim with a view to choose his forum.

Rachappa Subrao Jadhav Desai v. *Shidappa Venkatrao Sadhav Desai*, 17 A. L. J. R. 418 (P.C.) *relied on.*

The Suits Valuation Act and the Court Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper court for the institution of the suit having regard to the value of the property.

Civil Revision from an order of P. C. Plowden Esq., District Judge of Bareilly.

M. A. Aziz for the applicant.

A. M. Khwaja and *Mahmudullah* for the opposite parties.

The judgment of the Court was delivered by

Sen, J.

Sen, J.—On August 10, 1929 plaintiff instituted a suit in the court of the Munsif of Bareilly for dissolution of partnership, rendition of accounts and partition of certain immovable property. He also prayed for the appointment of a receiver. He stated in paragraph 15 of his plaint:—

> For purposes of jurisdiction and payment of court-fee, the suit has been valued at Rs.2,500 but a further court-fee would be paid within the period allowed by the court on such additional amount as is found due to the plaintiff against the defendant at the time when the decree is passed.

The Munsif had jurisdiction to entertain suits upto the value of Rs.4,000. Where the value of the subject-matter in dispute exceeded Rs.4,000, the proper forum for the suit was the court of the Subordinate Judge of

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*Civ. Rev. 206 of 1931

Bareilly. The defendants contested the correctness of the value put by the plaintiff and contended that the plaintiff had intentionally undervalued his claim and that the property in dispute was worth more than Rs.10,000. There being a contest regarding the value of the suit, the court amin was directed to submit a report as to the valuation of the property. His report was that the value of the partnership assets exceeded Rs.20,000. No objection was taken to the valuation put by the amin. The plaintiff however contended that his suit was in substance a suit for accounts within the purview of Section 7, Clause 4(*f*) of the Court Fees Act, that the court-fee was payable on the amount on which the plaintiff chose to value his claim, that Section 8 of the Suits Valuation Act having provided that the value as determinable for purposes of court-fees and the value for purposes of jurisdiction should be the same, and the plaintiff having valued his claim at Rs.2,500 the Munsif had jurisdiction to entertain the suit. This contention was repelled by the Munsif. He held that the value of the suit being more than Rs.4,000, the proper court to entertain the suit was the court of the Subordinate Judge. He accordingly ordered that the plaint should be returned to the plaintiff for presentation to the proper court. An appeal was preferred to the District Judge. He agreed with the view of the Munsif and dismissed the appeal. An application has now been presented to this Court under Section 115 of the Code of Civil Procedure and the contention raised is that the Munsif had jurisdiction to entertain the suit. A preliminary objection has been taken to the hearing of the application for revision on the ground that it was within the jurisdiction of the Munsif to go into the question as to what was the value of the subject-matter in dispute and that even assuming that the Munsif had gone wrong, he had jurisdiction to decide the case rightly or wrongly and no application for revision lay under Section 115 of the Code of Civil Procedure. The learned counsel for the applicant relies upon a ruling of this Court reported in *re Chhatarpali* v. *Kalap Dei*[1]. We are clearly of opinion that this case has no bearing upon the question in issue. In *Jageshra* v. *Durga Prasad Singh*[2] Tudball, J. held that

> it was of considerable doubt as to whether under Section 7, Clause 4 of the Court Fees Act a plaintiff was entitled to put on his relief a fictitious value and not the correct and proper value which was known to him.

Richards, C. J. held that

> the proper meaning to be attached to the latter words of Section 7, Clause 4 of the Court Fees Act was that the plaintiff should truly state the amount at which he valued the relief sought, and that he was not entitled to put in a fictitious value when the relief was capable of valuation.

We are of opinion that the Suits Valuation Act and the Court Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper court for the institution of the suit having regard to the value of the property. This matter must be taken to have been set at rest by the decision of their Lordships of the Privy Council in *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao Sadhav Desai*[3] in which it has been laid down as follows:—

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[1] [1931] A. L. J. 837
[2] 12 A. L. J. 844
[3] 17 A. L. J. R. 418

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INAYAT HUSAIN v. BASHIR AHMAD

Sen, J.

When a notional value, different from the real value, is placed upon property for the purpose of the court-fee, such notional value cannot displace the real value for the purpose of jurisdiction.

The following propositions of law may be laid down:—

(1) Where the valuation of the suit for purpose of jurisdiction is contested, the value must be determined by the court; and (2) where the valuation can be acertained correctly, the plaintiff cannot be allowed to put an arbitrary value upon his claim, nor can he be allowed to overvalue or undervalue his claim with a view to choose his forum. In our view, the courts below have arrived at the right decision. The application for revision is entirely without force. We accordingly dismiss it with costs.

Application dismissed

CIVIL

1932

Feb. 1

SULAIMAN, J.
YOUNG, J.

LAL BHUPENDRA NARAIN SINGH (*Appellant*)

versus

ASHTABHUJA RATAN KUER (*Respondent*)*

Succession Act (XXXIX of 1925), Secs. 299 and 271—Objector moves District Judge under Sec. 271—District Judge decides not to refuse application for letters of administration—Whether so-called order passed by him appealable.

Where the appellant moved the District Judge under Sec. 271 of the Succession Act (XXXIX of 1925), which does not in terms require any application by the objector, to refuse to hear the respondent's application for letters of administration and exercise his discretion to return it for presentation to another court, and the District Judge decided to go on with the proceeding and not to refuse the application for letters of administration, *held*, that the District Judge did not refuse the application for letters of administration and therefore literally speaking did not make any order by virtue of the power conferred on him by Sec. 271, and the so-called order passed by him was more or less in the nature of a finding and it could not be treated as a final order adjudicating upon the rights of the parties or disposing of any matter absolutely, and the case therefore did not come within the scope of Sec. 299 so as to give the objector a right of appeal.

Quaere. Whether appeals under Sec. 299 Succession Act (XXXIX of 1925) are limited exclusively to the appeals which are provided for in the Code of Civil Procedure.

FIRST APPEAL from a decree of HARISH CHANDRA ESQ., District Judge of Benares.

Binod Behari Lal for the appellant.

K. N. Katju and *M. N. Kaul* for the respondent.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This appeal arises out of proceedings relating to the grant of letters of administration. The respondent filed an application in the court of the District Judge of Benares, who has jurisdiction over Jaunpur district, on the basis of a will alleged to have been executed by her father at Jaunpur. In the objection which was originally filed by the objectors, no point was taken that the convenience and justice of the case required that the proceedings should not be carried on in the court at

*F. A. 208 of 1931

Benares. Later on it was argued on behalf of the objectors that the point arose by implication, and the discretion of the District Judge under Section 271 of the Indian Succession Act was invoked. The report of the Collector undoubtedly indicated that a very insignificant part of the property was situated within the district of Jaunpur, and almost the whole of the estate was in Oudh. It was, however, urged on behalf of the respondent that as the will was executed at Jaunpur, the witnesses would come from that city and it would be more convenient to them to come to Benares than to go to Fyzabad. The learned Judge did not think that there was any difficulty in investigating the matter at Benares, because in his opinion both Jaunpur and Fyzabad were in one and the same province as defined in the General Clauses Act. He, therefore, apprehended no difficulty, if letters of administration were granted by him. His opinion is open to question, as the definition of province given in the Indian Succession Act would seem to make any division of British India having a court of the last resort as a province within the meaning of that Act. The initial difficulty in the way of the appellant is that, in our opinion, no appeal lies. It is contended on behalf of the appellant that under Section 299 of the Indian Succession Act any order by the District Judge is appealable as of right, and it is only the procedure relating to the filing or the hearing of the appeal that is governed by the Code of Civil Procedure. Stress is laid on the fact that in the Probate and Administration Act the corresponding words were "under the rules contained in the Code of Civil Procedure", whereas in Section 299 the legislature has substituted therefor the words "in accordance with the provisions of the Code of Civil Procedure, 1908".

We doubt very much whether it has been intended to make every order passed by the District Judge necessarily appealable. If orders postponing a case or refusing to adjourn a case were appealable, the position might well become intolerable. It may be pointed out, as the preamble to the Indian Succession Act (39 of 1925) indicates, that the object of the Act was to consolidate the law. One would, therefore, not feel inclined to hold that drastic changes have been introduced by the new Act, unless the language of the section clearly leads to that conclusion. It cannot be disputed that under the old section the courts in India generally used to hold that the right of appeal was limited to the cases provided for in the Code of Civil Procedure. No doubt there are one or two cases in which appeals were entertained from orders which would not have been appealable under the Code; but they stand by themselves. It may be a matter for consideration whether the slight change in the phraseology of Section 299 necessarily implies that the old policy has been altered and a drastic change in the law introduced by the new Act. But it is not necessary for us in this case to answer the wider question whether appeals under the Indian Succession Act are limited exclusively to the appeals which are provided for in the Code of Civil Procedure. It is clear to us that in order to have a right of appeal there must be an order made by the District Judge by virtue of any of the powers conferred upon him by Part 9 of the Act. "Order" generally implies an adjudication of the rights of the parties and a direction to be carried out by them. The appellant had moved

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Sulaiman, J.

the District Judge under Section 271, which does not in terms require any application by the objector. That section confers power on the District Judge to refuse an application for letters of administration, if in his judgment it could be disposed of more justly or conveniently in another district, provided that the deceased had no fixed abode at the time of his death in the district under the jurisdiction of the Judge concerned. The learned Judge obviously has not refused the application for letters of administration, and has therefore literally speaking not made any order by virtue of the power conferred upon him by Section 271. He has decided merely to go on with the proceeding, and not to refuse the application for letters of administration. The question whether it was more just or convenient to hear the application at Benares was a matter of discretion for the Judge. He was not bound to refuse the application merely because the deceased had no fixed abode at the time of his death at Benares; nor does the fact that only an insignificant part of the property is situated within his jurisdiction make it any the more obligatory to refuse the application. The operative portion of the so-called order which is appealed against is in the following words:

> I accordingly find that the petition should not be refused by this Court under Section 271 of the Indian Succession Act. Let March 7, 1931 be fixed for the framing of the remaining issues.

Section 295 requires that proceedings in his court should, as nearly as may be, take the form of a regular suit, according to the provisions of the Code of Civil Procedure, and under Section 268 the proceedings have to be regulated, so far as the circumstances of the case permit, by that court. The order passed by the District Judge is more or less in the nature of a finding on the question whether he should hear the application or exercise his discretion to return it for presentation to another court. It cannot be treated as a final order adjudicating upon the rights of the parties or disposing of any matter absolutely. We, therefore, do not think that this is a case which comes within the scope of Section 299 so as to give the appellant a right of appeal.

The learned advocate for the appellant has argued before us that we should interfere with the so-called order on our revisional side. It may be that another District Judge when considering the proportion of the values of the properties situated in the two provinces, the inconvenience of a second set of proceedings being taken later on in Oudh and the fact that the witnesses did not live at Benares where the case would be tried, might have exercised his discretion in a different way. Even in appeal an appellate court seldom interferes with an exercise of discretion. In revision we cannot interfere with mere errors of law. It is impossible to say that in this case there had either been a failure to exercise a jurisdiction vested by law or any illegality or material irregularity in the exercise of such jurisdiction. We are, therefore, unable to interfere under Section 115 C. P. C. We dismiss the appeal, but direct that the parties should bear their own costs.

Appeal dismissed

Civil

1932

March 14

Pullan, J
Niamat-ullah, J.

RAM PATI KUNWAR (*Plaintiff*)
versus
PHOOL SINGH (*Defendant*)*

Limitation Act (IX of 1908), Sec. 14—Applicability of—Plaintiff admits—That suit, as framed, not cognizable by civil court as pleaded by defendant—Plaint returned for presentation to proper court—Whether plaintiff entitled to benefit of Sec. 14.

A party may be in doubt as to whether a suit should be instituted in a civil or a revenue court. If a suit is honestly and with due care and caution instituted in one of such courts but at a subsequent stage it is found that a wrong forum had been chosen, it cannot be doubted that if an admission to that effect be made and the court which has no jurisdiction returns the plaint for presentation to the proper court, Sec. 14 of the Limitation Act, which is couched in comprehensive terms, will be applicable.

It was possible to construe the plaint filed in a civil court as one for avoidance of a lease and for compensation for use and occupation of land. Both the parties and the Subordinate Judge, however, put the construction which was equally plausible, viz., that it was a simple suit for arrears of rent by a landholder against the thekadar and as such it was cognizable by a revenue court. Accordingly, the plaint was returned to the plaintiff for presentation to the proper court; *held,* that there was no want of good faith and the plaintiff was entitled to the benefit of Sec. 14 Limitation Act.

Second Appeal from a decree of M. F. P. Herchenroder Esq., District Judge of Cawnpore, modifying a decree of Babu Ganga Ram Yadav, Assistant Collector first class of Fatehpur.

N. Upadhiya for the appellant.

S. S. Shastry for the respondent.

The judgment of the Court was delivered by

Niamat-ullah, J.

Niamatullah, J.—This appeal has arisen out of a suit brought by the plaintiff-appellant for arrears of rent for 1329-1334F and for the appointment of a receiver in terms of the relief claimed in the plaint. The suit was originally instituted in the court of the Munsif, Fatehpur. One of the pleas taken in defence was that the civil court had no jurisdiction. Another plea was that the plaintiff's suit was barred by *res judicata.* The Munsif did not decide the question of jurisdiction raised by the defendant, but held that the plaintiff's suit was barred by *res judicata.* Accordingly, he dismissed the suit. The plaintiff appealed to the court of the Subordinate Judge, who held that the suit was cognizable exclusively by a revenue court. Accordingly, the plaint was returned to the plaintiff for presentation to the proper court. The claim for 1329 to Kharif 1330 was time-barred when the suit was instituted in the civil court. It was subsequently abandoned by the plaintiff. When the plaint was presented in the revenue court, the plaintiff's claim for Rabi 1330F and Kharif 1331F was also barred by limitation unless the benefit of Section 14 of the Indian Limitation Act could be extended to her. The plaintiff's suit was decreed by the Assistant Collector except for the years 1329 to Kharif 1331F. He also decided some subsidiary questions. Both parties appealed to the District Judge, who confirmed the decree of the first court subject to slight modifications, which it is not necessary to mention at this stage. He upheld the view of the first court that the plaintiff's claim for Rabi 1330F and Kharif 1331F was barred by limitation. He further held that Section 14 of the Indian Limitation Act did not apply to the circumstances of the case. The plaintiff has filed the present second appeal against that part of the decree of the lower appellate court which relates to the arrears for Rabi 1330F and Kharif 1331F. The defendant has filed certain cross-objections, the nature of which will be stated in a later part of this judgment.

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*S. A. 1296 of 1929

The plaint, as originally framed, was very complicated. It recited the facts that Sheoratan Singh and Dayashankar Singh plaintiffs Nos. 1 and 2 granted a lease to the defendant Phool Singh who agreed to pay a certain rent for the *theka*. Sheoratan Singh and Dayashankar Singh assigned their proprietary rights to Mst. Rampati Kuer, plaintiff No. 2 the wife of Sheoratan Singh plaintiff No. 1. It was alleged in the plaint that one of the lessors was minor at the time the lease was executed, while the other lessor was devoid of common sense and not capable of understanding matters. It was further alleged that the lessee did not pay out of the rent interest due to one Dwarka Prasad as he was bound to do under the lease. The whole plaint contains allegations challenging the validity of the lease. The plaintiff claimed the right to recover possession of the property to which the lease related, but she reserved liberty to sue for that relief in a subsequent suit. The relief claimed in the present suit was for recovery of what the lessee was liable to pay under the *theka* and for the appointment of a receiver, who, it was prayed, should be directed to take possession of the property and to manage it during the term reserved by the lease and make payments in accordance with the stipulations contained in the lease. We have stated in detail the allegations contained in the plaint for a proper consideration of the question, whether Section 14 of the Indian Limitation Act can apply to the circumstances of the case. The learned District Judge held that Section 14 of the Indian Limitation Act did not apply to cases in which the plaintiff himself withdraws a suit instituted in the wrong court and subsequently institutes it beyond limitation in the right court. It should be explained in this connection that the Subordinate Judge, who disposed of the appeal from the decision of the Munsif, directed the plaint to be returned for presentation to the revenue court, because it was admitted on behalf of the plaintiff-appellant before him that the suit, as framed, was not cognizable by a civil court as pleaded by the defendant. There being no controversy between the parties on the question of jurisdiction and the Subordinate Judge himself not taking a different view, he acted on the admission of both the parties and passed his order thereon. In these circumstances it cannot be considered that the plaintiff-appellant withdrew the suit instituted in the civil court and subsequently instituted it in the revenue court which *ex hypothesi* was the proper court.

It has not been argued before us by the learned advocate for the defendant that the civil court had jurisdiction. We take it that the suit had been wrongly instituted in the civil court, that both the parties admitted before the Subordinate Judge that the civil court had no jurisdiction and that the Subordinate Judge held that the civil court had no jurisdiction.

The learned advocate for the defendant-respondent has referred us to certain cases in which it was held that where a suit is withdrawn under Order 23, Rule 1 of the Code of Civil Procedure with liberty to bring a fresh suit and a second suit is instituted after the expiry of limitation, though the first suit was within time, Section 14 of the Indian Limitation Act cannot apply. That view is obviously based on the language of Rule 2 of Order 23 C. P. C. which runs as follows:—

> In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

It is clear that there is no room for the application of Section 14 of the Indian Limitation Act where Order 23, Rule 2 C. P. C. is applicable. The law is mandatory and the court must start with the assumption that the subsequent suit is the only suit that was instituted by the plaintiff so that there can be no question of any other civil proceeding having been prosecuted in good faith by the plaintiff as required by Section 14 of the Indian Limitation Act. In the case before us the plaintiff did not withdraw her suit with liberty to bring a fresh one and the plaint filed in the revenue court was the self same plaint which she had previously filed in the civil court. We are clearly of opinion that the class of cases to which reference has been made above is wholly inapplicable and that Section 14 of the Indian Limitation Act is not inapplicable on that ground.

The learned District Judge seems to be of opinion that Section 14 of the Indian Limitation Act is applicable

> only to cases where the previous suit was *dismissed* by the court itself, because it was unable to entertain it.

There is nothing in Section 14 which warrants the proposition of law laid down by the learned District Judge. It clearly provides that

> In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

The important question to decide is whether the plaintiff prosecuted another civil proceeding in good faith. It is perfectly immaterial whether such proceeding ended in an order of dismissal or in some other order showing that the court refused to entertain it. Cases are easily conceivable in which a party may be in doubt as to whether a suit should be instituted in a civil or a revenue court. If a suit is honestly and with due care and caution instituted in one of such courts but at a subsequent stage it is found that a wrong forum had been chosen, it cannot be doubted that if an admission to that effect be made and the court which has no jurisdiction returns the plaint for presentation to the proper court, Section 14 of the Indian Limitation Act, which is couched in comprehensive terms, will be applicable. If the section be so restricted as to apply only to cases in which a previous suit is dismissed, it will cease to apply to a familiar class of cases in which plaints are returned without the suit being dismissed for presentation to the proper court. We are clearly of opinion that Section 14 is not so limited and that, if the plaintiff instituted the suit in good faith in the court of the Munsif of Fatehpur, she is entitled to the benefit of Section 14. The lower appellate court has not expressed any opinion as to whether the plaintiff acted in good faith in instituting her suit in the civil court. It has however observed:

> It is possible that a suit framed in this manner should have been tried by the civil court. The point is really only of academic interest,—now that the matter has reached the appellate court, since under Section 269, Agra Tenancy Act, 1926 I have clearly the power to decide the matter in controversy upon the merits.

We have already stated the salient features of the plaint as originally framed and think that the plaintiff and her pleader in the Munsif's court might well have considered that the suit was cognizable by a civil court. It is possible so to construe the plaint as one for avoidance of the lease and for compensation for use and occupation of land. Both the parties and the Subordinate Judge however put the construction which, to say the least, is equally plausible, namely, that it is a simple suit for arrears of rent by a landholder against her thekadar and as such it is cognizable by a revenue court. We are of opinion that there was no want of good faith on the part of the plaintiff or her legal adviser and that the suit was prosecuted in good faith upto the time when the plaint was returned by the Subordinate Judge for presentation to the revenue court. It is not disputed that if the whole of the period from the institution upto the date of the return of the plaint be excluded, the plaintiff's claim for Rabi 1330F and Kharif 1331F is within time.

The result is that the plaintiff's appeal succeeds and, in addition to the amount decreed by the lower appellate court, rent for Rabi 1330F and Kharif 1331F should also be decreed at the rate allowed by the learned District Judge for subsequent years.

The defendant Phool Singh has filed cross-objections relating to certain deductions which according to him should have been made in the decree prepared in accordance with the judgment of the learned District Judge. It is pointed out that the court of first instance had allowed Rs.45 a year as compensation to the defendant in respect of a grove which the lessors retained in their own possession. The defendant-lessee claimed compensation at the rate of Rs.150 a year in the court below. The learned District Judge's order as regards this dispute is a little ambiguous and led to the preparation by the office of an incorrect decree. The relevant portion runs as follows:—"The lower court has allowed Rs.45, while Rs.150 is claimed in respect of this item. I shall allow Rs.100". In preparing the decree it was assumed that Rs.100 was allowed for all the years in suit. It is contended on behalf of the defendant that the learned District Judge meant to allow Rs.100 a year. We think this contention is correct. The court of first instance had allowed Rs.45 for each year and the de-

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fendant claimed before the learned District Judge at the rate of Rs.150 a year. Reading the order of the learned District Judge in the light of these circumstances it is clear to us that he meant to allow Rs.100 for each a year. The decree, which will be prepared in accordance with our judgment, should proceed on the basis indicated above.

Another ground taken in the cross-objections is that the plaintiff lessor retained some ***khud-kasht*** land and that the defendant is entitled to deduction in respect thereof. There is nothing in the judgment of the learned District Judge to suggest that this point was raised before him. In any case, the claim being in the nature of a claim to a set off in a suit for arrears of rent is inadmissible. In fact, the deduction allowed in respect of the grove was not rightly allowed by the learned District Judge; but, as the plaintiff-appellant has not impugned the decree on that point, we must allow it to stand. As regards the deduction claimed in respect of ***khud-kasht*** land there is a contest before us and we must give effect to the plain provisions of the Agra Tenancy Act in this respect. Accordingly this cross-objection is disallowed.

Lastly exception is taken to the interest by the lower appellate court on the arrears of rent. There is no force in this objection.

In view of our findings the decree of the lower appellate court is modified in two respects: (1) The plaintiff's suit is decreed for all the years to which it relates; and (2) Rs.100 a year instead of Rs.100 for all the years in suit should be deducted from the amount found due to the plaintiff. The plaintiff-appellant shall have her costs from the contesting defendant Phool Singh in all the courts.

Decree modified

SUBAH LAL (*Defendant*)
versus
FATEH MOHAMMAD AND ANOTHER (*Plaintiffs*)*

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1932
March 1
SULAIMAN, J.

Limitation Act, Art. 144—Co-owners—Transferee from co-owner takes transfer of whole property—Other co-owner has no knowledge of extent of share transferred—Whether adverse possession commences as against other co-owner.

Where a transferee from a co-owner takes a transfer of the whole property, the other co-owner, *if he has actually no knowledge of the extent of the share transferred*, is entitled to presume that the co-owner has transferred his own interest only and that the transferee by virtue of his right to that share is enjoying possession of the whole property. Of course, if the assertion of title to the whole is brought to his knowledge, and it is accompanied by his ouster and exclusion, adverse possession would then commence as against him.

If a co-owner is in possession of the whole of the joint property and asserting his exclusive title makes a possessory mortgage of the whole and knowledge of the fact is communicated to his co-owners, he can treat his

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*S. A. 440 of 1928

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mortgagee's possession as his own constructive possession and count the period of occupation by his mortgagee as a part of the period of his own adverse possession. But where the possession of the co-owner himself was not adverse to his co-owners, and it is not he, but his mortgagee who, having become his subsequent vendee, is setting up adverse possession, then the mortgagee vendee cannot join the two periods together in order to complete his period of prescription for acquiring full title.

Corea v. *Appuhami,* 1912 A. C. 230, *Prahlad Singh* v. *Baru Mal,* 1930 A. L. J. 1420, *N. Varada Pillai* v. *Jeevanath Nammal,* 18 A. L. J. 274, *Halim Shah* v. *Rahim Bux,* 1930 A. I. R. Oudh 475, *Vaijapuri Chettiar* v. *Subramania Chettiar,* 1929 A. I. R. Mad. 27 and *Ghulam Mohammad* v. *Mst. Begam,* 1930 A. I. R. Lah. 251 *referred to.*

Two persons jointly owned a shop in equal shares. A lease was granted to the defendant by the managing co-owner, who remained in possession as a lessee for some time. In 1910 the managing co-owner made a usufructuary mortgage of this very shop to the defendant, and in 1913 the managing co-owner sold the shop to the defendant, who continued in possession all this time. The other co-owner had no reason to suspect the conduct of the managing co-owner, and no evidence was led to prove that the other co-owner had knowledge of the mortgage. On a suit for joint possession by the other co-owner instituted in 1924, the defendant pleaded adverse possession. *Held,* (1) that in the absence of proof that knowledge of the extent of the property mortgaged was communicated to the other co-owner the defendant's possession did not become adverse as against him; (2) that assuming that possession became adverse after the execution of the sale deed of 1913, it was not open to the defendant to tack on the period of his possession as usufructuary mortgagee to the period of his possession as vendee so as to acquire full title by prescription.

SECOND APPEAL from a decree of G. C. BADHWAR ESQ., District Judge of Farrukhabad, confirming a decree of MAULVI MOHAMMAD ZIAUL HASAN, Subordinate Judge.

This appeal was heard by Mukerji and Niamatullah, JJ. who differed in their opinions, and a reference was made to a third judge, Sulaiman, J. The judgments of Mukerji and Niamatullah, JJ. are reproduced below.

Mukerji, J.

MUKERJI, J.—The defendant in the suit is the appellant before us. The facts that have been found by the court below are as follows:—There were three brothers, Husain Baksh, Makhnu and Qadir Baksh. Their pedigree is given at page 7 of the printed paper book. The shop in dispute belonged one half to Qadir Baksh and the other half to Husain Bakhsh. Qadir Bakhsh died in the lifetime of his brothers and Makhnu survived Husain Baksh. Makhnu inherited the half share of Husain Bakhsh. He did not obtain possession and the entire shop continued to be in the possession of the sons of Qadir Baksh.

The sons of Qadir Bakhsh leased out the shop in dispute to the defendant-appellant, and then, in the life time of Makhnu, made a usufructuary mortgage of the shop in favour of the defendant-appellant, on April 21, 1910. Thereafter on January 16, 1913, they sold outright the shop to the defendant. Makhnu died some time after March 12, 1912.

The plaintiff respondents are son and daughter respectively of Makhnu. They claimed the entire shop as the exclusive property of Husain Bakhsh inherited by their father Makhnu. The defence was that Makhnu predeceased Husain Baksh, and on the death of Husain Bakhsh the sons of Qadir Bakhsh took possession of the property. As stated above, the courts below found that the stories told by both the parties were false. The defendant's plea of adverse possession has been negatived by the courts below, and in this appeal we have to consider whether the plea has been established.

The contention on behalf of the plaintiffs that found favour with the courts below was that the sons of Qadir Baksh and the children of Makhnu were co-owners of joint property, and possession of some of the co-owners, viz., of the sons of Qadir Bakhsh, could not be adverse to the plaintiffs till it was established that the factum that Qadir Bakhsh's sons were claiming adversely had been brought to the notice of the plaintiffs.

As a general proposition of law, there can be no doubt that possession, where it is referable to a title, cannot be considered to be adverse, and hence a co-owner's possession is *prima facie* not adverse to the other co-owners. This was held in numerous cases and was laid down by their Lordships of the Privy Council in the well-known case of *Corea* v. *Appuhami,* [1912] Appeal Cases, page 230. Here, however, we are concerned not merely with co-sharers but with a third party, viz., the defendant-appellant.

So long as possession remained with the sons of Qadir Bakhsh and conceding for the sake of argument but not admitting, so long as possession remained with the tenants of the sons of Qadir Bakhsh, the possession was with co-owners, and that possession could not, ordinarily, be regarded as adverse to the other co-owners; but as soon as the defendant obtained a usufructuary mortgage from the sons of Qadir Bakhsh and got possession under it, in my opinion, it must be taken that the possession of the defendant became adverse to the plaintiffs. The possession of the defendant after the mortgage could not be referred to mere co-ownership of the mortgagors with the plaintiffs. A mortgage of the entire property by one of the proprietors is a clear assertion of adverse title and the possession of the mortgagee is surely adverse to the co-owners of the mortgagors.

Article 144 of the Limitation Act, column 3 puts down the date of starting limitation as "when the possession of the defendant becomes adverse to the plaintiff". We note here that, in 1910, the mortgage was executed and it was followed in 1913, by a sale deed in favour of the defendant, the original mortgagee. In my opinion, by no stress of argument can it be established that the initial possession of the defendant as a mortgagee was not adverse to the plaintiffs, although it is conceded that the possession following the sale was adverse.

The view expressed above is supported by a two Judge decision of this Court, viz., *Prahlad Singh* v. *Baru Mal,* [1930] A. L. J. 1420, a decision to which I was also a party. This decision upheld, on Letters Patent Appeal, the decision of a single Judge of this Court, so the view expressed in the decision is the view of three Judges of this Court.

On behalf of the respondents the case of *Hafiz Abdullah* v. *Ali,* 4 L. R. All. 139 has been cited. The facts of that case are not on all fours with the facts of the present case. There, the co-owner had made a usufructuary mortgage and, although the mortgagee had been in possession for more than twelve years, the possession had been taken back by the mortgagor on redemption, before the suit was brought by the mortgagor's co-owner for a share in the property. At the date of the suit the possession was with a co-owner, and it was for the co-owner to establish when this possession became adverse to the plaintiff. It was held that the mere fact that he had made a mortgage was not sufficient, because the factum of the mortgage had not been brought to the notice of the plaintiff. I need not consider whether this case was rightly decided or not, as, as I have said, it is a case clearly distinguishable from the facts of the case before me. Unless we are prepared to hold that a usufructuary mortgage by a co-owner stands on the same footing as an ordinary lease by a co-owner and a usufructuary mortgage is no indication of a claim of adverse title, we are bound to hold that the possession of a mortgagee under a usufructuary mortgage is adverse to the co-owners of

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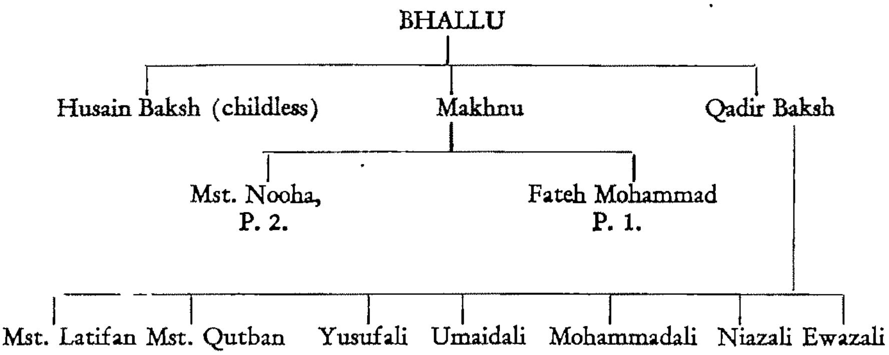
the mortgagor, from the date the mortgagee takes possession under the mortgage.

In the result I would hold that the appellant has established more than twelve years adverse possession against the plaintiffs and would, therefore, allow the appeal, set aside the decrees of the courts below and dismiss the plaintiffs' suit with costs throughout.

NIAMATULLAH, J.—The suit which has given rise to this appeal was brought by the plaintiff-respondents for recovery of possession of a shop situate in Kanauj. The following pedigree will explain the nature of the plaintiffs' claim:—



It is no longer in dispute that the shop in question together with other shops belonged to Husain Bakhsh and Qadir Bakhsh, shown in the above pedigree. Their brother Makhnu had originally no interest in it. Qadir Baksh predeceased both of his brothers, leaving his sons and daughters. On Husain Baksh's death, his moiety devolved upon his sole heir, Makhnu, and thereafter the ownership of the shop was vested in Makhnu to the extent of half and in Qadir Baksh's children to the extent of the other half. The plaintiff's allegation that the entire shop was allotted to Husain Bakhsh on a partition between him and his brother Qadir Bakhsh has been found by both the courts below to be untrue. Similarly, the defence that Makhnu did not survive Husain Baksh has been held to be false. Husain Baksh died in 1909 or 1910. Makhnu died sometime after March 1912. The shop in dispute was let by the descendants of Qadir Bakhsh to Subah Lal, the appellant, as a tenant. Subsequently, in 1910, a usufructuary mortgage of the shop was made by Ewaz Ali and others the heirs of Qadir Bakhsh in favour of the appellant. In 1913, Ewaz Ali and others sold the shop to him. The present suit was instituted on November 16, 1924.

The only defence, which it is necessary to consider in second appeal, is one of adverse possession, pleaded by the defendant appellant. Both the courts below have overruled the defence, and the only question argued in second appeal is whether the plaintiffs' suit was barred by limitation.

The record affords no indication as to how Husain Bakhsh and Qadir Bakhsh jointly enjoyed the shop in question. It has, however, been found by the lower courts that, during the life time of Makhnu, actually possession was with the descendants of Qadir Bakhsh, specially Ewaz Ali. The finding of the lower appellate court on the question of possession is as follows:—

"Somehow or other, the children of Qadir Bakhsh got possession of the shops inherited by Makhnu   The relations between the descendants of Qadir Bakhsh and the plaintiffs appear to have been cordial and intimate, inasmuch as Mst. Nooha, the daughter of Makhnu, is married to a son of Qadir Baksh, and Fateh Muhammad, the son of Makhnu, is married to one of the daughters of Qadir Baksh. Makhnu was blind and was a cripple, and his son Fateh Mohammad lived away from Kanauj for a number of years and returned home about 6 or 8 years ago, and even then he was confined to bed for 4 years. Ewaz Ali used to manage the property, and the plaintiffs had no reasons to suspect the conduct of Ewaz Ali".

Accordingly, the lower appellate court held that the possession of Ewaz Ali and others, who were co-sharers of the plaintiffs, was not adverse, nor was that of the mortgagee (the appellant) adverse to the plaintiffs, who had no reason to think that the character of the appellant's possession had changed from that of the lessee to that of the mortgagee. The trial court had, likewise, held that "Subah Lal's vendors, Ewaz Ali and his brothers and sisters, were jointly in possession of the shops with Makhnu and his heirs. Their possession cannot be said to be adverse to the plaintiffs even if we disbelieve the evidence for the latter that they continued to receive rent of the shops from the tenants through Ewaz Ali. It can, no doubt, be argued that the mortgage of April 21, 1910 was an act by which the defendant mortgagors asserted full title to the shop in question against their co-owners the present plaintiffs; but there is nothing to show that the mortgage was brought to the notice of the plaintiffs. I find no difficulty in believing the plaintiffs' case that it came to their knowledge only recently, seeing that Subah Lal had admittedly been occupying the shop as lessee from before the mortgage and thus there was nothing to excite the plaintiffs' suspicion. There is absolutely nothing to show that either Subah Lal or his mortgagors ever asserted a title adverse to the plaintiffs to the knowledge of the latter. I cannot, therefore, hold that the plaintiffs' co-owners, Ewaz Ali and his brothers and sisters, or their mortgagee, the present defendant Subah Lal, was in adverse possession of the shop in question prior to the date of the sale in Subah Lal's favour".

I have quoted at length the findings of the two courts below to indicate how far they conclude questions arising in this second appeal. Adverse possession is a mixed question of law and fact. We must accept the facts found by the lower appellate court and proceed to decide whether the law was correctly applied to those facts. There can be no doubt that both the courts below have concurrently found that possession of Ewaz Ali and others was not in denial of the plaintiffs' title and that the possession of Subah Lal was that of a lessee up to 1910 and, therefore, not adverse. Both the courts below have further found that the plaintiffs had no reason to suspect that Subah Lal obtained a mortgage deed from Ewaz Ali and others. For aught we know, the plaintiffs had no knowledge of the sale made by Ewaz Ali and others in 1913! but as the suit is within 12 years from its date, the courts below appear to have assumed, for the purposes of the case, that the plaintiffs were aware of it and that Subah Lal's adverse possession began in 1913. On the findings of fact arrived at by the lower appellate court, it is not possible to distinguish this case from *Ali* v. *Hafiz Abdullah*, decided by a Division Bench of this Court in a Letters Patent Appeal reported in 4 L. R. All. 139 (Letters Patent Appeal No. 35 of 1921). The learned Judges observed as follows:—"The mere possession of the house by the brothers or the possession of a mortgagee from them would not amount to adverse possession, unless there was what may be deemed to be an ouster of the plaintiffs or their predecessor Maula Bakhsh. There might be actual ouster, or there might be conduct which would amount to ouster. In the present case what was found was that the two brothers mortgaged the whole house to the mortgagee, who remained in possession. From this fact alone it could not be concluded that the plaintiffs or Maula Bakhsh had been ousted from the house. It was not found by the lower appellate court that the plaintiffs or Maula Bakhsh had any information as to the nature of the mortgage effected by the brothers of Maula Bakhsh. If two-thirds only had been mortgaged, the mortgagee would have been in possession of the house. The mere fact therefore of the mortgagee being in possession was not sufficient to constitute ouster from the property". The case before the Bench was stronger in that they held that the mortgagee's possession would not amount to ouster, unless the plaintiff was aware of the extent of the share mortgaged. It should be noted that, in that case, the mortgagee entered into possession from the start as mortgagee and not, as here, as a lessee.

The above case proceeds on the rule laid down by their Lordships of the Privy Council in *Corea* v. *Appuhami*, [1912] A. C. 230, which is an authority for the proposition that the relationship between co-sharers comes into existence as soon as title is vested in them by the operation of the rules of inheritance; and that actual possession by one of them not accompanied by a denial of the title of the other and not amounting to ouster or anything equivalent thereto, is not adverse.

It was contended on behalf of the appellant that Ewaz Ali and others might have been co-sharers of the plaintiffs; but their mortgagee (the appellant) was not. Assuming this is so, the appellant's possession has to be pronounced to be adverse before limitation for the plaintiffs' suit is reckoned from the date of the mortgage. To be adverse, it must be such as to be in open denial of the plaintiffs' right. This principle is not peculiar to co-sharers, but is applicable to all persons claiming adverse possession. It is true possession is *prima facie* adverse but if the apparent circumstances suggest a lawful title in the possessor, his denial of the right of the mortgagor's co-sharer, implied in a transaction, not coming to his knowledge cannot set limitation running against him—registration cannot in such a case give rise to the presumption of notice nor can knowledge of the transaction be imputed to the rightful claimant where there is nothing to put him to inquiry. If the appellant's possession as lessee was not adverse to the plaintiff (it is not contended that it was), the subsequent execution of a deed of usufructuary mortgage which did not introduce any visible change in the character of the appellant's possession cannot make his possession adverse. Apart from this consideration, the transferee of a co-sharer can acquire no more than what belongs to his transferor. By the mortgage in favour of the appellants, no more than the share of Ewaz Ali and others passed to him. At the date of the mortgage, his possession, in the eye of law and as regards title, was that of a co-sharer in relation to the plantiffs. Of course, if the fact that he claimed to be in possession in denial of the plaintiff's title was known to the plaintiffs, his possession would be adverse to them, just as the possession of his mortgagor would have been so, if he had repudiated the plaintiffs' title to their knowledge. In the absence of repudiation of the plaintiffs' title to their knowledge either by Ewaz Ali and others or by their mortgagees, the possession of neither can be adverse.

The case of *Prahlad Singh* v. *Barumal*, [1930] A. L. J. 1420 was also referred to in the course of arguments. It was held in that case that "it is permissible for a person claiming adverse possession to add the period of his possession as usufructuary mortgagee to the period of his possession as a vendee from his usufructuary mortgagor". This rule, so far as it goes, is quite correct, if I may say so with respect. It does not, however, decide that the possession of the mortgagee of a co-sharer is always adverse to the other co-sharers. It was apparently common ground in that case that the mortgagee's possession was adverse. In any case, the decision of the learned judges proceeds on the assumption that it was so. If the mortgagee's possession is adverse to the co-sharer of the mortgagor, it is the adverse possession of the mortgagor through his mortgagee and if the mortgagee continues in possession for more than 12 years, it is the mortgaging co-sharer who would acquire proprietary rights by prescription, the mortgagee merely obtaining mortgagee rights by adverse possession. If, before the expiry of the period of 12 years, the mortgagor sells his interest to the mortgagee or to a third person he transfers not only such rights as he originally had in the property but also his possessory right as against his co-sharers, which would ripen into ownership if his possession through the mortgagee had been left to continue for full 12 years. In this view, I am clearly of opinion that there is no conflict between the case last mentioned and the earlier one which I have followed.

For the foregoing reasons, I would dismiss the appeal and uphold the decree appealed from.

BY THE COURT—As we are not agreed as to how this appeal is to be decided although on points of law that arise in this case there is not much difference in our opinions, and as the difference consists in how the law is to be applied to the facts found, we direct that the record of the case be laid before the Hon'ble the Chief Justice for reference to a third judge under Sec. 98 C. P. C. or Clause 27 of the Letters Patent of the High Court whichever of the two may be applicable. As the matter is not of any general importance, we do not consider that a reference to a larger number of judges will be necessary. The point to be decided is "whether, in the circumstances found by the lower appellate court, the suit was rightly decreed or whether it should have been dismissed as being barred by time under Article 144 of the Limitation Act?".

B. Malik (with him *U. S. Bajpai*) for the appellant.

M. N. Kaul (for *K. N. Katju*) for the respondents.

The following judgment was delivered by

Sulaiman, J.

SULAIMAN, J.—In this case the learned Judges constituting the Bench who heard it first differed in their opinions. As the order of reference shows there was not much difference of opinion on the point of law that arose in the case, the main difference was as to how the law was to be applied to the admitted facts. Accordingly the point of law which the learned Judges have referred is as follows:—

> Whether in the circumstances found by the lower appellate court, the suit was rightly decreed or whether it should have been dismissed as being barred by time under Article 144 of the Limitation Act?

The facts as found by the lower appellate court are that one Bhallu had three sons, Husain Baksh, Makhnu and Qadir Baksh. In 1879 Husain Baksh and Qadir Baksh purchased the shop in dispute in equal shares. On the death of Qadir Baksh his half share devolved on his children Ewaz Ali and others. About 1909 Husain Baksh died, and his half share devolved on his brother Makhnu. Makhnu died in 1912 and that half share devolved on his descendants, the present plaintiffs. Thus so far as the legal title is concerned there can be no doubt that on the findings the plaintiffs had a legal title to a half share in the disputed shop.

According to the lower appellate court Ewaz Ali used to manage the property. A lease had been granted either by Ewaz Ali alone or jointly with his brothers and sisters to the defendant Subah Lal, who remained in possession as lessee for some time. On April 24, 1910 Ewaz Ali and his brothers and sisters made a usufructuary mortgage of this very shop to the defendant Subah Lal, who had been in possession from before. Later on January 16, 1913 Ewaz Ali and others sold the shop to the defendant, who has continued in possession all this time. The lower appellate court has further found that "the plaintiffs had no reasons to suspect the conduct of Ewaz Ali." It may also be noted that there was no evidence led as to the actual knowledge of the plaintiffs or their predecessors of the usufructuary mortgage made by Ewaz Ali and others to the defendant.

The substantial question which arose in second appeal was whether in the absence of any proof of knowledge of the usufructuary mortgage, the plaintiffs' claim was barred by time because adverse possession of the defendant commenced from the date of the possessory mortgage.

In order to indicate the difference of opinion between the two learned Judges it is necessary to give a brief summary of their conclusions.

Mukerji, J. held that:

> As a general proposition of law, there can be no doubt, that possession, where it is referable to a title, cannot be considered to be adverse and hence co-owner's possession is, *prima facie*, not adverse to the other co-owners.

The learned Judge distinguished the case of *Corea* v. *Appuhami*[1] on the ground that here we were concerned not merely with co-sharers but with a third party, viz., the transferee. He then remarked:

> So long as possession remained with the sons of Qadir Baksh and conceding for the sake of argument but not admitting, so long as possession remained with the tenants of the sons of Qadir Baksh, the possession was with co-owners, and that possession could not ordinarily be regarded as adverse to the other co-owners, but as soon as the defendant obtained a usufructuary mortgage from the sons of Qadir Baksh and got possession under it, in my opinion it must be taken that the possession of the defendant became adverse to the plaintiffs. The possession of the defendant after the mortgage could not be referred to mere co-ownership of the mortgagors with the plaintiffs. A mortgage of the entire property by one of the proprietors is a clear assertion of adverse title and the possession of the mortgagee is surely adverse to the co-owners of the mortgagors.

He accordingly held that the possession of the defendant as a mortgagee was adverse to the plaintiffs and the claim was barred after the lapse of 12 years from that date. He further held that the period of occupation as a usufructuary mortgagee could be tacked on to the period of occupation as a vendee and relied on the case of *Prahlad Singh* v. *Baru Mal*[2] and distinguished the case of *Hafiz Abdullah* v. *Alli*[3].

On the other hand Niamatullah, J. held that

> If the appellant's possession as lessee was not adverse to the plaintiffs (it is not contended that it was) the subsequent execution of a deed of usufructuary mortgage which did not introduce any visible change in the character of the appellant's possession cannot make his possession adverse. Apart from this consideration, the transferee of a co-sharer can acquire no more than what belongs to his transferor. By the mortgage in favour of the appellants, no more than the share of Ewaz Ali and others passed to him. At the date of the mortgage, his possession, in the eye of law and as regards title, was that of a co-sharer in relation to the plaintiffs. Of course, if the fact that he claimed to be in possession in denial of the plaintiff's title was known to the plaintiffs his possession would be adverse to them, just as the possession of his mortgagor would have been so if he had repudiated the plaintiffs' title to their knowledge. In the absence of repudiation of the plaintiffs' title to their knowledge, either by Ewaz Ali and others or by their mortgagees, the possession of neither can be adverse.

As regards the other question the learned Judge observed:—

> If the mortgagee's possession is adverse to the co-sharer of the mortgagor, it is the adverse possession of the mortgagor through his mortgagee, and if the mortgagee continues in possession for more than 12 years, it is the

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[1] [1912] A. C. 230

[2] [1930] A. L. J. 1420

[3] 4 L. R. All. 139

> mortgaging co-sharer who would acquire proprietary rights by prescription, the mortgagee merely obtaining mortgagee rights by adverse possession. If, before the expiry of the period of 12 years, the mortgagor sells his interest to the mortgagee or to a third person, he transfers not only such rights as he originally had in the property, but also his possessory right as against his co-sharers, which would ripen into ownership, if his possession through the mortgagee had been left to continue for full 12 years.

As regards co-owners the law is now well settled that there can be no adverse possession by one co-owner unless there has been a denial of title and an ouster to the knowledge of the other. Their Lordships of the Privy Council in *Corea* v. *Appuhami*[4] approved of the well known principle recognised by Wood, V. C. that "possession is never considered adverse if it can be referred to a lawful title"; and remarked:

> entering into possession and having a lawful title to enter (a co-sharer) could not divest himself of that title by pretending that he had no title at all; his title must have enured for the benefit of his co-proprietors.

It is however clear that their Lordships did not mean to suggest that a co-owner can never acquire adverse possession against other co-owners, even though he openly declares himself that he had exclusive possession as an owner of the whole and he does so to the knowledge of the other co-owners. What was obviously meant by Wood, V. C. was that possession by itself is never considered adverse if it can be referred to a lawful title. If however exclusive possession of one co-owner is accompanied by an open assertion of adverse title which amounts to an ouster of the other co-owners, and the fact of such assertion is brought to their knowledge, there is nothing to prevent the character of his possession from changing into adverse. This is so even when co-ownership existed before any adverse possession could commence. But where a person has begun to hold possession adversely to certain co-sharers and then before the statutory period of limitation he succeeds to the title of one of them, his possession may continue to be adverse to the other co-sharers, though he has become jointly interested in the latter. *N. Varada Pillai* v. *Jeevarath Nammal*[5].

When co-owners are jointly entitled to a property each of them has a right to enjoy the whole property but without excluding the others. It follows that the mere fact that one co-sharer is in possession of the whole property at any time does not necessarily imply his denial of the title of his co-owners, their ouster or any assertion of adverse possession against them. If the other co-owners find no occasion to effectively enjoy the property at the time, they need not mind the possession by one of them. In the eye of the law they are deemed to be in constructive possession of the joint property. The position becomes different when their title has been denied and their right of enjoyment of the property has been repudiated to their knowledge. From that moment the character of the possession of the co-sharer changes, and it becomes adverse against those who have knowledge of the ouster, and time begins to run against them. I am not saying that if the adverse possession of a person commenced before he was a co-owner, the mere fact that he subsequently acquires a share too in the property would necessarily break the continuity of his adverse possession. But where from the very commencement of possession, there was co-ownership, the possession of one must *prima facie* be deemed to be permissive and not adverse.

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[4] [1912] A. C. 230

[5] 18 A. L. J. 274

The question in the present case is whether the same principle can be extended to a transferee from a co-owner who professedly takes a transfer of the whole property. There is some conflict of judicial opinion on this question. In *Sheikh Abdul Ghafur* v. *Ashmath Bibi*[6] a Bench of the Madras High Court held that the entry of an alienee from a co-owner into the property alienated is adverse to the other co-owners from the very moment of that entry. Reliance was mainly placed on certain previous rulings, without examining the question afresh. This case was followed by single judges of the Lahore High Court in the cases of *Anwar* v. *Kishan Singh*[7] and *Ibrahim* v. *Ali Mohammad*[8] and by a learned Judge of the Rangoon High Court in the case of *Maung Tun U* v. *Maung Tun Aung*[9].

In the case of *Hafiz Abdullah* v. *Alli*[10] a Bench of this Court held that the mere possession of a house by the brothers or the possession of a mortgagee from them would not amount to adverse possession, unless there was what may be deemed to be an ouster of the plaintiffs or their predecessor Maula Baksh. In that case it was found that the two brothers mortgaged the whole house to the mortgagee who remained in possession, and it was held that from that fact alone it could not be concluded that the plaintiffs had been ousted from the house. The case however was peculiar inasmuch as the mortgage had been redeemed and the brothers who had made the mortgage had taken back possession by the time the suit was instituted. They were asserting their own adverse possession and wanted to count the period of occupation by their mortgagee. This case has been followed in the cases of *Vaiyapuri Chettiar* v. *Subramania Chettiar*[11] and *Ghulam Mohammad* v. *Mst. Begam*[12]. *See* also the case of *Spencer* v. *Devadoss*[13] and *Sheoraj* v. *Ajudhia*[14].

The case-law has been recently reviewed in an elaborate judgment delivered by a Bench of the Oudh Chief Court in *Halim Shah* v. *Rahim Bux*[15].

It is contended before me that there is a marked distinction between a co-owner who started with premissive possession originally but wanted to change the character of his possession so as to make it adverse, and a tranferee from a co-owner who from the very start has been asserting his adverse possession. It is accordingly urged that the principle governing the possession by co-owners should not be applied to transferees from co-owners. But if this argument were accepted, the same legal position would arise in the case of heirs of a co-owner who had asserted his exclusive and adverse possession before his death.

It cannot be disputed that the underlying principle is that the possession by one co-owner of the entire joint property is perfectly lawful as he has the title not only to his undivided share but to the whole of the property, and has possession of the whole property as well as of every un-

[6] 54 I. C. 385

[7] 71 I. C. 171

[8] 116 I. C. 890

[9] 5 Rang. 93

[10] 4 L. R. All. 139

[11] 1929 A. I. R. Mad. 27

[12] 1930 A. I. R. (Lah.) 251

[13] 1924 A. I. R. Mad. 241

[14] 4 Luck. 503

[15] 1930 A. I. R. (Oudh) 475

divided part. An owner of an undivided share in a property can be rightly in possession of the whole. The possession by him of the entire common property is therefore referable to his legal title and is not adverse to the other co-sharers.

It would follow that there can be no difference in principle whether a person is the original co-owner, or has become a co-owner by virtue of a transfer. From the moment of his acquiring a share in the common property he becomes a co-owner and has the same legal title as his predecessor to enjoy the whole. His possession of the whole is equally referable to his legal title and his possession need not necessarily be adverse. The other co-owners, if they have actually no knowledge of the extent of the share transferred, are entitled to presume that their co-owner has transferred his own interest only and that the transferee by virtue of his right to that share is enjoying possession of the whole property. The mere fact that a transferee is in possession would not put them on enquiry for the transferee has just as much right to enjoy the whole property as his transferor had. The principle of law based on the mere fact of co-ownership would apply with equal force to a transferee from a co-owner, who steps into the shoes of his vendor. A co-owner has no duty cast upon him to watch the conduct of another co-owner and be on the look-out to find out the extent of the share purported to be transferred by him, and to intervene if more than the real share has been transferred. He is entitled to assume that the permissive nature of the possession has passed on to his co-owner's transferee who has now become the co-owner in place of the original co-owner. Of course, if the assertion of title to the whole is brought to his knowledge, and it is accompanied by his ouster and exclusion, adverse possession would then commence as against him. The burden therefore would be on the transferee to establish that the denial of title and ouster were brought to the knowledge of the other co-owner and in the absence of such proof he would not be able to perfect his adverse possession.

The second question which arose for consideration was whether the defendant was entitled to tack on the period of his occupation as the usufructuary mortgagee to the period of his possession as a vendee. If a co-owner is in possession of the whole of the joint property and asserting his exclusive title makes a possessory mortgage of the whole and knowledge of the fact is communicated to his co-owners, he can certainly treat his mortgagee's possession as his own constructive possession, and count the period of occupation by his mortgagee as a part of the period of his own adverse possession. But where the possession of the co-owner himself was not adverse to his co-owners, and it is not he, but his mortgagee who, having become his subsequent vendee, is setting up adverse possession, then the mortgagee vendee would not be able to join the two periods together in order to complete his period of prescription for acquiring full title. When a person is in possession of the property in the capacity of a usufructuary mortgagee, unlawfully against the true owners, the only title which he can acquire by adverse possession is that of a mortgagee. If that title is perfected, he would be entitled to insist on being redeemed. But he could not after a lapse of 12 years' possession as a usufructuary mortgagee, successfully claim to have acquired the full pro-

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prietary interest. He can never acquire title which he did not profess to hold during his possession as mortgagee. In such an event he cannot add his period of mortgage to the period of occupation as vendee in order to complete 12 years' adverse possession as a full owner. Only his title as a mortgagee would be unimpeachable.

In the case of *Prahlad Singh* v. *Baru Mal*[16] on which reliance has been placed, there was no question of a mortgage having been made by a co-owner, followed by a subsequent sale. There Mst. Manohari had first held permissive possession of the shop, but it was assumed, presumably on the pleadings, that she could set up adverse possession. Accordingly it was held that the plaintiff's claim against her transferee had become barred by time because of the lapse of 12 years from the initial assertion of adverse possession by her. I do not imagine that the learned Judges meant to lay down that even if a licensee is estopped under Section 116 of the Evidence Act from denying the title of the true owner until she has first given up possession, her mortgagee can nevertheless set up the licensee mortgagor's adverse possession of the whole proprietary interest for his own (mortgagee's) benefit.

No doubt adverse possession is a mixed question of law and fact; but the findings of the lower appellate court that the plaintiffs had no reason to suspect the conduct of Ewaz Ali must be accepted in second appeal. In the absence of any proof that knowledge of the extent of the property mortgaged was communicated to the other co-owners, the defendant's possession did not become adverse as against them. It is not clear that it became adverse even after the execution of the sale deed of 1913. But even if the possession since 1913 had been adverse, it would not have been open to the defendant to tack on the period 1910-1913 so as to acquire full title by prescription.

I must not be understood to imply that Section 41 of the Transfer of Property Act cannot be applicable to a transferee from a co-owner where he fulfills the requirements of that section. I may note that no question has arisen in this case as to the defendant having taken a transfer from an ostensible owner after having taken reasonable care to ascertain that the transferor had power to make the transfer and acted in good faith.

My answer to the question referred therefore is that in the circumstances found by the lower appellate court, the suit was rightly decreed, as it was not barred by time under Article 144 of the Limitation Act.

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[16] [1930] A. L. J. 1420

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SULAIMAN, J.
BOYS, J.
SEN, J.

SIRAJ FATIMA
versus
MAHMOOD ALI AND OTHERS*

Minor—Right of—To institute a suit to avoid a decree or order against him—On the ground of negligence of his guardian—Evidence Act, Secs. 44 and 2—Whether bar evidence of negligence in such a suit.

A minor has a right to institute a suit in the civil court to avoid a decree or order passed by a competent court against him on the ground of the negligence of his guardian. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. *Brijraj* v. *Ram Swarup*, I. L. R. 48 All. 44 *approved.*

Per SULAIMAN and SEN, JJ. (BOYS, J. *dissenting*)—The Evidence Act does not purport to destroy any substantive right that may exist independently of that Act. Sec. 44 of the Act is merely permissive and not prohibitive. There is nothing in Sec. 44 or Sec. 2 of the Act which precludes the plaintiff from proving that a judgment previously obtained had been obtained by the negligence of his guardian, and was not binding on him.

The plaintiffs were clearly the rightful owners of the entire zamindari property in suit but in the revenue papers their names were recorded jointly with the defendants. On the strength of these entries in the revenue papers the defendants applied in the revenue court for partition of their shares. The plaintiffs being minors were represented by their certificated guardian, who objected that the defendants had no right in the property. A question of proprietary title having been raised the revenue court directed the guardian to file a civil suit within three months. The guardian failed to file any suit, and as a result the revenue court decided the question against the present plaintiffs and ordered partition. One of the plaintiffs on attaining majority instituted the present suit for a declaration of title to the property and for possession in his own right and acting as the next friend of his minor brothers and sisters, against the defendants who were applicants for partition. *Held,* (1) that the legal rights of the plaintiffs being absolutely clear, the failure of the guardian to file a civil suit as ordered by the revenue court prejudiced the interests of the minors, and the guardian ceased to represent the minors properly and effectively, and the inaction of the guardian amounted to negligence, and the minors were entitled to treat the partition order as not binding on them; (2) that when the partition order under the Land Revenue Act itself fell to the ground, Sec. 233 (*k*) would have no application, and the present suit was maintainable.

SECOND APPEAL from a decree of BABU RAJ BEHARI LAL, Additional District Judge of Cawnpore, confirming a decree of BABU SARUP NARAIN, Second Subordinate Judge.

The following is the Referring Order:—

Boys, J.

BOYS, J.—In view of the order that we propose to pass, it is not necessary to say more than is sufficient to show how the case comes before the Court. One Afzal Ali had two wives, by the first of whom he had two daughters, Siraj Fatima and

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Nisar Fatima. Of these, Nisar Fatima is dead, and her daughter Kaniz Fatima is defendant No. 3. Siraj Fatima is defendant No. 1. By the other wife, Afzal Ali had, we were variously informed, three sons and a daughter or three sons and two daughters. It is immaterial which is correct. On Afzal Ali's death 7/8 of his property descended to his children, about which there is no dispute. 1/8 went to Saghirunnissa, his second widow. She died in 1918, and in the ordinary course the 1/8 share should have descended to her own children. In fact Siraj Fatima and Nisar Fatima succeeded in getting their names recorded along with the children by the other wife Saghirunnissa.

The next stage was that Siraj Fatima and Nisar Fatima applied to the revenue court for partition of their share of the 1/8 relying on an oral gift. The children of the other wife Saghirunnissa through their certificated guardian, Wajid Ali, objected to any partition in favour of Siraj Fatima and Nisar Fatima. The guardian was directed to file a suit in the civil court. He failed to do so within the specified time, and then the revenue court, as it was bound to do, presumed that there was no force in the objection, and directed partition.

Hence the present suit by the children of Saghirunnissa against Siraj Fatima and Kaniz Fatima, the daughter of Nisar Fatima, who by this time had died. The other defendants are transferees, and Wajid Ali was impleaded as defendant No. 4. The plaintiffs alleged fraud and collusion on the part of Wajid Ali in not going to the civil court as he had been directed, and he was alleged to have colluded with the defendants.

Both courts held that there was no oral gift, and with this we are no longer concerned. Both courts further held that there was gross negligence on the part of the guardian Wajid Ali and, semble, that they were, therefore, justified in passing over the provision of Section 233 (*k*) of the Land Revenue Act and decreeing the plaintiffs' claim.

The appeal to this Court was first of all heard by Mr. Justice Sen and myself, no one appearing on behalf of the respondent. We decreed the appeal upon a reference to the cases *Beni Prasad* v. *Lajja Ram*, I. L. R. 38 All. 452, a decision of two Judges, and *Bachan Singh* v. *Bhika Singh*, 106 I. C. (All.) 49, a decision of a single Judge.

On the application of the respondent the appeal was subsequently restored and has come up again for a further hearing before us today. It is unnecessary to mention any other cases that have been quoted to us than the decision of *Brij Raj* v. *Ram Sarup*, I. L. R. 48 All. 44. It is also a decision of two Judges. The decisions are directly opposed. No reference was made in the latter case to the earlier. In view of the difficulty of the question and of the very great importance of it, it is desirable, in our opinion, that the case should be heard by a Full Bench.

We direct, therefore, that the case be laid before the Hon'ble the Chief Justice for the appointment of such a Bench, if he see fit.

M. L. Agarwala and *A. M. Khwaja* for the appellants.

Ambika Prasad Dube for the respondents.

The following judgments were delivered:—

Sulaiman, J.

SULAIMAN, J.—This is a second appeal by the defendants arising out of a suit for a declaration of title to certain zamindari properties consisting of shares in certain villages, and for recovery of possession and mesne profits. One Afzal Ali had two daughters Siraj Fatima and Nasir Fatima from his first wife, and he had a second wife Saghirunnissa whose children are the plaintiffs. Abid Ali defendant No. 2 is the husband of Nisar Fatima and Kaniz Fatima defendant No. 3 is her daughter. Afzal Ali died in 1918 leaving his two daughters from the first wife, his second wife and her

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children. Two annas share in his estate devolved on his wife Mst. Saghirunnissa. Saghirunnissa also died later in the same year and according to the strict Mohammedan Law her share devolved upon her children and not on her step-daughters. But the names of all the children of Afzal Ali were recorded in the revenue papers against the two annas share left to Saghirunnissa on her death. Sometime after this Nisar Fatima also died and her share devolved on her husband and her daughter, and sister.

An application for partition was filed in the revenue court by Abid Ali the husband of Nisar Fatima (presumably both on his own behalf and on behalf of his minor daughter) and Siraj Fatima against the other children of Afzal Ali, who are the present plaintiffs. The application is not before us, and it is not clear whether it was for a perfect partition of the mohal or for an imperfect partition. It appears however that the minors were represented in the proceeding by Wajid Ali who was the grandfather-in-law of the plaintiff Mahmood Ali. It is also clear that Wajid Ali had been the certificated guardian of the minors. An objection was filed by the guardian-ad-litem that the plaintiffs were entitled to the entire share left by Saghirunnissa and that the applicants had no interest in that share. As the names of the applicants were already recorded in the revenue papers the partition court decided to proceed under Section 111(1)(*b*) of the Land Revenue Act and directed that the plaintiffs through their guardian should institute a suit in the civil court within three months for the determination of that question. Admittedly no suit was filed by the guardian. The revenue court therefore acting under Sub-section (2) decided the question against the objectors and ordered partition. The final order for partition was made on October 18, 1922. Mahmood Ali attained majority in 1923, and the present suit was filed by him, his brothers and sisters on July 9, 1924 against the defendants who had been the applicants for partition in the revenue court and also against Wajid Ali. The plaint was very badly drawn up and there were allegations in paragraph 8 of the plaint to the effect that the defendant No. 2 Abid Ali won over the plaintiffs' guardian Wajid Ali and colluded with him to cause harm to the plaintiffs; accordingly the plaintiffs' guardian did not properly look after the partition case on behalf of the plaintiffs, nor did he put forth any objection with respect to the plaintiffs' right of ownership while the minor plaintiffs were unable to take any proceeding; and when the defendant came out successful in the partition case they wanted to deprive the plaintiffs of their right, but the proceeding has legally no effect as against the plaintiffs. The reliefs sought were for the establishment of the plaintiffs' right of ownership and proprietary possession over the property and for the dispossession of the defendants, mesne profits, interest and costs. There was a general prayer for any other relief which may be just and beneficial to the plaintiffs. The defendants contested the claim on the ground that there was no fraud, collusion or negligence on the part of the guardian and that the claim was barred by Section 233(*k*) of the Land Revenue Act. They further pleaded that there had been an oral gift of the share made by Saghirunnisa to the defendants.

In spite of the allegations of fraud, collusion and negligence the second part of issue No. 2 was framed in a very vague and general way:—

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Are the proceedings not binding on the plaintiffs as they were minors and were the plaintiffs minors at the time or not?

Both the courts below have found that the alleged oral gift made by Mst. Saghirunnissa was not proved. They have also found that the plaintiffs were minors during the proceedings in the revenue court. None of the courts finds that there was any fraud or collusion on the part of the defendants. The lower appellate court has further found that there was gross or culpable negligence on the part of the guardian in not filing a civil suit. It has held that the suit was in consequence not barred by Section 233 (*k*) of the Land Revenue Act, and that the plaintiffs had a right to maintain it.

The case was first disposed of *ex parte* and was subsequently restored. The Bench hearing the appeal have referred it to a Full Bench in view of an apparent conflict of opinion between the cases of *Beni Prasad* v. *Lajja Ram*[1] and *Bachan Singh* v. *Bhika Singh*[2] on the one hand and the case of *Brij Raj* v. *Ram Sarup*[3] on the other.

The allegations in the plaint and the reliefs claimed therein were vague and so was the issue framed at the time. But there is no doubt that the plaintiffs sought to avoid the effect of the revenue court partition by alleging the negligence of their guardian in addition to their allegations of fraud and collusion. The finding of the lower appellate court that under the circumstances of this case there was gross or culpable negligence on the part of the guardian must be accepted in second appeal. The only question that remains for consideration is whether a suit for possession of the property previously partitioned by the revenue court can lie in a civil court.

There are a large number of cases containing observations for and against the view that negligence of the guardian is a ground for avoiding the decree. It may be convenient briefly to refer to them before discussing the reasons on which those decisions are based. In the case of *Raghubar Dayal Sahu* v. *Bhikya Lal Misra*[4] one of the learned Judges, Field, J. at page 76 referred to *Gregory* v. *Molesworth*[5] where it was said:

> It is right to follow the rule of law, where it is held that an infant is as much bound by a judgment in his own action as if of full age, and this rule is general, unless gross laches, or fraud and collusion, appear in *proche in ami*, then the infant might open it by a new bill.

He then referred to the practice in the Court of Chancery that if it were sought to question a decree passed against a minor on the ground of fraud or collusion, it might be done by an original bill, but if it were sought to impeach the decree passed against an infant on the ground of laches in the *proche in ami*, that the next friend had omitted to put forward proper available grounds of defence, this was usually done by re-opening the original case upon motion or petition. He also referred to the case of *Hoghton* v. *Fiddey*[6] where this practice was explained. The learned Judge then said that for suits in this country the procedure was different, and if an infant desired to have a decree set aside on the ground that his next friend had neglected his interest and had not put forward on his behalf good grounds of defence which were available the proper mode of procedure was to apply for a review under the C. P. C.; but if he sought to set it aside by a separate suit, then the plaintiff in such a suit could proceed only upon proof of fraud or collusion. The other learned Judge did not discuss the question but held that the decree was good because no fraud was established. The question as to the proper procedure did not therefore really arise in the case.

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[1] I. L. R. 38 All. 452=14 A. L. J. 438

[2] I. L. R. 48 All. 44=23 A. L. J. 901

[3] 106 I. C. (A) 49

[4] 12 Cal. 69

[5] 3 Atkyns 626

[6] L. R. 18 Eq. 573

In the case of *Daulat Singh* v. *Raghubar Singh*[7] the learned Judges observed:

> But short of fraud being established and proved and fraud not only on one side but on both, i.e., on the part of the then plaintiff and on the part of the present plaintiff's then guardian, we know of no right which the present plaintiff can now have to dispute the validity of the decree which became final. Even if the guardian was negligent and through her negligence did not properly protect the interest of the minor in the previous suit the minor is well bound by the decree, so long as the guardian did not act fraudulently and in collusion with the minors then petitioners. If the law were otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a plaintiff or defendant in the suit. The minor having been represented by a lawfully constituted guardian he is as much bound by the decree in that suit as if it had been *sui juris* at the time and had represented himself.

But in that case the plaintiff had come to court on the allegation of fraud which was not proved, and there was even no finding that there had been a negligence of the guardian. The observations were therefore *obiter dicta.*

In the case of *Chandra Shekhar Tewari* v. *Balakdhar Dube*[8] a learned Judge of this Court remarked:

> If the guardian neglected to support the case of the defendant, and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the defendant to avoid the operation of the decree.

There too the plaintiffs had come into court on the allegation of fraud which was not established.

In the case of *Beni Prasad* v. *Lajja Ram*[9] the Bench remarked that they entirely agreed with the remarks of Field, J. in *Raghubar Dayal's* case, which have been quoted by me above. But this observation also was an *obiter dictum.* There was no evidence of any kind to connect the opposite party with the omission of the guardian to plead limitation, and as pointed out by the learned Judges the plea of limitation was one to which effect could have been given even though not pleaded, because the court is bound to give effect to it under its own motion. The learned Judges clearly held that even if a minor could avoid a decree by a separate suit merely on the ground of gross negligence of his guardian, he could not do so in that case because no such negligence had been established. In the case of *Bechan Singh* v. *Bhika Singh*[10] a single Judge of this Court followed the view expressed in *Chandra Shekhar's* case and in *Beni Prasad's* case.

On the other hand, it was laid down in the case of *Lalla Sheo Churn Lal* v. *Ram Nandan Dobey*[11] that gross negligence on the part of a next

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[7] [1894] A. W. N. 141

[8] I. L. R. 38 All. 452 at 454

[9] 10 A. L. J. 149

[10] 106 I. C. 1927, 49

[11] I. L. R. 22 Cal. 8

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friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in the old Section 103 of the C. P. C. (now Order IX, Rule 9). In the course of the judgment the learned Judges referred to the English Law as contained in "Macpherson on Infants" that an infant plaintiff though bound by the decree can reopen the proceedings upon a new matter or on the ground of laches or of fraud and collusion. They also referred to Simpson on the Law of Infants, where it was stated that a decree may be impugned where there has been gross negligence by the next friend in the conduct of the infant's case or new matter discovered since the date of the decree. They quoted the observations of the V. C. in *re*: *Hoghton*[12].

> I am clearly of opinion that she cannot be called upon to endure that inconvenience (to suffer by any negligence or want of knowledge on the part of her then next friend). The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests.

They concluded that according to the law as administered in England, the gross negligence of his next friend could entitle an infant to obtain an avoidance of proceedings undertaken on his behalf. The learned Judges then went on to point out that the setting up of fraud in a fresh suit was an answer to the statutory bar and remarked:—

> As fraud and negligence are on the same footing the plaintiff has the same relief in each case (page 13).

They distinguished an earlier case of the Calcutta High Court on the ground that the general propositions laid down therein were subject to the exception of fraud, and they considered that if the question of gross negligence had been in any way before the Bench, it would have been excepted in that case also. The principle laid down in *Lalla Sheo Churn Lal's* case has been applied to a fresh claim brought even after a decree in a contested suit. I may simply give references to a few cases of the other High Courts.

Jwala Singh v. *Jaimal Singh*[13], *Mohammad* v. *Sukha Singh*[14], *Bonda Chinnaya* v. *Pothala Achanma*[15], *Gottepati Subamma* v. *Gottepati Narasamma*[16], *Mohan Lal* v. *Neki*[17], *Hanmantapa* v. *Jivubai*[18] and *Chunduru Punnayyan* v. *Rajani Viranna*[19]. I may also mention the case of *Ram Sarup Lal* v. *Shah Latafat Hossein*[20] where an application for the review of an order allowing the withdrawal of a suit by a next friend filed through another next friend was entertained and the case of *Parmeshwari Pershad Narain Singh* v. *Sheo Dutt Rai*[21] where an *ex parte* decree was set aside on the ground of the negligence of the guardian. See also the case of *Bipin Chandra Das* v. *Menajaddi*[22].

The case of *Brij Raj* v. *Ram Sarup*[23] decided by a Bench of this Court contains a well considered judgment reviewing at some length the various authorities. The learned Judges referred to Macpherson on Infants, Simpson on the Law of Infants in *re*: *Hoghton's* case, *Gregory* v. *Moles-*

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[12] L. R. 18 Eq. 573 (576)

[13] 1 I. C. 400

[14] 13 I. C. 20

[15] 16 I. C. 543

[16] 26 I. C. 16

[17] 37 I. C. 195

[18] 24 Bom. 547

[19] 45 Mad. 425

[20] 29 Cal. 735

[21] 6 Cal. L. J. 448

[22] 47 Cal. L. J. 287

[23] I. L. R. 48 All. 44

worth and also Halsbury's Laws of England Vol. XVII, Paragraph 316. The court concluded that the same rule of law would be applied in India, viz., that the gross negligence of his next friend would entitle a minor to the avoidance of proceedings undertaken on his behalf, and by parity of reasoning the same rule would apply in the case of a minor defendant who had been represented in a litigation by a guardian-ad-litem. The learned Judges then went on to hold that the negligence or laches of the guardian which entitles a minor to avoid a decree must be of a gross character.

There is thus a clear conflict of opinion between the observations made in the case of *Beni Prasad* v. *Lajja Ram*[24] and *Brij Raj* v. *Ram Sarup*.

The cases which contain observations that negligence is not a good ground for the setting aside of a decree passed against a minor proceed mainly on the doctrine that an infant is as much bound by a judgment or order as an adult, provided he was represented by a proper guardian. The idea seems to be that the only duty cast upon the litigant is that he should see that the opposite party, if a minor, is properly represented by a duly constituted guardian and that there is no duty cast upon him to see that the guardian-ad-litem vigilantly prosecutes the case on behalf of the minor. On the other hand, the cases which have laid down that negligence is a good ground proceed on the circumstance that according to English Law the negligence of the guardian entitles a minor to avoid the decree, and infer that the same rule is applicable in India. In some cases the learned Judges have gone so far as to remark that negligence stands on the same footing as fraud.

That in England gross negligence of the guardian is a good ground for the avoidance of a decree against a minor cannot be doubted. It however appears that the usual practice there is to allow review in a case where negligence is asserted and remedy by a separate action where fraud or collusion is asserted. But no difficulty arises in England where these provisions are part of the common law and are not contained in any statutory enactments. The rule of equity allowing a party to avoid a decree on the ground of fraud or a minor to avoid it on the ground of negligence of his guardian is just as well established a rule as the rule of *res judicata.*

In India we have codified law. The rule of *res judicata* is contained in Section 11 of the C. P. C. That section may not be absolutely exhaustive, and the principle of *res judicata* may apply for instance to execution proceedings, although execution proceedings do not come within the letter of the section. But to say that Section 11 has certain exceptions not set forth therein is quite another matter. We here have a statutory enactment prohibiting a court from re-trying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a court competent to try a subsequent suit which has been heard and finally decided by such a court. In the face of the express language of the Act it cannot be said that the section is not of general application, but that there are certain exceptions to it which are not set forth therein.

The rule of *res judicata* is however a rule of procedure. The Evidence Act also contains adjective law and is an act of procedure. Section 44 of that Act permits a party to a suit or other proceeding to show that a previous judgment or order which is relevant, was obtained by fraud or collusion. Thus we have a statutory provision permitting a party to show that a judgment or order which would have operated as ***res judicata*** is not binding upon the party because it had been obtained by fraud or collusion. Reading the two provisions of law together it would follow that a suit to avoid a previous judgment on the ground of fraud or collusion would not be barred. But Section 44 does not contain any exception as regards the negligence of the guardian of a minor. The effect of Section 11 C. P. C. therefore cannot be got rid of by a reference to Section 44 of the Indian Evidence Act.

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[24] I. L. R. 38 All. 452

It has been contended before us that Section 44 read with the provisions of Section (2) (1) contains an exhaustive list of the circumstances under which a judgment can be avoided, and that all other rules of evidence, whether based on common law or otherwise, which permitted evidence to be led for avoiding a judgment are now excluded under the provisions of this latter section. But this last mentioned section merely excludes all rules of evidence not contained in any statute, Act or regulation in force. The Evidence Act does not purport to destroy any substantive right that may exist independently of that Act. Section 44 is merely permissive and not prohibitive. It allows a party to prove fraud and collusion in order to avoid a judgment or order. But it does not go further to prevent him from adducing evidence of negligence of his guardian, provided of course he had a right independently of the Evidence Act. There is in fact no provision in the Evidence Act which would prevent a person from adducing evidence to prove his right to avoid a judgment, provided the right is a substantive right and not a mere matter of procedure. The right is not merely one of adducing evidence in a particular way. A person who wants to establish his alleged substantive right to avoid a decree is prepared to abide by all the rules of evidence laid down in the Indian Evidence Act, and is not contravening any provision which prevents the leading of such evidence to prove the alleged right, provided of course, such a right exists independently and is not excluded by any section of the Act, as, for instance, hearsay evidence and evidence of a contemporaneous oral agreement are expressly excluded. There is therefore nothing in Section 44 or in Section 2 of the Evidence Act which precludes the plaintiffs from proving that a judgment previously obtained had been obtained by negligence of the guardian.

This however does not by itself get rid of the difficulty created by Section 11 C. P. C. The language of that section is unqualified, and no exception can be admitted to it. But there is yet another aspect of the matter. When a person seems to avoid a judgment, for instance on the ground of fraud, he concedes that the judgment so long as it stands is good but he claims that he has a right to avoid it. The option to avoid the judgment accrued to him after the judgment was delivered, and it was open to him to accept it or to avoid it. His right to exercise the option of avoiding the voidable judgment when exercised would vacate the judgment itself. There would then no longer be any previous determination of the question as an obstacle in his way. Under Section 11 C. P. C. the court is

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prevented from trying an issue which has already beeen determined; but if the judgment previously determining that issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud, the obstacle contemplated by Section 11 is automatically removed.

In my opinion there can be no doubt that a right to avoid a judgment on the ground of fraud exists independently of Section 44 of the Evidence Act. A contract obtained by fraud is voidable at the option of the party defrauded. In the same way a judgment obtained by fraud is voidable at his option. One may give the instance of a compromise decree. The decree cannot stand on a footing higher than that of the contract itself. If the compromise was obtained by undue influence, coercion or fraud and was voidable, the decree could be equally avoided. If this were not the case then a party against whom a judgment has been obtained by undue influence would have no remedy whatsoever. Undue influence is not one of the exceptions mentioned in Section 44 of the Evidence Act and would not be covered by it. Furthermore, as in the case of undue influence the party concerned has full knowledge of all the facts, his attempt to avoid the judgment subsequently would not be based on any matter analogous to the discovery of a new matter within the meaning of Order 47, Rule 1. As was observed by their Lordships of the Privy Council in the case of *Chhaju Ram* v. *Neki*[25] the general words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously, viz., the discovery of a new matter or evidence, or some mistake or error apparent on the face of the record. A case of undue influence would not be covered by O. 47, R. 1. *Nathu Lal* v. *Raghubir Singh*[26]. That was a case of a compromise obtained by undue influence or collusion (not fraud). I pointed out in my judgment that the cases of fraud on the court (not on a party) or a mutual mistake or where there is no due representation of a party might stand on quite a different footing. The case of fraud on a party might in certain circumstances, when the party is not aware of the fraud practised upon him at the time, may be a matter analogous to the discovery of a new and important matter and the order may be open to be reviewed. But in the case of an undue influence knowledge exists all along. It may also be difficult to hold that a judgment obtained by undue influence would be open to be reviewed under the inherent jurisdiction of the court, because it is no concern of the court to watch that the parties are acting at arm's length. The only conclusion that one can therefore come to is that a right to avoid a judgment on the ground of undue influence or fraud just as much as a right to avoid a contract on those grounds is a substantive right because the binding character of the transaction itself is impugned. It is not a mere matter of procedure or rule of evidence. It therefore exists independently of the Evidence Act.

The next question is whether the right of a minor to avoid a decree on the ground of negligence of the guardian is also a substantive right. That in England such a right is recognized admits of no doubt. But it is wrong to say that negligence is either included in fraud or stands on exactly the same footing. In the case of fraud or collusion not only the

[25] 49 I. A. 144

[26] 1926 A. I. R. (A) 50

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guardian is to blame, but the blame also rests on the opposite party. Whereas in the case of a mere negligence of the guardian, short of collusion or fraud, the opposite party may be wholly innocent. Where the conduct of the opposite party has been tainted by fraud or collusion he has no real grievance if the order so obtained is set aside when the fraud or collusion is proved. On the other hand, a party who was innocent can have a serious grievance if an order obtained by him fairly in a contested matter is subsequently sought to be set aside on the ground that the minor's guardian acted negligently. There is some force in the observation that it is not any part of the duty of the opposite party to watch the conduct of the guardian-ad-litem and to see that he is acting with due care and caution. After all in many cases a minor litigant may suffer serious loss owing to the negligence of his guardian or trustee. A remedy may be recognized in law by way of a suit for damages for the negligence of the person whose duty it was to take proper care. Another difference between negligence and fraud or collusion is that the former does not come within the scope of Section 44 of the Evidence Act which lays down exceptions whereas the latter do.

But the principles recognized in England show that the right of a minor to avoid a decree on the ground of the negligence of his guardian is a well established rule of common law, and is therefore a substantive right. But such negligence is recognized to give the minor a right to avoid the decree. No one should be allowed to obtain a decree of a binding character against a minor unless the latter has been properly represented. If there is no such proper representation the minor ought to have a substantive right to avoid it. The right of the minor is to impugn the judgment itself. He is not trying to go behind a finding arrived at in the previous suit, but is attacking the very judgment itself. When the judgment itself is vacated, no question of *res judicata* would arise.

It seems to me that it is also possible to avoid the effect of the provisions of Section 11 C. P. C. by holding that the minor ceased to be a party to the suit when his guardian-ad-litem was grossly negligent. Of course, there can be no bar of *res judicata* where a party in the subsequent suit was not, properly speaking, a party to the previous suit.

The case of a minor litigant is very peculiar. While the litigation is being fought he is in a helpless position and cannot protect his interests or defend his rights. The courts have therefore a duty cast upon them to watch his interest vigilantly and the minor is considered to be under the protection of the court. The guardian-ad-litem who is appointed to represent the minor has to be appointed by the court and he must be a proper person to be his guardian for the suit. There is however no such formal order in the case of a next friend who sues on behalf of a minor and who is not appointed by the court. The guardian is bound to take care of the interest of the minor in the same way as a prudent man would look after his own interest. Negligence on his part would be a breach of duty. The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The minor who is not able to resist the claim himself is represented by the duly constituted guardian, who is under an obligation to exercise due care and skill which a prudent man would exercise if he himself were a party. If the guardian appointed is not a proper guardian, for instance where his interest is adverse to that of the minor or where the guardian is grossly negligent in looking after the interest of the minor, it can hardly be said that the minor is properly represented in the litigation. Even where there was a duly constituted guardian and there was no flaw in his appointment, their Lordships of the Privy Council in the case of *Durga Prasad* v. *Kesho Prasad Singh*[27] held that as the guardian named in the case was not a legal guardian and had no right to defend the suit on behalf of the minor, the decree was not binding upon him. In the case of *Rashidunnissa* v. *Mohemmad*[28] their Lordships of the Privy Council remarked that where the guardian was a disqualified person, the minor "was never a party to any of these suits in the proper sense of the term." In the case of *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad*[29] the counsel for the defendant had to admit before their Lordships of the Privy Council that the previous decree was not binding on the minors in respect that they were not properly represented. There the father had been appointed as their guardian though his own alienation was being impugned by the minor sons. Side by side with this view, their Lordships of the Privy Council have also laid down that even though there be no formal appointment of a guardian-ad-litem, a minor is bound by a decree obtained by him if his interest had been duly protected and he was effectively represented by his mother, even though there was an absence of an order appointing her as his guardian *Walian* v. *Bankey Behari*[30].

It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there be such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him, if he is sufficiently represented and his interests are well protected.

The rules contained in Order 32 C. P. C. relate to the appointment of a guardian-ad-litem which can be altered or added to by the High Courts. They are not substantive provisions of law. It seems to me that even in his duties, he ceases to represent the minor properly and effectively, and where a guardian has been formally appointed, but he is grossly negligent the result is the same as if no proper guardian had been in existence. As pointed out above it is a part of the duty of the court itself to see that the minor is properly represented and his interest is being looked after adequately. It is also the duty of the court to see that the guardian appointed is a proper person who would safeguard the interest of the minor. If therefore the guardian ceases to take any interest in the case or is grossly negligent so as to sacrifice the interest of the minor, it cannot be said that the minor is still properly represented in the litigation. Wilful and wanton neglect on the part of the guardian disqualifies him. This also therefore appears to me to be a basis on which the avoidance of a decree against the minor can be allowed.

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[27] I. L. R. 8 Cal. 656

[28] I. L. R. 31 All. 572

[29] I. L. R. 46 All. 95

[30] [1903] 30 Cal. 1021

In ordinary civil cases the more speedy and appropriate remedy would be by way of a review of judgment on an application presented to the court which passed the decree. Such an application can be said to be based on the discovery of a new important matter or evidence because the minor cannot be considered to have been aware of the negligence of his guardian during his minority. He must be deemed to discover it after attaining majority because it is only then that he can move in the matter. The ground of negligence is therefore analogous to that of a discovery of a new or important matter or evidence which will come within the purview of Order 47, R. 1. But such a remedy is restricted by the law of limitation, and the application has to be made within the prescribed short time.

The question is whether a separate remedy by way of a suit is also not available. No doubt the questions did not come up for consideration in the case of *Bibi Walian* v. *Banke Behari Persad Singh*[81]. All the same their Lordships of the Privy Council did not throw out the subsequent suit brought by the minor on the mere ground that his remedy, if any, was by way of review of judgment and not by a separate suit. If the principle of *res judicata* is not a bar there is no ground for holding why a separate suit would not lie. The same thing happened in *Raja Bahadur Raja Brij Narain Rai* v. *Mangala Prasad*[82].

In the present case there is clear reason for allowing a separate suit. There is no provision for a review of judgment by a subordinate revenue court under the U. P. Land Revenue Act. The doctrine of inherent jurisdiction can hardly be invoked in such a case. It would not be open to the revenue court to re-open the partition on the allegation that the guardian of the minor had been negligent. As a matter of fact so far as the provisions of that Act go there is no section expressly applying the provisions of the C. P. C. relating to the appointment of a guardian for a minor to the proceedings in the revenue court. The remedy of the minor, if any, can be only by a separate suit. The suit for avoidance of a previous order of a competent court is undoubtedly one of a civil nature and falls within the scope of Section 9 C. P. C. Such a suit is maintainable in a civil court. If a review of judgment by the Revenue Court is not permitted, there is no reason why remedy by way of a fresh suit in the civil court should not be allowed.

It may further be noted that in the present case the alleged negligence of the guardian consisted of the omission to file a suit in the civil court as directed by the revenue court, and not in omitting to do anything in the revenue court itself. The suit in the civil court would have been brought by Wajid Ali as next friend of the minor and his position there would not have been identical with that of a guardian-ad-litem of a defendant to a suit. The question is therefore not one of a review of the Revenue Court's order in consequence of anything done in that court.

In *Brij Raj's* case the learned Judges quoted remarks made in some judgments that there was no substantial difference between 'negligence' and 'gross negligence'; but that it was the same thing with the addition of a vituperative epithet. The learned Judges however very properly pointed out that it was not every kind of negligence, which would entitle a minor to avoid a decree, but that the amount of care required should be judged by the standard of ordinary men. Of course, every sort of negligence, however trivial, would not be a sufficient ground, for there may be some negligence, the effect of which may not be prejudicial to the interest of the minor. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. The direct result of the negligence must be a serious prejudice to the minor and the negligence must not be merely such as might be innocently committed even by a reasonable person taking the ordinary precautions which he would have taken in his own case. Where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian, although not brought to the notice of the court at the time, the decree can be avoided. In the present case, the negligence lay in the omission to file a suit as ordered by the revenue courts, and the lower appellate court has found that in the circumstances of this case, when the legal rights of the plaintiffs were clear, it amounted to a gross or culpable negligence.

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[81] I. A. 30, 182

[82] I. L. R. 46 All. 95

It has been contended by the learned advocate for the appellants that even if there is a right to avoid a decree or order passed by a competent court on the ground of gross negligence of the minor's guardian there is an absolute bar created by Section 233 (*k*) of the Land Revenue Act against a civil suit being filed after a revenue court has partitioned the property.

The position was well settled under Act XIX of 1873 after the pronouncement of the Full Bench in the case of *Muhammad Sadiq* v. *Laute Ram*[88]. The nature of the partition proceedings in a revenue court, the purpose and effect of the order for partition, and the nature of the adjudication of the rights of the parties were well explained in the elaborate judgment delivered by the Chief Justice in which the other learned Judges concurred. But the case turned on the language of Section 241 (*f*) of the old Act which said "re-distribution of land." We now have Section 233 (*k*) in its place where the words are "partition or union of mohals". In one sense it may be said that the language of the new Act is more general and wider because partition includes distribution of lands and the section covers all suits "with respect to" it.

The language is undoubtedly unhappy and has been a source of some conflict of opinion. In some cases it has been construed strictly literally and it has been held that a suit for possession filed in a civil court relating to property allotted to the opposite party in a revenue court partition does not seek to disturb the partition of the mohal and is therefore not prohibited. If mohals are treated as geographical areas, the division into those areas is not interfered with by handing over possession of a small share or lands from the owner of one mohal to the owner of another mohal. It has been suggested that where no question of *res judicata* arises, the civil

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[88] I. L. R. 23 All. 291

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court's jurisdiction is not barred.

On the other hand, in other cases it has been pointed out that a partition court does not merely adjudicate upon the rival claims of recorded co-sharers but must ascertain lands held in common and in severalty and has power to allot lands belonging to one co-sharer to another co-sharer if the partition cannot otherwise be conveniently made; and therefore after the partition has been effected and lands have been allotted in different mohals that allotment cannot be interfered with by a civil court on the basis of any title that existed before the partition. Again a person may want to have his share and all his lands separated and constituted into a new and separate mohal. He does not want to have any longer any joint liability for the payment of Government revenue with the other co-sharers. With this object in view he applies to the revenue court and gets his properties partitioned and put into a separate mohal. After this process has been gone through, it should not be left open to a co-sharer in the other mohal to come to the civil court and again claim that he still owns some lands in this separate mohal and is a co-sharer with the owner of the mohal, or that the owner of the separate mohal is still a co-sharer in the other mohal and has therefore a joint liability for the payment of Government revenue. It has been suggested that the whole object of a partition proceeding is to allot specific lands to specific co-sharers and place them into a separate mohal in the case of a perfect partition and into separate pattis in the case of an imperfect partition even though in order to prepare convenient compact areas it may be necessary to take some lands from one and give them to another in exchange for something else. Where parties were arrayed on different sides and a conflict of interest was necessarily implied, the allotment should not be allowed to be altered by the civil court on the basis of a title prior to such allotments. Under Section 4(4) of the Land Revenue Act it is an area under a separate engagement for the payment of land revenue. The engagement for payment of revenue with a co-sharer would be disturbed if some plots allotted to him are taken out of his possession. There would have to be a fresh assessment of revenue on those particular plots.

Since *Mohammad Sadiq's* case there have been no less than three Full Benches of this Court on the question of the extent of the applicability of Section 233 (*k*). The first two are *Shambhu Singh* v. *Daljit Singh*[34] and *Kalka Prasad* v. *Man Mohan Lal*[35], which were decided by the same Bench and on the same date. These were followed by another Full Bench in the case of *Bijai Misra* v. *Kali Prasad Misra*[36]. In this last-mentioned case (Banerji and Tudball, JJ., Richards, C. J. dissenting) held that a subsequent civil suit was barred. They applied the principle laid down in *Mohammad Sadiq's* case to a case under Section 233 (*k*). It may be noted that Tudball, J. was also a member of the previous Full Benches, and so was Richards, C. J. The latest Full Bench appears to have been consistently followed in a number of cases, vide *Ganga Prasad* v. *Beni Prasad*[37]. A contrary view appears to have been taken in the case of *Data Din* v. *Nobra*[38] but *Bijai Misra's* case does not appear to have been referred to by

[34] 38 All. 243

[35] 38 All. 302

[36] 39 All. 469

[37] [1930] A. L. J. 601

[38] [1930] A. L. J. 1846

counsel. In the case of *Ram Sukh Pandey* v. *Prithi Singh*[39], *Ganga Prasad's* case was distinguished. The position has been recently reviewed in the case of *Ram Rikha Misra* v. *Lallu Misra*[40] in which a contrary view has undoubtedly been expressed. The latest Full Bench case of *Bijai Misra* v. *Kali Prasad Misra* was referred to by one learned Judge and was presumably distinguished as it could not have been dissented from by a Division Bench. Of course, so long as a latest Full Bench case is not overruled it has to be followed, if it cannot be distinguished. In the present case however the question does not directly arise, and it is therefore unnecessary to consider the correctness of the decision in *Bijai Misra's* case.

It seems to me that we may assume in favour of the appellants that ordinarily a civil suit does not lie for the possession of property, which has been allotted to the opposite party by a revenue court at a partition. But it does not follow that the bar created by Section 233 (*k*) is so absolute as to prevent a party from going behind an order of the revenue court even on the ground of fraud, or collusion or on the ground of the negligence of the guardian of the minor. When an original decree of a civil court can be set aside by a minor on the ground of the gross negligence of his guardian, I can see no valid reason why a revenue court's order in a partition proceeding cannot be set aside on the same ground. No case has extended the scope of Section 233 (*k*) to such an extent.

The only other question that remains is as to the actual form which our decree should take. It has been contended by Mr. Khwaja, who has argued the whole case with ability, that the proceedings in the revenue court up to the time when it directed the plaintiffs' guardian to file a civil suit, should be restored inasmuch as there was no negligence of the guardian up to that time. He further contends that the mere filing of an application for partition in the revenue court ousts the jurisdiction of the civil court altogether, and while an application is pending and remains undisposed of, the civil court cannot go on with a suit relating to the possession of the same property.

It seems to me that the present case is not analogous to a civil suit brought against a minor in which there has been some irregularity in the appointment of a guardian for the minor which has prejudiced him and the claim against the minor would be barred by time if a fresh suit were instituted against him. In such a case a mere declaration may be granted and the former suit restored, or if the same question can be raised in the second suit and the merits gone into afresh, the court may itself determine them. As pointed out above, in the present case the revenue court has no power to review a judgment as no such power is conferred upon it by the U. P. Land Revenue Act, nor do the provisions of Section 114 and Order 47, C. P. C. apply to revenue court proceedings. The plaintiffs would therefore have no remedy whatsoever unless a civil court can grant them a substantial relief, viz., that of recovery of possession.

When the order of the revenue court for the final partition can be vacated, it would no longer stand as an obstacle in the way of the plaintiffs. When the order under Section 112 itself falls to the ground, Section 233 (*k*) would have no application. That section could be applied only when

[39] [1930] A. L. J. 1307

[40] [1931] A. L. J. 307

there is an order for partition passed by a revenue court which is binding on the plaintiffs. I see no force whatsoever in the contention that the original application for partition must be deemed to be still pending in the revenue court, nor do I see any force in the argument that the mere fact that such an application has been filed in a revenue court at once ousts the jurisdiction of the civil court to try the question of title.

Sulaiman, J. In my opinion the decree passed by the lower appellate court was right, and the appeal should be dismissed.

Boys, J. BOYS, J.—This appeal came first before Mr. Justice Sen and myself on May 12, 1931, when we allowed the appeal, no body appearing on the other side. On the application of the respondent the appeal was subsequently restored and came up for hearing before the same Bench again on January 12, 1932, when we directed that the case be laid before the Hon'ble the Chief Justice for the appointment of a Full Bench. The case has now come before a Full Bench for disposal.

The appeal is a defendants' appeal arising out of a suit for declaration of the plaintiffs' title for possession, and for mesne profits. The facts are as follows:—

Afzal Ali married twice. By his first wife he had two daughters, Siraj Fatima and Nisar Fatima. His first wife died in his lifetime. Nisar Fatima's husband was Abid Ali. Nisar Fatima died on August 29, 1920, leaving a daughter Kaniz Fatima. Siraj Fatima is defendant No. 1. Abid Ali is defendant No. 2, his wife Nisar Fatima having died. Kaniz Fátima Nisar Fatima's daughter, is defendant No. 3.

Afzal Ali's second wife was Saghirunnissa and she had three sons, who were minors, and two daughters who were minors at the date of the partition proceedings which led to this suit. Afzal Ali died on March 29, 1918, and Saghirunnissa died on September 29, 1918.

Two annas of her husband's property descended to Saghirunnissa. It is only about this two annas and not about any of the rest of Afzal Ali's property that there is dispute in these proceedings.

On Saghirunnissa's death the two annas was recorded in the names of Siraj Fatima and Nisar Fatima, the children of the first wife, and also in the names of the three sons and two daughters of Saghirunnissa, the second wife. It is manifest that in the absence of any further explanation the names of the step-children Siraj Fatima and Nisar Fatima were wrongly recorded.

Siraj Fatima and Abid Ali, the husband of Nisar Fatima, now deceased, applied for partition of their share in this two annas against the sons and daughters of Musammat Saghirunnissa who were represented by a certificated guardian, Wajid Ali, who is described to us as being a retired tahsildar and grandfather of the wife of the eldest of Saghirunnissa's sons.

On behalf of the minors Wajid Ali objected that the representatives of the first wife could have no right in the personal property of the second wife. Wajid Ali as guardian was directed to file a suit. He failed to file any suit, and as a result a final order was passed for partition on October 18, 1922.

In 1923 Mahmud Ali, the eldest son of the second wife Saghirunnissa, became a major. On July 19, 1924, the present suit was filed by Mahmud

Ali and the other sons and daughters of Saghirunnissa under his guardianship.

The plaint alleged that Nisar Fatima assisted by her husband Abid Ali had filed the partition suit, had won over the plaintiffs's guardian Wajid Ali, and had colluded with him, and as a result thereof Wajid Ali did not properly look after the partition case. As an instance of the failure to look after the partition case properly the plaint specified not his failure to file a suit but his failure to put forward any objection with respect to the plaintiff's title.

The defendant set up an oral gift which has been found to be not proved; denied that there was any negligence on the part of Wajid Ali, the guardian; and relied upon Section 233 (*k*) as a bar to the suit.

Both the trial court and the lower appellate court have held (1) that there was an oral gift; (2) that Wajid Ali had been guilty of negligence in not filing the civil suit, and (3) that Section 233 (*k*) of the Land Revenue Act was no bar to the suit, and the plaintiff has had his decree.

The defendants have appealed, and two questions have been pressed before us, firstly that while a decree may be treated as a nullity if proved to have been obtained by fraud or collusion, it cannot be set aside on the ground of negligence, whether gross or otherwise; and secondly, it has been contended that S. 233 (*k*) is in any case a bar to a suit in the civil court.

In regard to S. 233 (*k*) it was contended that it constituted a bar not only to any interference by a civil court with the distribution of mahals but to interference with the allotments to particular co-sharers. The question is very far from being free from difficulty, but it does not call for decision in the present case. There can be no question but that the decree of any court may be treated as a nullity if it can be shown to have been obtained by fraud or collusion. In such a case the reasoning would be as follows. A plaintiff has normally the right to come into court and ask for a declaration of his title for possession and for mesne profits. He is met at the outset by a judgment of the revenue court where, as in the present case, he has had an opportunity of contesting or getting contested the question of title has not contested it and it has been decided against him. The defendant will, of course, rely upon S. 11 C. P. C. The plaintiff will counter this by relying upon S. 44 of the Evidence Act. The judgment tendered by the defendant is of course relevant, and S. 44 of the Evidence Act declares that evidence is relevant which is directed to show that the judgment was obtained by fraud or collusion. So far whether Section 44 be regarded or not as engrafting an exception on S. 11 C. P. C., the decision is clear. It only remains to consider whether "gross negligence" is on the same footing as "fraud" or "collusion" for our present purpose.

It is not necessary to enter into what may be the distinction between "negligence" and "gross negligence". There is, as I said in one of the earlier orders in this case, no practical difference, but I would express it otherwise as it has been more happily expressed in other cases, that there is no definite line between the two. The question whether the negligence was sufficiently grave or gross is a question which would have to be decided in the particular circumstances of each case provided that it be first determined that negligence, whether gross or otherwise, is on the same footing as fraud or collusion, for the purposes of holding a decree to be a nullity.

I am not, however, able to arrive at a conclusion that they are on the same footing. By S. 11 C. P. C. the judgment, given that other necessary conditions exist, is conclusive. An exception as it were in favour of being allowed to plead that the judgment was obtained by fraud or collusion is made by S. 44 of the Evidence Act. Can any such exception be made in favour of negligence? Section 2 of the Evidence Act declares that on and from the first day of September 1872 all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India shall be repealed. Now, I cannot get beyond the fact that S. 44 embodies a rule of evidence. Nor can I get beyond the fact that there is no distinction between a rule of evidence permitting proof of fraud or collusion and a rule of evidence permitting evidence of negligence. This seems to me therefore conclusive that evidence cannot be given of negligence on the part of a guardian in order to arrive at a conclusion that a decree can be treated as a nullity. It has been suggested that a guardian who is negligent is in fact no guardian at all and that in that aspect of the matter it can be held that the minor was not properly represented. But this appears to me a straining of the words "not properly represented" which is not permissible.

It was also further pressed upon us that if we were to hold that a judgment cannot be treated as a nullity on the ground of the gross negligence of a guardian it might lead to the interests of minors very gravely suffering. This is manifestly so, but there are many cases in which a minor or a *cestui qui* trust may suffer at the hands of a trustee or a pardanashin lady, at the hands of her mukhtar or relatives without there being a remedy against an innocent third party. Again it is not possible to suppose that gross negligence was omitted from S. 44 otherwise than deliberately. In view of the state of the law in 1872 there cannot be any doubt that the idea of putting gross negligence by a guardian on the same footing as fraud and collusion must have been present to the minds of the Legislature.

Whatever weight, however, may be attached to these last considerations, I have considered and reconsidered S. 2 and S. 44 of the Evidence Act, and I cannot escape from the definite conclusion that to allow evidence of gross negligence on the part of a guardian as relevant for the purpose of destroying the effect of a decree or judgment would be to act upon a rule of evidence which is not embodied in the Evidence Act or in any statute or regulation and which I am therefore debarred by Section 2 from acting upon.

I would, therefore, hold on this single point that the plaintiff was debarred from setting up negligence as a ground for holding the decree of the revenue court to be a nullity. I would, therefore, allow the defendants' appeal with costs and dismiss the suit.

Sen, J.

SEN, J.—This is an appeal by the defendants. The facts which gave rise to this appeal may be briefly indicated.

One Afzal Ali owned zemindari property in four villages, viz:—(1)

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Narkhurd, (2) Mosinpore, mahal Afzal Ali, (3) Panka Bahadur Nagar, mahal Bahadur Singh and mahal Mathura Prasad and (4) Mirzapore, mahal Badal Singh, patti No. 3. Afzal Ali died on March 29, 1918 leaving a number of heirs. He left two adult daughters, viz., Siraj Fatima defendant No. 1 and Nisar Fatima by a predeceased wife. He also left a widow Mst. Saghirunnissa and by her three minors sons, Mahmud Ali, Masud Ali and Zahid Ali and two minor daughters, Wajibunnissa and Sahebunnissa. These persons are the plaintiffs in the action. Nisar Fatima was married to Abid Ali, defendant No. 2. She died on August 29, 1920, leaving a daughter Kaniz Fatima defendant No. 3.

Under the Mohammedan law of inheritance a one-eighth share in the estate of Afzal Ali devolved upon his widow, Mst. Saghirunnissa. The widow died in 1918 and her estate consisting of the one-eighth share in the property of Afzal Ali devolved upon her sons and daughters alone, Siraj Fatima and Nisar Fatima having no claim to the same. Mahmud Ali plaintiff was married to the grand-daughter of Wajid Ali, a retired Tehsildar. Wajid Ali has been impleaded as defendant No. 4. Upon the death of Saghirunnissa, Siraj Fatima and Nisar Fatima applied for mutation of names against the share of Saghirunnissa in the four villages jointly with the minor sons and daughters of Saghirunnissa and mutation was so effected. In 1922, Siraj Fatima and Abid Ali and Kaniz Fatima applied for partition of their shares in the revenue court. The application for partition is not before this Court but it is common ground that the application was made with reference to the property which formed part of the one-eighth share belonging to Mst. Saghirunnissa. The minor sons and daughters of Saghirunnissa were represented in the partition proceedings by Mir Wajid Ali who was their certificated guardian. Mir Wajid Ali contested the application for partition, denied that the applicants had any title to the property left by Saghirunnissa, and contended that under the Mohammedan Law, the property belonged exclusively to the sons and daughters of Saghirunnissa. A plea involving a question of proprietary title having been raised, the revenue court directed Mir Wajid Ali to institute a suit in the civil court for adjudication of title within three months. For some inscrutable reason, the guardian did not institute the civil suit. Thereupon the revenue court ordered a partition of property as claimed. This was on October 18, 1922.

Mahmud Ali the eldest son of Saghirunnissa emerged from minority in January 1923. The present action was commenced by him on July 9, 1924 in his own right and acting as the next friend of his minor brothers and sisters. The plaintiffs stated in Paragraph 8 of the plaint:—

> Mst. Nisar Fatima, assisted by her husband defendant No. 2, who was in police service in Cawnpore district and who is a very cunning man filed a partition suit in revenue court as a matter of precaution. She having won over the plaintiffs' guardian, colluded with him and made efforts to cause harm to the plaintiffs. Accordingly the plaintiffs' guardian did not properly look after the partition case on behalf of the plaintiffs nor did he put forth any objection with respect to the plaintiffs' right of ownership, while the plaintiffs being minors, were unable to take any proceedings. Thus defendants Nos. 1 to 3 came out successful in the partition case and

wanted to deprive the plaintiffs of their right. It has legally no effect as against the plaintiffs.

The pleadings in the case have not been artistically drawn up. Before 1922, Nisar Fatima was already dead. But there can be no doubt that the plaintiffs intended to repudiate and ignore the order of the partition court upon the ground of fraud, collusion and culpable neglect on the part of their guardian in not initiating and carrying through proper proceedings for the protection of their rights. The plaintiffs did not ask for the avoidance of the order of the revenue court directing partition of the property. They chose to ignore the order altogether and sought the following reliefs:—

> (*a*) On the establishment of the plaintiffs' right of ownership, proprietary possession over the property given in list A may be awarded and the defendants may be dispossessed. (*b*) A decree for Rs.996-3-6 on account of mesne profits and interest may be passed in favour of the plaintiffs against the defendants.

The other defendants against whom the suit was directed were the transferees of the property under conveyances executed by Siraj Fatima. Mir Wajid Ali did not contest the claim.

Defendants 1 to 3 resisted the suit upon various grounds. They contended that Mst. Saghirunnissa, through natural love and affection, had made an oral gift of her one-eighth share in her husband's estate in favour of her own sons and daughters as also her step-daughters, Siraj Fatima and Nisar Fatima, that Mir Wajid Ali was not guilty of any neglect in not instituting a suit in the civil court in obedience to the direction of the revenue court, that his inaction was due to the fact that he knew and realised that his wards had no title to the property in controversy and that the suit was barred by Section 233 (*k*) of the Land Revenue Act.

Neither the court of first instance nor the court of appeal has gone into the questions of fraud and collusion which were emphatically denied by the defendants. It must be taken that there were no material before the court to support these charges and that the pleas relating to fraud and collusion have failed. The issues formulated in the case were somewhat loosely worded but the issues were comprehensive enough. The parties fully understood what were the real points of difference in the case and adduced evidence accordingly. They were in no way taken by surprise and the defendants cannot be allowed to raise the plea as they verbally seek to raise before this Court at this late stage that they have been prejudiced by the loose wording of the issues.

The court of first instance gave the plaintiffs a decree for possession and for Rs.150 as mesne profits together with interest. The findings of the trial court are that the suit is not barred by Section 233 (*k*), that Mst. Saghirunnissa had made no oral gift as contended by the defendants and that Mir Wajid Ali was guilty of gross neglect in not carrying out the direction of the revenue court to institute a civil suit for adjudication of title and that this had seriously prejudiced the plaintiffs. On the last mentioned point, Mr. Swarup Narain observed as follows:—

> It does not appear if any allegation of an oral gift was ever made in the partition case or not. Most probably not. So the question is whether Wajid Ali's act in not filing the declaratory suit amounts to gross negli-

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> gence or not. In my opinion, it does. The plaintiffs' right was so very clear that if the guardian had been mindful of his duties as guardian he would not have kept quiet. I therefore hold that the plaintiffs are not bound by the partition proceeding and that the present suit is not barred.

In Paragraph 5 of their memorandum of appeal in the lower appellate court, the defendants challenged the correctness of this finding. The lower appellate court overruled this contention. It agreed with the findings of the trial court that Section 233 (*k*) did not operate as a bar to the suit, that the oral gift was not proved and that the partition order was liable to be set aside as it was vitiated by gross negligence on the part of the plaintiffs' guardian. The court observed:—

> In my opinion, the partition proceedings also are not binding upon the plaintiffs. It is perfectly clear that there was gross negligence on the part of the guardian in that case. Objection as to the plaintiffs' right was made. The guardian was ordered to establish the claim in the civil court. He took no step. The plaintiffs' case was a perfectly clear one. They were clearly entitled to the property. There was culpable negligence on the part of the guardian which ended in loss to the plaintiff. In my opinion, the plaintiffs are not bound by those proceedings.

In the result the defendants' appeal was dismissed. The defendants appealed to this Court and the appeal came up before a Division Bench. Originally the respondents were unrepresented. In view of certain rulings cited, the appeal was decreed *ex parte*. Subsequently, the *ex parte* order was vacated and the appeal was reheard. It having appeared to the court that there were conflicting decisions on the point as to whether a decree or order passed by a competent tribunal could be set aside on a fresh suit instituted by the minors in the civil court on the ground that the decree had been passed against them because their guardian was guilty of gross neglect, this matter was referred to a larger Bench. The case has now been fully argued by both sides and a mass of authorities has been cited.

An attempt was made to challenge the findings on the two main issues of facts indicated above. The appellants cannot be allowed to do this. The findings are based upon evidence and are not vitiated by any misapplication of substantive law or of any rule of procedure affecting the merits.

It was next contended that the use of the expression "gross negligence" is vague and indefinite and that the degree of negligence ought to have been defined inasmuch as the plaintiffs cannot be clothed with a right of action for *mere* negligence in all cases. In my view, the amount of care which a guardian is under obligation to take may vary with the flexible posture of each case. The word "gross" qualifying negligence is not indicative of any *standard of negligence*. In judicial decisions, the word has been understood in different senses; sometimes signifying non-specialist negligence, sometimes signifying the amount either of specialist or of non-specialist negligence. Lord Craworth in a well-known case[41] before the Judicial Committee while allowing that the epithet 'gross' was not without its significance, stated in clear terms that "degrees of care are not definable". Famous in legal history is the dictum of Baron Rolfe in *Wilson* v. *Brett*[42]:—

[41] L. R. 2 P. C. 1868, 337

[42] 11 M and W (1843) 113

> I could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet.

I understand the term to include inexcusable absence of such ordinary care which under the circumstances of the case a prudent man was bound to take to safeguard his interest or that of a person who was dependent upon him. Where the prudent man abandons his prudence without any excuse in the conduct of any affair affecting the interest of his wards he must be held to be guilty of negligence. Where negligence is established liability follows for all resultant consequences.

It has been contended that the bar raised by Section 233 (*k*) is absolute and that the said bar is not liable to be set aside even where the order of the revenue court is vitiated by fraud, collusion or negligence.

To clear the ground, it may be pointed out here that the bar can in no case extend to one of the villages in suit, viz., Narkhurd. This village was not partitioned by the revenue court. Mr. Khwaja for the appellant, who has argued the case with ingenuity, skill and conspicuous ability, has contended that in partition proceedings the question of title could only be raised within the limits indicated by Section 111 of the Land Revenue Act and that the remedy of the unsuccessful objector lies in an appeal under Section 112 and not by a separate suit. He has also contended that his remedy is by way of review. He takes his stand on Section 233 (*k*) which provides that no person shall institute any suit or other proceedings in civil court with respect to partition or union of mahals except as provided in Sections 111 and 112. He has called to his aid a decision of the Full Bench in *re Mohammad Sadiq* v. *Laute Ram*[48]. This decision turned upon an interpretation of Section 241*F* of Act XIX of 1873, the language of which is in many respects different from that of Section 233*K* of Act III of 1901. It is not permissible to construe the provisions of one statute in the light of any judicial decision on a provision of another statute unless the two are in *pari materia* and are identical in terms. Opinions vary, but in my judgment, the scope of Section 233*K* is narrower than that of 241*F*. The distribution of the land of a mahal by partition is not the same thing as the partition of union of mahals. In the latter case, each mahal is a consolidated unit and the section is not trenched upon by a decision of the civil court which does not affect the integrity of the mahal as a whole. The case-law as to the import and scope of Section 233*K*— and I include my own judgments—presents a hopeless tangle. There are three Full Bench decisions which are reported in 38 All. 243, 38 All. 302 and 39 All. 469. These have been followed by a large number of Division Bench rulings such as I. L. R. 53 All. 568, [1930], A. L. J. 601, [1930] A. L. J. 146 and 18 A. L. J. 110. It is not necessary to notice or discuss these authorities in detail. It will suffice to say that there is no consensus of judicial opinion in support of Mr. Khwaja's plea, that when once a partition proceeding has been initiated in a revenue court, no suit of whatever description relating to the subject-matter can be entertained by the civil court. Indeed there is a sharp cleavage of judicial opinion on the point.

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[48] I. L. R. 23 All. 291

It may be conceded that in the normal state of things, the civil court cannot entertain a suit which may have the result of affecting the partition or union of mahals. But the material point which calls for determination in this case is whether it is open to the civil court to ignore any order as to partition made by the revenue court where the order has been passed affecting the interest of minors by reason of negligence on the part of the guardian. It is too late in the day to question that a decree or order in a civil suit may be ignored by the party aggrieved, where the order has been procured by fraud or collusion. In *the Duchess of Kingston's* case (decided in 1776) the proposition laid down was as follows:—

> Fraud is an extrinsic collateral Act which vitiates the most solemn proceedings of the courts of justice. Lord Coke says, it avoids all judicial acts ecclesiastical or temporal.

Section 44 of the Indian Evidence Act is an enabling section and provides that any party to a suit or other proceeding may show that any judgment, order or decree was obtained by fraud or collusion. This section enacts a rule of evidence and may be taken to graft an exception upon the rule of *res judicata* as enunciated in Section 11 of the Code of Civil Procedure. This section does not enact any rule relating to the substantive right possessed by a citizen nor does it enumerate and exhaust the grounds upon which a decree or order may be attacked. If fraud or collusion vitiates the order or decree passed by a civil court, there does not appear to be any ground for holding that it does not or cannot make inoperative or nugatory an order passed by the revenue court in a partition proceeding. If a minor plaintiff has a right either to ignore or to challenge the propriety of an order passed by the revenue court against him in partition proceedings, the said right is undoubtedly a substantive right. If the minor possesses a substantive right, the right should be capable of being enforced by a suit. A suit for enforcement of such right is clearly a suit of a civil nature within the purview of Section 9 of the Code of Civil Procedure. The jurisdiction of a civil court to entertain a suit of this description exists unless it has been taken away by clear legislative enactment. I have already set out the reliefs which the plaintiffs claim in this suit and have also indicated that the plaintiffs have treated the revenue court proceedings as a nullity on the ground of negligence on the part of their guardian. It has been contended by the appellant that having regard to the provisions of Sections 2 and 44 of the Indian Evidence Act, the plaintiffs are precluded from leading any evidence to prove that the order of the revenue court is vitiated by culpable negligence on the part of their guardian. The answer to the argument is that the right claimed by the plaintiffs is a substantive right and is not merely a rule of evidence; and in order to establish that right, they can always avail themselves of the provisions of the Evidence Act relating to the admissibility of relevant evidence. The plaintiffs are always entitled to prove their case by relevant and admissible evidence within the Act and not beyond it.

In many of the judicial decisions, which have been cited by the respondents the decree or order has been declared to be nugatory on the ground that negligence stands on the same footing as fraud or collusion. There can be no manner of doubt that the incidents of fraud or of collusion are in many respects different from those of negligence. Notwithstanding this difference, it is patently clear that their effect is much the same. A minor cannot act for himself. He has to depend upon his guardian whose position is fiduciary and as such *ubberemei fidei*. If the guardian does not fulfil his obligations to the ward, and wilfully, wantonly or inexcusably abandons his trust with the result that loss or injury accrues to the ward, the latter may have two remedies. He may bring an action against his guardian for tort. Cases however are conceivable where a decree for damages may not amount to a complete remedy or may be no remedy at all. The guardian may be a penniless pauper. The other remedy which, to my thinking, is justly available to the minor is to treat the order as a nullity and to press for such reliefs as he is lawfully entitled to as the owner of the property in dispute. In doing so, the minor cannot be successfully met by a plea of *res judicata*. Where in a suit or proceeding the minor is represented by a guardian-ad-litem but the latter does not function as such, and through inexcusable negligence fails to carry out the duties, which justice demands or necessity compels, the minor for all practical purposes is unrepresented in the suit. A decree or order obtained against a minor who is not properly represented in the action cannot be pleaded as a bar to a suit instituted by the minor relating to the same subject-matter.

There is a preponderance of authority in favour of the view that a minor can always sue for avoidance of a decree or order which could not have been passed against him but for the negligence of his guardian. Mr. Khwaja contends for the opposite view. He has referred to a number of authorities. I proceed to deal with them now.

Daulat Singh v. *Raghubir Singh*[44], decided by Edge, C. J. and Banerjee, J. contains no more that an *obiter dictum* that a specific fraud attributed must be alleged and proved, that such fraud must be fraud on both sides and that mere negligence on the part of the guardian in protecting the minor's interest would not be sufficient to prevent the decree being binding on the minor. It was further held that if the law were otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a plaintiff or a defendant in the suit. No authorities have been cited in support of the observation *qua* negligence. In *Sham Lal* v. *Ghasita*[45] the point did not arise. A previous decree was repudiated on the ground that the minors were not properly represented as their guardian-ad-litem, Mst. Durga Dei, was a married woman. This case has no bearing except in so far that a reference was made to *Raghubar Dayal* v. *Bhikya Lal*[46] which was distinguished. I shall deal with the last-mentioned case presently.

In *Chander Shekhar Tewari* v. *Balakdhar Dubey*[47] the minor sought to repudiate the decree on the ground that it was vitiated by fraud. No fraud was proved. Banerjee, J. held that a minor who was represented in a suit by a duly-constituted guardian was as much bound by a decree passed in that suit as if he were of full age, when there was nothing on the record to show that there was any fraud on the part of the guardian. The decree was not attacked on the ground of negligence on the part of the guardian. The learned Judge however made the following observation in the case:

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[44] A. W. N. 1894, 141

[45] I. L. R. 23 All. 459

[46] I. L. R. 12 Cal. 69

[47] 10 A. L. J. 149

> If the guardian neglected to support the case of the defendant, and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the defendant to avoid the operation of the decree.

It was not considered in the case whether the minor is represented at all where the guardian practically abandons his trust and refuses to fulfil his duties to the minor. The observation quoted above suggests that if the guardian's neglect was ***deliberate,*** matters might wear a different complexion.

In *Beni Prasad v. Lajja Ram*[48] Richard, C. J. took the same view as Banerjee, J. and ruled that the decree obtained against a minor except upon proof of fraud or collusion on the part of the guardian was not liable to avoidance. The *dictum* of Field, J. in *Raghubar Dayal* v. *Bikhya Lal* has been relied upon in support of this view. But in an earlier part of the judgment, the learned Judge observes:

> No doubt it is possible for a minor where the guardian has conducted his case with gross negligence to come to the court and seek relief by way of review of judgment.

If a review of judgment is open to the minor why is not a suit permissible? How does an application for a review lie on the ground of negligence or misfeasance on the part of the guardian? With due respect, it is submitted that the case has not been approached from the proper angle. In *Raghubar Dayal* v. *Bikhya Lal*[49] the learned Judges delivered separate judgments. Field, J. ruled that where a decree had been passed against an infant duly represented by his guardian and the infant, on attaining majority, sought to avoid the decree by a separate suit, he could succeed *only* on proof of fraud or collusion on the part of the guardian. The decree impugned in the case was an ***ex parte*** decree. The learned Judge observes:

> If an infant desires to have a decree set aside on the ground that his next friend had neglected his interest and had not put forward on his behalf good grounds of defence, which were available, the proper mode would be to apply for a review.

The provisions of Section 623 of the Code of Civil Procedure of 1882 (the corresponding provisions in the present Code of Civil Procedure is Order 47, Rule 1) allows a review upon the grounds of error apparent on the face of the record, the discovery of new evidence which was not available notwithstanding due diligence or for any other sufficient cause. In *Chajju Ram* v. *Neki*[50] their Lordships of the Judicial Committee laid down that "any other sufficient cause" meant a reason sufficient on grounds at least analogous to those specified immediately previously. A review on ground of negligence cannot be said to be *ejusdem generis* with discovery of new evidence or error apparent on the face of the record. Negligence on the part of the guardian therefore can be no ground for review under the Code of Civil Procedure.

En passent, it may be observed that the provisions of the Civil Procedure Code are not applicable to partition suits in a court of revenue except within the limits defined in Section 112 of the Land Revenue Act. Moreover, there is no provision for review of judgment of an inferior court of revenue. The only review permitted is, under Section 220, and its application is restricted to judgments of the Board of Revenue. It is manifestly clear that the plaintiffs could claim no remedy by way of review of judgment.

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[48] I. L. R. 38 All. 452 [49] I. L. R. 12 Cal. 69 [50] 49 I. A. 144

The ruling in 12 Calcutta 69 has been dissented from the Madras High Court in I. L. R. 45 Madras 425 and 51 M. L. J. 369. I am in full accord with the view of the learned Judges of that Court and endorse their reasoning.

In *Bachan Singh* v. *Bhikha Singh*[51] Iqbal Ahmad, J. followed the decisions in 10 A. L. J. 149 and 38 All. 452. He ruled that where the defendant was represented by a duly constituted guardian in the execution proceedings, the mere failure of the guardian to diligently prosecute the case on behalf of the defendant could not have the effect of vitiating the order of the executing court. No reason for this is to be found in the judgment. It may be that the opposite party may not be under an obligation to see that the duly constituted guardian is alive to his duties for the protection of the minor, but where the guardian is undutiful to his trust in such a degree as would leave the minor without any protection whatsoever in a matter in which protection was most needed, the minor is really unrepresented. In *Anjaneyulu* v. *Chinna Subbiah*[52] the question now in issue did not arise. The point considered was whether a given set of circumstances constituted gross negligence on the part of the guardian. The question was decided in the negative. The decision in *Nawab Singh* v. *Gur Bux Singh*[53] does not assist the appellant. All that it lays down is that mere failure on the part of the *guardian-ad-litem* to defend a suit or to appeal from a decree was of itself not gross negligence, since it was possible that there might be a good case against the minor and the *guardian-ad-litem* might have thought fit not to incur additional expense in *defending* the suit. I am in agreement with this view. It would be most unwise and imprudent on the part of the guardian to incur expenses on behalf of the minor in defending a suit, where he had no defence. In such a case, a failure or omission on the part of the guardian does not amount to negligence. Indeed it is an act of common prudence.

I would now turn to the reverse side of the shield.

Under the English Law, negligence equally with fraud to be collusion vitiates a decree or order passed against a minor. Simpson on the Law on Infants, (2nd Edition page 512) says:

> A decree may also be impeached, where there has been great negligence by the next friend in the conduct of the infant's case,

The same rule should apply to the case of the *guardian-ad-litem.*

In Macpherson on Infants (page 386), there occurs the following passage:—

> An infant plaintiff, though thus favoured in the course of the suit is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representative, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud or collusion, which will annul the proceedings of the courts of justice as much as any other transaction.

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[51] 106 I. C. 49=[1927] I. L. R. All. 601

[52] 82 I. C. 952=A. I. R. 1924 Mad. 860

[53] 82 I. C. 598=A. I. R. 1925 Lah. 116

In Halsbury's Laws of England (Vol. 17, Paragraph 316, page 138) the law has been summarised and expressed in the following terms:—

> An infant plaintiff is as much bound as an adult by a judgment or order in the cause, even though there may have been irregularities in the conduct of it, unless there has been fraud or gross negligence on the part of his next friend. But in special circumstances, he may be allowed on coming of age to amend his claim or to bring a fresh action.

It is clear that under the English law, a bill for review is not the only remedy.

In *re Houghton* v. *Fiddey*[54] Mallins, Vice Chancellor is reported to have said:—

> The question which I have to decide is whether this infant on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then friend. I am clearly of opinion, she cannot be called upon to endure such inconvenience The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it.

The rules of law set out above are not founded upon any peculiarities of English Statutes. They are general principles broad-based upon rules of justice, equity and good conscience and as such form part of universal jurisprudence. It is on this ground that they have been followed in this country in numerous cases.

I do not think it necessary to deal in detail with the cae-law on the other side of the line. These cases are *Sheo Charan Lal* v. *Ram Nandan*[55] and *Ram Swarup Lal* v. *Shah Latafat Hussain*[56]. In this case, the former next friend of the minor, though guilty of no fraudulent misconduct, was grossly negligent of the minor's interest in withdrawing from the suit. Review of judgment was applied for on this ground and granted. The judgment of Lord Hardwick in *Gregory* v. *Molesworth* was followed, in which it had been laid down that the infant had such a remedy, when either gross laches or fraud or collusion appeared in the next friend. *Parmeshwar Prasad Narain Singh* v. *Sheo Dut Rai*[57]. This is an illuminating judgment of Mukerjee, J. in which many of the leading cases on the subject have been referred to. *Bipin Chandra Das* v. *Mena Jaddi*[58]. This case mainly turned upon the question whether the minor was properly represented by a duly constituted guardian and as to whether there was no proper representative, the appointment of the guardian having been obtained by contrivance. In *Karsan Das Natha* v. *Dadkavabai*[59], Farpan, J. ruled that it was open to the infant to impeach a decree by a suit, in cases where his guardian had been guilty of fraud or negligence, in allowing the decree to be passed against him. In *Hanmantapa* v. *Jivibai*[60], Parsons and Ranade, JJ. decided that where fraud or negligence was established against the guardian of a minor in the conduct of a previous suit, the minor or his administrator had the right to bring a suit to set aside the previous decision. In *Gotepati Subbal* v. *Gotepati Narasamma*[61], Sankaran Nair and Spencer, JJ. held that a minor was not bound by a decree passed against him, where

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[54] L. R. 18 Equity 573 at 576

[55] I. L. R. 22 All. 8 at 12 and 13

[56] I. L. R. 29 Cal. 735

[57] 6 C. L. J. 448

[58] 46 C. L. J. 287

[59] I. L. R. 19 Bom. 571

[60] I. L. R. 24 Bom. 547 at 552

[61] 27 M. L. J. 486

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it was established that his guardian was guilty of gross negligence. It was further held in this case that where the guardian had neglected to put forward the rights of the minor under a will of which he was aware, a decree obtained against the minor under such circumstances did not operate as *res judicata* against him. In *Dada Saheb* v. *Gajraj Singh*[62] Devadass, J. held that where the *guardian-ad-litem* absented himself at the hearing and the vakil was not able to explain why witnesses summoned were not present in court and consequently a decree was passed against the minor, the application for adjournment being refused, there was gross negligence on the part of the guardian and that the decree must be set aside. *Subbiahpandaram* v. *Arunachala Pandaram*[63] is not a case in point. All that was held in this case was that a *bona fide* suit instituted by a guardian without considering the legal aspect of the case did not amount to gross negligence. In *Vadapilli Gajrao* v. *Kala Venkamma*[64] Devadass, J. held that failure to set up proper defences to a suit against the minor is gross negligence and that the minor can, on that ground sue for the avoidance of the decree. I fully agree with this view. I would submit with respect that it would be going too far to say that the fact that the defences might have been very successfully met by the plaintiff in that suit did not make the guardian not *negligent*, would be going too far. The duties of the guardian in such a case have been discussed by their Lordships of the Privy Council in 14 Moore's Indian Appeals 393 at 399. The law on the subject of the minor's right to institute a suit for the avoidance of the decree passed against the minor on account of the negligence of the guardian has been discussed at great length by Wazir Hasan and Neave, A. I. Cs. in *re Rameshwar Bux Singh* v. *Mst. Ridh Kunwar*[65]. It has been held that a minor is as much bound by a judgment in his own action as if of full age, unless gross laches or fraud or collusion is established on the part of the guardian. I agree with the reasoning upon which the judgment proceeds. The case of *Jammu* v. *Mahadeo Prasad*[66] was not a case of a minor instituting a suit for the avoidance of a decree on the ground of his guardian's negligence. While holding that the revenue court had exclusive jurisdiction in matters relating to tenancy, it was held that where fraud intervened in the creation of the tenancy, the proper *forum* for the declaration of the title of the person who had been defrauded was the civil court.

The most exhaustive decision on the question in issue is that of Lindsay and Kanhaiya Lal, JJ. in *Brijraj* v. *Ram Swarup*[67]. Principles have been examined and important decisions on the question have been fully dealt with. I am entirely in agreement with the view of the learned Judges.

It would appear from the above that the balance of authorities is distinctly in favour of the view that a minor is entitled to bring a fresh suit to repudiate a decree passed against him on account of gross laches on the part of the guardian. I have not a particular liking of the adjective gross.

My conclusions may be briefly summarised:—

(1) Where a minor had a substantial claim or defence, but the decree was passed against him during his minority by reason of wanton, wilful

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[62] A. I. R. 1925, Mad. 204

[63] A. I. R 1925, Mad. 379

[64] A. I. R. 1927, Mad. 497

[65] A. I. R. 1925, Oudh 633

[66] A. I. R. 1922, All. 294

[67] I. L. R. 48 All. 44

or inexcusable neglect on the part of his next friend or guardian-ad-litem in not duly prosecuting or defending the suit, the minor on attaining majority was competent to sue for the setting aside of the decree.

(2) The guardian is under no legal obligation to prosecute or defend every suit or proceeding in disregard of its merits. The prime factor in each case is the consideration of the fact as to how far it is in the interest of the minor to prosecute or defend.

(3) Whether or not the guardian is guilty of negligence in the prosecution or defence of a suit or proceeding is in each case a question of fact and does not admit of an inflexible answer but has to be determined with reference to time, place or other circumstances relating to each case.

(4) The standard of conduct which is required from the guardian is one which might be reasonably expected in view of all the circumstances of the case from a person in a fiduciary position who is required to protect the interest of persons committed to his care. He is to act like a reasonably prudent man.

(5) Where the guardian is required either to initiate or continue any proceedings in a court of law, which are necessary for protecting the interest of the minor, the failure of the guardian to act is undoubtedly negligence.

(6) The remedy of the minor may be against his guardian but that is not his exclusive remedy. He can institute a suit in the civil court for the avoidance of the decree or order which has been passed against him by reason of the laches or negligence on the part of the guardian. The minor may repudiate the decree on the ground of negligence quite as much as he can do so where the decree is vitiated by fraud or collusion.

(7) The order of the revenue court in the circumstances proved in this case cannot operate as a bar under Section 233 (*k*) of the Land Revenue Act or Section 11 of the Code of Civil Procedure. The granting of the reliefs claimed in the suit does not affect the integrity of the mahals. The order moreover of the revenue court cannot raise the bar of *res judicata,* as the minors must be taken not to have been duly represented by the guardian on the crucial occasions when they should have been represented.

In view of the findings arrived at by the lower appellate court, the decree passed in favour of the plaintiff-respondents is the right decree. I would therefore dismiss the appeal.

BY THE COURT—The appeal is dismissed with costs.

Appeal dismissed

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Jan. 12

MUKERJI, J.
BENNET, J.

BRIJ GOPAL (*Plaintiff*)
versus
SURAJ KARAN (*minor*) THROUGH DHAPI KUNWAR AND OTHERS (*Defendants*)*

Court Fees Act, Sch. II, Art. 17(iii) and Sec. 7(iv)(c)—Suit for declaration—'Family property belonged equally to plaintiff and defendant and certain documents did not affect jointness of family'—Court-fee payable—Actual relief asked for should be looked into.

For the purpose of determination of the court-fee the actual relief asked for should be looked into and it is entirely beside the consideration of the court whether the suit is likely or not to fail, because the plaint did not ask for a consequential relief. *Radha Krishna* v. *Ram Narain,* 1931 A. L. J. R. 235 *followed. Arunachalam Chetty* v. *Rangasamy Pillai,* I. L. R. 38 Mad. 922 *referred to.*

In his suit for a declaration that the entire family property in the hands of the plaintiff, as the head of a joint family, belonged equally to the plaintiff and the male defendant, and that certain documents executed by certain deceased members of the family did not affect the jointness of the family, plaintiff paid a court-fee of Rs.10 only. *Held,* that the plaint was sufficiently stamped.

FIRST APPEAL from a decree of BABU CHARU DEB BANERJI, Subordinate Judge of Azamgarh.

U. S. Bajpai, S. B. Johari, G. S. Pathak and *Swarup Chandra* for the appellant.

K. N. Katju, Shiva Prasad Sinha, Hazari Lal Kapoor and *Govind Das* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is the plaintiff's appeal and is directed against an order rejecting his plaint.

The suit out of which this appeal has arisen, was instituted to obtain a declaration that the entire family property in the hands of the plaintiff, as the head of a joint family, belonged equally to the plaintiff and the male defendant, the defendant No. 1, and that certain documents executed by certain deceased members of the family did not affect the jointness of the family.

When the suit was filed, the Munsarim reported that the relief called for payment of an additional court-fee of Rs.10, as, in the opinion of the Munsarim, there were two declarations involved in the relief. Thereupon, the plaintiff got the relief amended*, and the court decided that the court-fee paid, namely, Rs.10, was sufficient.

The defendant No. 1 in his written statement, filed on July 17, 1928, took the plea that the court-fee paid was insufficient. He did not ask that the question of court-fee should be tried as a preliminary issue. Before any issues could be framed in the case, the Munsarim made a second report on September 4, 1929 and stated that in view of a decision contained in

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*The amended relief did not materially differ from the original relief.

*F. A. 31 of 1930

Arunachalam Chetty v. *Rangaswamy Pillai*[1] he was of opinion that the plaintiff ought to pay an additional court-fee of Rs.1,415 being the *ad valorem* court-fee payable on the value of the suit fixed for the purposes of jurisdiction.

The plaintiff contended before the court below that the court-fee was sufficient, but this contention was rejected, and time was given to the plaintiff to make good the deficiency. As the plaintiff failed to make good the deficiency, the plaint was rejected, as already stated by us.

The learned counsel for the appellant argued that he never asked for any consequential relief either openly or impliedly, and that the Madras case quoted by the Munsarim was not applicable. He also relied on a decision of this Court, namely, *Radha Krishna* v. *Ram Narain*[2], where it was held that for the purpose of determination of the court-fee the actual relief asked for should be looked into, and it was entirely beside the consideration of the court whether the suit was likely or not to fail, because the plaint did not ask for a consequential relief.

We are entirely agreed with the decision of our Court, and we are further of opinion that the Madras decision has no application to the facts of this case. In that case an injunction had been asked for and that was certainly in the nature of a consequential relief.

Mr. S. P. Sinha, learned counsel appearing for the respondent No. 1, did not resist the appeal and said that the responsibility for the costs of the appeal should not be laid on his client. He further stated that the plea that there was a deficiency of court-fee had been taken only as a matter of form, but it was never pressed in the court below. In this, he seems to be right, but the pliantiff's costs cannot be entirely thrown away, and we think he ought to get them in case of his success in the suit, although not as a result of his success in this appeal.

Holding as we do that the plaint was sufficiently stamped, we set aside the order of the court below and send back the case to it for trial on the merits. Costs here and hitherto will abide the result.

[ED., A. L. J.—The amended relief ran as follows:—It may be declared that the document, known as agreement dated May 9, 1913, and the document known as will, dated November 7, 1925, are null and void and are not binding upon the plaintiff, and that zamindari property and houses, specified below, and the banking business carried on and the funds deposited in the firm styled Radha Krishn Gopi Krishn, and the outstanding debts have been jointly acquired and possessed by the parties and the plaintiff has a moiety share in them.]

Order set aside

[1] I. L. R. 38 Mad. 922

[2] 1931 A. L. J. R. 235

CIVIL

1932

Feb. 10

SULAIMAN, J.
YOUNG, J.

JATHALI BHUL (*Plaintiff*)
versus
NADIA (*Defendant*)*

Landlord and tenant—Occupancy holding—House built with zemindar's permission—Site not a holding within meaning of Kumaun Rules—Suit for possession of the house—Cognizable by civil court—Kumaun Tenancy Rules of 1918—Rules 3 and 9, read with Schedule (1) Serial No. 15.

Where plaintiff sued for possession of a house and a court-yard attached thereto standing on a plot of land alleged to be plaintiff's holding, and under the Kumaun Tenancy Rules of 1928 suits in respect of any matter relating to a holding were cognizable by a revenue court only; *held*, that the land-holder having allowed a building to be put upon the land, the nature and character of the holding was changed and it ceased to be land used or held for agricultural purposes; and in these circumstances the site was not a holding within the meaning of the Kumaun Rules, and the suit was cognizable by the civil court.

Jalesar Sahu v. *Raj Mangal*, I. L. R. 43 All. 607 *applied.*

CIVIL REVISION from an order of S. N. DUBE ESQ., District Judge of Kumaun.

B. L. Dave for the applicant.

L. M. Roy for the opposite party.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is a plaintiff's application in revision from an order of the District Judge of Kumaun. A suit was filed by the plaintiff in the court of the Small Cause Court Judge, who had the jurisdiction of an additional Assistant Collector in revenue cases also. The suit was for possession of a house and a court-yard attached thereto standing on a plot of land which was alleged to be the plaintiff's holding. The plaintiff suggested that five years before the suit he was in joint possession with the defendant, but when a separation took place the defendant did not give him possession of the same. The defendant's case was that the house had been built by his ancestors and had been in the possession of his family for generations.

On the pleadings the first court framed an issue whether the suit was cognizable by the civil court or not. It came to the conclusion that it was cognisable by the civil court, and recorded a finding to that effect. The court imagined that the finding would be appealable, and accordingly stayed proceedings pending the filing of the appeal. The defendant appealed to the District Judge, who entertained the appeal and came to the conclusion that the suit was not triable by the civil court, and sent the record back to the first court with directions to proceed according to law, which implied that the plaint should be returned for presentation to the proper court.

There is no doubt that the first court treated the suit as having been filed on the civil side, and the District Judge treated the appeal before him as an appeal from an order recording a finding on the question of jurisdiction.

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*Civ. Rev. 189 of 1931

It cannot be doubted that in an ordinary civil suit no appeal, not even a revision, lies from a mere finding on the question of jurisdiction. The special rules and orders made by Government which relate to the Kumaun Division, however, provide an appeal from a finding on the question or issue to the effect whether the case is cognisable by a civil or by a revenue court. (Rule No. 4(*a*) under the Tenancy Rules of 1918). But the provisions in Rule 4(*b*) make it clear that the rule applies to revenue courts, and not to civil courts.

Under Rules 3 and 9, read with Schedule (1), Serial No. 15, suits in respect of any matter relating to a holding are cognisable by a revenue court only. It is, therefore, quite clear that unless the present claim can be regarded as one in respect of any matter relating to a holding, it would not be cognisable by the revenue court.

Admittedly the house in question, along with its court-yard, was more than five years old and appears to have been built long ago. The suit was confined to the house and the court-yard attached to it, and not to any other part of the plot used for agricultural purposes. The plaint does not suggest that the property claimed is being used for any such agricultural purposes. No doubt the plaintiff's allegation was that this was a part of his *khaikari,* that is, occupancy holding. But when the land-holder allowed a building to be put upon the land, the nature and character of the holding was changed and it ceased to be land used or held for agricultural purposes. In these circumstances, it is very difficult to hold that the site is still a holding within the meaning of the Kumaun Rules.

We may in this connection point out that in *Jalesar Sahu* v. *Raj Mangal*[1] it was laid down with regard to a grove which had been planted over an occupancy holding that the character of the land was changed and the site ceased to be a holding after the grove had come into existence. We think that the analogy of that case applies. It is now impossible to regard the site as a holding. The suit for possession of the house and the court-yard appertaining to it is, therefore, not in respect of any matter relating to a holding, but is a suit of a civil nature. We may also point out that a contrary interpretation put on the rule would compel a tenant who has been in occupation of a house for generation to sue within six months of his losing possession, whereas if the site has ceased to be a holding, he can sue the trespasser within 12 years in the civil court.

In our opinion, the view taken by the trial court was correct and the suit was cognisable by the civil court. The District Judge has erred in holding that this suit was not cognisable by the civil court. We accordingly allow this revision and set aside the order passed in appeal. The finding of the trial court is in reality, not an appealable order at all, but an expression of opinion on an issue in the case. Costs of this revision will abide the result.

Application allowed

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[1] I. L. R. 43 All. 607

CIVIL

1932

Feb. 16

MUKERJI, J

NIAMAT-ULLAH, J.

SHEIKH MOHAMMAD (*Applicant*)
versus
SAGAR MAL (*Opposite party*)*

Municipalities Act (II of 1916), Sec. 319—Reference by District Magistrate—High Court's duty—Merely to express opinion on a point of law formulated by the District Magistrate and not to investigate facts.

Under Sec. 319 of the Municipalities Act (II of 1916) all that the High Court is required to do is to see a statement of facts made by the District Magistrate himself and to express its opinion on a point of law arising out of the statement. This point of law should also be formulated by the District Magistrate. It is no part of the duty of the High Court to investigate the facts.

ORDER on reference submitted by the District Officer, Azamgarh.

M. Waliullah for the applicant.

P. L. Banerji and *Krishna Murari Lal* for the opposite party.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is a reference under Section 319 of the Municipalities Act, 1916.

It appears that at Mau in the district of Azamgarh there is a Notified Area constituted under the last Chapter of the Municipalities Act. A certain gentleman, who was a member of the Notified Area, applied for permission to build on a certain land, and he got that permission in a certain way. The appellant before the District Magistrate took exception to the method in which the sanction had been obtained by the applicant, and he filed an appeal to the District Magistrate. This reference has arisen out of the said appeal.

As we read Section 319 of the Municipalities Act, the High Court is to express an opinion on a point of law on a set of facts to be stated by the District Magistrate, in the reference. It is no part of the duty of the High Court to investigate the facts. The District Magistrate is the appellate authority, and the High Court may be required to state its opinion on a point of law, for his benefit.

The learned Magistrate has stated some of the facts, but he has also referred us to the record and also has drawn our attention to a certain note, dated November 19, 1931, prepared by the President of the Mau Notified Area.

We are of opinion that we should not have been asked to look into the record or into the note of the President of the Notified Area. All we are required to do is to see a statement of facts made by the District Magistrate himself and to express our opinion on a point of law arising out of the statement. The point of law should also be formulated by the District Magistrate.

We find that the reference is defective, inasmuch as for facts we have been asked not to confine ourselves to the reference made by the District Magistrate but to certain other extraneous documents. Further, we find that the exact point of law, which in the opinion of the District Magistrate

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*Mis. Case 841 of 1931

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Sheikh Mohammad v. Sagar Mal
Mukerji, J.

arises, has not been formulated in terms, though it is possible for us to guess what was passing in the mind of the learned District Magistrate.

In the circumstances, we direct that the file be returned to the District Magistrate. If he still feels it necessary to make a reference, he should comply with the instructions contained in this judgment and prepare a statement of facts which should be clear and precise as findings of fact, and he should also formulate the question of law on which he wants our opinion. We make no order as to costs.

We were told on behalf of the respondent in this reference to inform the District Magistrate, that before he submits a reference and a statement of facts, he should hear the parties. As to this, we have no doubt that the statement of facts will be drawn up after hearing the parties. We note that under Section 318, Sub-section (3) the Magistrate is not to pass any orders without hearing the parties. We also note that Mr. Banerji for the respondent wants to question the validity of reference and that we have not heard him on this point and we have not expressed any opinion as to his competency to question the reference.

FAQIR CHAND AND ANOTHER (*Decree-holders*)
versus
KUNDAN SINGH AND OTHERS (*Judgment-debtors*)*

Civil
1932
Feb. 27
Mukerji, J.
Bennet, J.

Civil Procedure Code, Sec. 48 and Limitation Act, Art. 182—Final decree—Amendment of—Application for execution of amended decree—Made more than 12 years after the date of final decree—Whether time-barred.

An application for execution of an amended decree made more than 12 years after the date of the final decree is barred by limitation under Sec. 48 C. P. C.

Narsingrao Konher Inamdar v. *Bondo Krishna*, I. L. R. 42 Bom. 309 *relied on.* *Baldeo Shukul* v. *Syed Yusuf*, 60 I. C. 318 *dissented from.*

On a correct reading of Art. 182 of the Limitation Act, it is obvious that where execution is barred by Sec. 48 of C. P. C., execution cannot be allowed under Art. 182 of the Limitation Act. In other words, Art. 182 is subject to the provisions of Sec. 48. An amendment of a decree therefore does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by Sec. 48, that is, that the period of 12 years under Sec. 48 is final and cannot be extended by any amendment of the decree whether that amendment is made before the expiry of the period of 12 years or after the expiry of 12 years.

EXECUTION FIRST APPEAL from the decision of BABU MAKHAN LAL, Subordinate Judge of Moradabad.

G. S. Pathak for the appellants.

A. Sanyal for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is an appeal from an order in execution dismissing an application of the decree-holder for execution. The application has been dismissed by the lower court on two grounds, firstly that the exe-

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E. F. A. 517 of 1930

cution was barred by time, being more than 12 years from the date of the decree, and secondly that the decree-holder was not entitled to execution against the property which is in the present application for execution. As regards the second point the facts are as follows:—Mauza Sua-wala was divided at some period not stated into four mahals of 5 biswas each. One of these mahals was called mahal Jahan Singh otherwise Mahal Safed. A person called Jahan Singh owned half that mahal, that is 10 biswas out of 20 biswas of that mahal, and as the mahal comprised 5 biswas of the village, Jahan Singh owned 2½ biswas of the entire Mauza Sua-wala. A mortgage was made by Rupchand, the son of Jahan Singh, on October 25, 1899 in favour of the predecessor of the decree-holder, the property mortgaged being expressed as 2½ biswas out of 20 biswas of Mauza Sua-wala. On March 15, 1913 a suit was brought on this mortgage, the plaint naming the property mortgaged as "2½ biswas of Sua-wala which has become 10 biswas." In August 1913 a preliminary decree was passed on a compromise granting instalments, the property being expressed as "Mahal Safed 2½ biswas which has become 10 biswas". There was a default in payment of instalments and a final decree was prepared on August 18, 1916. In the final decree there was an error, as it stated that the property was Sua-wala "2½ biswas jiske" tin "biswa ho gaya hain". The error was that instead of the word "(دس)" the " د " was omitted and only the letter " س" remained. The decree, therefore, was read with a single letter as if it was " س" that is three biswas. Now it was the duty of the decree-holder to see that his decree was in accordance with the judgment and negligence on the part of the decree-holder led to this error appearing in the final decree. It has not been shown to us that there was any negligence whatever on the part of the judgment-debtor which contributed to the error in the decree. This error was perpetuated in a sale certificate of October 20, 1924 by which the decree-holder bought the property at an auction-sale on this decree, and the error was further extended by expressing the property "2½ biswas minjumla 10 biswas khata khewat No. 1 mauza Sua-wala mahal Safed", that is 2½ biswas out of 10 biswas in khata khewat No. 1 Mauza Sua-wala mahal Safed. The decree-holder finding the error in the sale certificate made a further application for execution of sale of 7½ biswas out of 10 biswas in khata khewat No. 1 mahal Safed. The judgment-debtor made an objection that he was not entitled to do so by the terms of the final decree, and that objection was allowed on November 30, 1926. The decree-holder brought an appeal, and the High Court held on May 4, 1928 that the execution must take place in accordance with the final decree, that is, that the final decree was for 3 biswas and a further half biswa could be brought to execution sale. It is claimed by the memorandum of the present appeal that there was fraud on behalf of the judgment-debtor, and learned counsel stated that the fraud consisted in this objection, but we do not consider that the objection was fraudulent or frivolous, because it was upheld by this Court in appeal in regard to 7 biswas out of 7½ biswas. No other fraud was alleged to have been perpetrated by the judgment-debtor.

On July 31, 1928 the decree-holder applied for amendment of the final decree of August 18, 1916, that is, the application was made 18 days before the period of 12 years allowed by Sec. 48 C. P. C. expired. Notice was issued, and on September 15, 1928 after the period of 12 years had expired, the court ordered amendment of the final decree by the introduction of the letter " د " before the letter "س", that is, that the final decree read 10 biswas instead of 3 biswas. On April 8, 1929 the decree-holder applied for execution in accordance with the amended decree, and this is the present application. The lower court has made a series of errors in confusing the Mauza with the mahal, and the lower court is not correct in holding that the final decree does not entitle a decree-holder to proceed against the remaining 7½ biswas, mahal Safed, so far as the area goes. We now proceed to consider the merits of the question of limitation. There are two provisions of law dealing with limitation for applications for execution. One of these is contained in Section 48 of the Code of Civil Procedure and the other is contained in Article 182, First Schedule of the Limitation Act. Article 182 states that a period of three years is allowed, time beginning to run from the date of amendment of a decree where the decree has been amended. Learned counsel contends that his client should receive the benefit of this provision, but Article 182 states in the first column as follows, "For the execution of a decree or order of any civil court not provided for by Article 183 or by Sec. 48 of the Code of Civil Procedure." Now the language used is somewhat peculiar, as it states "not provided for", an expression which applies very well to Article 183 which deals with decrees of High Courts or orders of His Majesty in Council. The words "provided for" do not apply so clearly to Section 48, as Section 48 does not deal with decrees of courts to which Art. 182 does not apply. But the meaning of the words "provided for", in our opinion, is that where execution is barred by Section 48 of the Code of Civil Procedure, execution cannot be allowed under Art. 182 of the First Schedule of the Limitation Act. In other words Art. 182 is subject to the provisions of Sec. 48 of the Code of Civil Procedure. The present Limitation Act is Act IX of 1908, and by that Act the provisions in question in regard to amendment of decree was introduced, and it did not exist in the previous Limitation Act of 1877. In the same year of 1908 the Code of Civil Procedure at present in force was enacted. Now no change was made in Sec. 48 C. P. C. providing for the extension of the period of 12 years in that Section from the date of the amendment of a decree. We consider that the legislature advisedly omitted that provision from Sec. 48, and that the omission was not accidental. In our opinion the effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by Sec. 48, that is, that the period of 12 years under Sec. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of 12 years, or whether that amendment is made after the expiry of the period of 12 years. The reason why no amendment was made in Sec. 48 is that probably the greater period of 12 years is allowed by that Section, and it is probably the intention of the legislature that that period of 12 years should be final, and that within that period a decree-holder should amend his decree, and obtain all consequent remedies. If a decree-holder neglects to

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Faqir Chand v. Kundan Singh

Bennet, J

amend his decree within a sufficient period before the expiry of 12 years to allow him to obtain his remedy by execution, then he has only himself to blame. In *Narsingrao Konher Inamdar* v. *Bondo Krishna*[1] it has been laid down on page 323 as follows:—

> It is the duty of a successful plaintiff to see that the decree is drawn up correctly against the defendants. I fail to see how the defendants should be held to blame if the decree does not correctly represent the judgment unless he has been a party to inducing the error in the decree. The Subordinate Judge cannot repeat his judgment so as to give a fresh starting point for limitation. I therefore think that November 17, 1897 (the date of the unamended decree) must be taken as the date of the decree sought to be executed.

We also note that a decree bears the date of the original judgment, and an amendment does alter the date of the decree.

Learned counsel refers to a ruling of a single Judge of the Patna High Court in 1921, *Baldeo Shukul* v. *Syed Yusuf*[2]. In that ruling it was laid down that where a decree was amended, the date of amendment is the date of the decree within the meaning of Section 48 of the Code of Civil Procedure. An application for execution in that case was made more than 12 years after the date of the original decree, but within 12 years of the date of an amended decree. The court held as follows:—

> But it has been argued before me that, in so far as Sec. 48 does not embody the provisions of Art. 182, time must begin to run from the date of the decree. I am unable to agree with this contention.

The learned Judge did not refer in his judgment to the fact that Art. 182 specially excludes cases provided for by Sec. 48 of the Code of Civil Procedure, and apparently this fact was not brought to his notice. We therefore consider that the ruling in question is no authority for the issue in this case, because the ruling does not deal with the point which we consider is vital to the question.

Accordingly we hold that the present application in execution having been made more than 12 years after the date of the final decree is barred by limitation under Sec. 48 of the Code of Civil Procedure. We therefore dismiss this appeal with costs.

Appeal dismissed

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[1] I. L. R. 42 Bom. 309

[2] 60 I. C. 318

Civil

1932

March 4

Mukerji, J.
Bennet, J.

ARJUN SINGH (*Plaintiff*)

versus

MAHESHA NAND AND OTHERS (*Defendants*)*

Transfer of Property Act (IV of 1882), Sec. 91—Mortgage by sub-tenant—Death of tenant heirless—Right of tenant-in-chief to redeem—N. W. Tenancy Act (XII of 1881), Sec. 9—Grove land—Mortgage by sub-tenant—Not illegal.

The plaintiff's grandfather was sir-owner and zamindar of a portion of a plot and occupancy tenant of the remaining portion. He got a guava grove planted on the plot by his sub-tenant. In 1885 the sub-tenant (and his wife) executed a usufructuary mortgage of the said plot in favour of

*S. A. 1214 of 1930

Civil

1932

Arjun Singh v. Mahesha Nand

the father of defendants. The mortgagors died about 1903. In 1928 the plaintiff brought a suit for redemption of the usufructuary mortgage; *held*, (1) that on the extinction of the rights of the mortgagors as sub-tenants their rights reverted to the plaintiff in his capacity of sir-owner and zamindar in one part of the plot and in his capacity of tenant-in-chief in the other part of the plot, and he had an interest in the property in question and was therefore entitled to redeem. *Tulsi Ram Sahu* v. *Gur Dayal*, I. L. R. 33 All. 111 (F.B.) *relied on;* (2) that there is nothing in Act XII of 1881 which makes a mortgage of a grove by a tenant illegal, as the prohibitions refer to tenants of agricultural land.

SECOND APPEAL from a decree of BABU KRISHNA DAS, Subordinate Judge of Ghazipur, reversing a decree of BABU KANHAIYA LAL SRIVASTAVA, Munsif of Saidpur.

N. A. U. Siddiqi for the appellant.

Ram Nama Prasad and *Kanhaiya Lal* for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a second appeal by a plaintiff whose suit for possession of a certain plot has been dismissed by both the lower courts. As the second appeal raised some difficult questions of law it has been referred by a learned single Judge of this Court to a bench of two Judges. The facts which were set forth in the plaint were as follows. A portion of plot No. 561 was sir land of which the plaintiff himself is the owner and zamindar and the remaining portion of the said plot was in the zamindari of other persons and was held by the plaintiff as tenant. Entries to this effect were made in the settlement of 1883 for Chamru Singh, the grandfather of the plaintiff. Between the years 1883 and 1885 Chamru Singh, grandfather of the plaintiff, got a guava grove planted on the said plot by Ramsaran Khatik, his sub-tenant, with his consent and permission. Ram Saran and his wife Mst. Sochani made a usufructuary mortgage by a deed of March 7, 1885 for the sum of Rs.55 to Sheo Ram Lal, father of defendants. The written statement admitted that formerly guava trees stood on the land in question and that the mortgage deed in question had been executed as alleged. It has been proved that the plaintiff's grandfather was a zamindar. The mortgagors died about 25 years before the suit, and as the suit was brought in 1928 this would make the year of their death about 1903. In 1906 the mother of the present plaintiff mortgaged this and other plots to Sheo Ram Lal by a mortgage deed, and that deed recited the previous mortgage of 1885 and provided that the mortgagee would retain possession of plot No. 561 until the plaintiff should redeem the mortgage of 1885. The mortgage of 1906 was redeemed on June 26, 1922, and the endorsement on the mortgage deed of redemption stated that plot No. 561 was to remain in the possession of the mortgagee until redemption of the mortgage of 1885. The lower appellate court has dismissed the suit of plaintiff on the ground that the plaintiff is not entitled to redeem the mortgage of 1885, and that that mortgage came to an end with the death of the mortgagors about 1903. Before us learned counsel for the respondent has upheld the decision on three grounds, firstly that the mortgage of 1885 was illegal, as a transfer by a sub-tenant was not permitted by Sec. 9 of Act XII of 1881 (N. W. Tenancy Act); secondly that the defendant had adverse possession from 1903, if not from 1885; thirdly, that the plaintiff is not a person entitled to redemption as his grandfather was not a party to the mortgage deed, having merely attested it as a witness.

In regard to the alleged illegality of the mortgage of 1885 we note that paragraph 2 of the plaint sets forth that the land was planted with a guava grove between the years 1883 and 1885, and that the mortgage was made on March 7, 1885. This is a clear allegation that at the time of the mortgage in suit land was a guava grove. There was no specific denial of this allegation in the written statement, and on the contrary paragraph 2 of the written statement admitted that formerly guava trees stood on the land in question. There is nothing in Act XII of 1881 which makes a mortgage of a grove by a tenant illegal, as the prohibitions refer to tenants of agricultural land. Accordingly we consider that the mortgage of 1885 was a legal mortgage.

In regard to the argument that the defendants had adverse possession, we consider that it is not shown that the possession of the defendants became in any way adverse with the death of the mortgagors in 1903. In any case the defendants by accepting the mortgage of 1906 agreed to hold the land as mortgagees of the plaintiff both under that mortgage and under the mortgage of 1885, and again at redemption of the mortgage of 1906 in 1922 the defendants reiterated their position as mortgagees under the mortgage of 1885. Under the circumstances the defendants cannot succeed in any claim for title by adverse possession.

We now come to the question of the right of the plaintiff to redeem. We consider that this should be dealt with in two aspects. First of all we will deal with the case in the general aspect and the rights of the plaintiff as a zamindar and sir-owner of a portion of this plot and as tenant-in-chief of the remaining portion. It has been laid down in *Tulshi Ram Sahu* v. *Gur Dayal*[1], that where there was a usufructuary mortgage of 1870 executed by a fixed-rate tenant, who then disappeared and whose death was presumed, a suit for redemption after 1901 could be brought by the zamindar for the redemption of that usufructuary mortgage. The principle underlying this ruling was that on the extinction of the fixed-rate tenancy the land reverted to the zamindar and did not escheat to the Crown. This is the general feudal principle of English Law which records the rights of a succession of overlords in real property, and on the extinction of the rights of an owner the rights revert to his overlord. In the present case therefore on the extinction of the rights of the mortgagors as subtenants their rights reverted to the plaintiff in his capacity of sir-owner and zamindar in one part of the plot and in his capacity of occupancy tenant in the other part of the plot. We might refer to Sec. 91 of the Transfer of Property Act, which lays down that besides the mortgagor any person who has any interest in the property mortgaged may redeem. Now the plaintiff in the capacities mentioned has an interest in the property in question. Accordingly we consider that the plaintiff is entitled to redeem.

We also consider that it is not open to the defendants to contest the right of the plaintiff to redeem, because in 1906 and 1922 the defendants admitted in the documents in question the right of the plaintiff to redemption, and the defendants agreed to continue as the mortgagees of the plaintiff. It is not open therefore to the defendants having accepted the position of mortgagees of the plaintiff to set up a defence that the plaintiff is not entitled to redeem the mortgage in question. We allow this appeal with costs throughout and we grant the plaintiff a decree for redemption of the usufructuary mortgage on payment of the mortgage money Rs.94-9-8 within a period of six months from the date of this decree. A decree for redemption under Order 34, Rule 2 of the Code of Civil Procedure will be framed. *Appeal allowed*

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[1] I. L. R. 33 All. 111 (F.B.)

PANCHANAN BANERJI AND ANOTHER (*Plaintiffs*)
versus
ANANT PRASAD PANDEY AND OTHERS (*Defendants*)*

CIVIL
1932
March 4
PULLAN, J.
NIAMATULLAH, J.

Tenancy Act (Local Act III of 1926), Sec. 266(1)—Several co-sharers—Tenant let into possession by one co-sharer without consent of others—Co-sharers entitled to treat lease as nullity and to eject the tenant.

Where land belonging to three co-sharers was let to the defendant by the agent of only one of them without the consent of the other two co-sharers, *held*, (1) that Sec. 266(1) of the Tenancy Act of 1926 applied and the defendant, not having been admitted to tenancy by all the three co-sharers, did not acquire the rights of a statutory tenant and was not entitled to retain possession as such; (2) that there was nothing to prevent the co-sharer who had granted the lease to the defendant from joining the other co-sharers to eject him. *Kunwar Singh* v. *Abdul Ali Khan*, [1928] A. I. R. All. 525 *followed. Bhola Nath* v. *Baskin*, 1894 A. W. N. 127 and *Amin Ullah* v. *Hajirah*, 3 A. L. J. 767 *distinguished.*

SECOND APPEAL from a decree of BABU KRISHNA DAS, Subordinate Judge of Ghazipur, modifying a decree of MAULVI ZAMIRUDDIN, Munsif.

S. N. Gupta for the appellants.

A. P. Pandey for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an appeal by plaintiffs Nos. 1 and 2 and arises out of a suit for recovery of possession of a number of plots specified in lists A and B annexed to the plaint and for damages, on the allegation that the principal defendant Anant Prasad has no right to them and that he entered into possession without any lawful title. It is common ground that the land in dispute is part of the zemindari of the plaintiffs Nos. 1 and 2 and Ishwar Dayal and formed the occupancy holding of one Ram Kishun, who died 3 years before the institution of the suit. Ishwar Dayal was originally impleaded as defendant 2nd party but subsequently transposed to the array of plaintiffs as plaintiff No. 3. It was alleged by the plaintiffs Nos. 1 and 3 that Ram Kishun left no heirs and that in consequence his occupancy rights lapsed. They instituted a suit for ejectment of the sub-tenants Baldeo and Bholet Bhar. Anant Prasad, the present contesting defendant, intervened, claiming to be the lawful heir of Ram Kishun. The plaintiffs' suit was decreed on the finding that Ram Kishun left no heir entitled to succeed to his occupancy tenure. Delivery of possession was taken by the plaintiffs. Inspite of delivery of possession by the court, which passed the decree in the suit already referred to, they failed to obtain actual possession which remained with Anant Prasad, who claimed title as heir to Ram Kishun, and also put forward his right as a tenant put into possession by Ishwar Dayal, defendant 2nd party (now plaintiff No. 3). Accordingly, plaintiffs Nos. 1 and 2 brought the present suit in the civil court for recovery of possession and damages impleading Ishwar Dayal, as defendant 2nd party, on whose behalf Anant Prasad, the principal defendant, claimed to be a tenant. The suit was resisted by Anant Prasad on the ground that he was the heir of Ram Kishun and a tenant under a lease granted on behalf of Ishwar Dayal, defendant 2nd party, after the decision in the previous suit. He claimed to be a tenant in respect of the lands of all the co-sharers including plaintiffs Nos. 1 and 2 and Ishwar Dayal. The issue thus raised being one whether the relationship of landlord and tenant existed between the parties was referred to the revenue court which negatived Anant Prasad's right as an heir of Ram Kishun, but upheld his plea that he had been admitted into tenancy after the decision of the previous suit. The court of first instance dismissed the plaintiffs' suit on that finding. The lower appellate court found on appeal by the plaintiffs Nos. 1 and 2, that the lands in dispute were let to Anant Prasad by one Balkaran Singh, who was a karinda on behalf of Ishwar Dayal, defendant 2nd party, but that he had no authority to act on behalf of plaintiffs Nos. 1 and 2. Accordingly, it held that Anant Prasad is not a tenant of plaintiffs Nos. 1 and 2 but that he cannot be deemed to be a trespasser. The decree of the court of first instance was so far modified that joint possession was decreed to plaintiffs Nos. 1 and 2. The latter have filed the present second appeal.

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*S. A. 818 of 1930

It has not been argued before us that Anant Prasad is entitled to possession of the lands in dispute as heir of Ram Kishun, the deceased occupancy tenant. His defence rests solely on the plea that the lands in dispute were let to him after the decree in the previous suit. The finding of the lower appellate court so far as it held that Balkaran Singh, the karinda of Ishwar Dayal, let the land in dispute to Anant Prasad and had authority to do so on his behalf must be accepted in second appeal. It is likewise conclusive that Balkaran Singh has no authority to let it on behalf of plaintiffs Nos. 1 and 2. The position then is that the land belonging to the three co-sharers was let by only one of them. The question is whether the tenant in whose favour the tenancy was created by one of the three co-sharers is entitled to retain possession in spite of the dissent of the other two. We are of opinion that Section 266 of the Agra Tenancy Act (Act III of 1926) governs the case and that the defendant Anant Prasad cannot be considered to be a tenant in respect of the lands in dispute. That section declares that

> Where there are two or more co-sharers in any right, title or interest all things required or permitted to be done by the possessor of the same shall be done by them conjointly, unless they have appointed an agent to act on behalf of them all.

It is only the possessor of proprietary right who can let land. The Sec-

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Niamatullah, J.

tion is, therefore, clearly applicable and the tenancy could be created by all the co-sharers conjointly and any attempt by only one of them to create a tenancy must be declared to be ineffectual. The defendant Anant Prasad not having been admitted to tenancy by all the three did not acquire the rights of a statutory tenant. This being so, he is not entitled to retain possession as such. His learned advocate argues that he is entitled to retain possession of the undivided share of Ishwar Dayal at whose instance he was placed in possession. This position is however untenable inasmuch as Ishwar Dayal merely admitted Anant Prasad as a tenant and cannot be deemed to have assigned his proprietary or possessory right in the lands. The only ground on which Anant Prasad has defended the suit and the only right which he has claimed and could have claimed is that he is a tenant of the land in virtue of the lease granted by Balkaran Singh on behalf of Ishwar Dayal. If this defence cannot be sustained he must be considered to be in unlawful possession.

Another argument which has been put forward on behalf of the defendant Anant Prasad is that Ishwar Dayal who is not in the array of plaintiffs cannot succeed and obtain possession jointly with plaintiffs Nos. 1 and 2, he having himself created a tenancy in favour of the defendant Anant Prasad. We are of opinion that this contention must be rejected. The lease in favour of Anant Prasad having been found to be one granted by an unauthorised person, it confers no right upon the defendant Anant Prasad. There is nothing to prevent Ishwar Dayal from joining the other co-sharers to eject one who is found to possess no right in respect of the land in dispute.

A learned single Judge of this Court has taken the same view as regards a tenant let into possession by one of several co-sharers. In *Kunwar Singh* v. *Abdur Ali Khan*[1] it was held that where one of the co-sharers granted a permanent lease of the joint holding without the consent of the other co-sharers, such co-sharers are entitled to treat the lease as a nullity and to eject the lessee. The view is based on the terms of Section 194 of the Old Tenancy Act (Act II of 1901) which is almost identical with the present Section 266. The lower appellate court has referred to the cases of *Bhola Nath* v. *Baskin*[2] and *Amin Ullah* v. *Hajirah*[3]. We have considered these cases and are clearly of opinion that the question arising before us did not arise and was not decided in them. The lower appellate court has also referred to a decision of the Board of Revenue reported in Vol. III of the Law Reporter, Allahabad, Section 165. That decision is also not in point. Besides, we find that in two other cases; 3 U. D. page 355 and 4 U. D. 697 the Board of Revenue took a contrary view which is in accord with our own.

The result is that this appeal succeeds. It is accordingly allowed. The decrees of the lower courts are set aside and the plaintiffs' suit for possession is decreed. Their claim to mesne profits shall be enquired into and if they are found entitled to any mesne profits a final decree shall be passed. The defendant Anant Prasad must pay the costs incurred by plaintiffs Nos. 1 and 2 in all the courts.

Appeal allowed

[1] S. A. 2196 of 1925, decided on April 18, 1928=[1928] A. I. R. All. 525

[2] [1894] A. W. N. 127

[3] 3 A. L. J. 767

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Feb. 18

NIAMAT-ULLAH, J.

RAMA SHANKAR (*Plaintiff*)
versus
IQBAL HUSAIN (*Defendant*)*

Civil Procedure Code, Or. 9, R. 4—Suit dismissed in default of appearance—Plaintiff present but went to fetch vakil—Restoration—When should be granted.

The courts should not ignore the somewhat natural tendency among the litigants of hurrying to their pleaders, when their cases are called on, with the object of fetching them. Where a pleader is not forthcoming or is busy elsewhere and the case is dismissed in the meantime, the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice which it is intended to subserve.

Applicant's suit having been dismissed in default of appearance, he immediately applied for restoration and his affidavit stated that he was present when his case was called on but he went to search his vakil who was busy in another court and that on his return he learnt that his suit had been dismissed. *Prima facie* the allegations in the affidavit were not open to suspicion nor was there any counter-affidavit. *Held,* that applicant's suit should be restored.

CIVIL REVISION from an order of MAULVI MUHAMMAD AHMAD ANSARI ESQ., Small Cause Court Judge of Aligarh.

Kartar Narain Agarwala for the applicant.

The opposite party was not represented.

The following judgment was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This is an application for revision directed against an order passed by the judge of small cause court, Aligarh, rejecting the plaintiff's application for restoration of his suit which had been dismissed in default of appearance. The suit was fixed for July 17, 1931. The learned Judge says in his order rejecting the application for restoration that the applicant was called out twice but did not appear. This may be true; but there can be no denying the fact that, on the suit being dismissed for default, he made immediate preparation for an application for restoration being filed. He swore an affidavit on the same date between 12 and 1 o'clock, which stated that the applicant was present when the case was called on but went to search his vakil, who was subsequently found busy in another court and could not attend and that the applicant learnt on his return that the suit had been dismissed in default of his appearance. No counter affidavit was put in by the opposite party. *Prima facie,* the allegations contained in the plaintiff's affidavit are not open to any suspicion. The learned Judge, however, thought that the applicant had presented "a made up plea". He does not refer to any circumstances on which such conclusion is based. He has also remarked that he

> told litigants and their lawyers so often that they are not to run away when they are called into court for their case. They do not seem to listen to it. In this case, however, as stated by the opposite party in his reply the applicant was not at all present when his case was called up for hearing.

I do not understand the significance of the first portion of the remark

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*Civ. Rev. 507 of 1931

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Niamatullah, J.

quoted above. Unless the learned Judge accepted the affidavit filed by the applicant, he could not be one of those litigants who did not act according to the instructions which the learned Subordinate Judge had issued to the litigants and the lawyers. On the other hand, the learned Judge thinks that the applicant was not at all present when the case was called on more than once. This is apparently based on what the learned Judge calls "reply" of the opposite party. I find no counter-affidavit on the record, nor any reply in the proceedings of the court or otherwise. This is probably what the defendant verbally represented to the court. In the face of the applicant's affidavit, the learned Judge should not have acted on statements of the kind made by the defendant. I am satisfied that the circumstances in which the applicant's suit was dismissed in his absence are correctly stated in the affidavit. The question is whether they constitute sufficient cause for the plaintiff's non-appearance. While litigants would do well to act as the learned Judge says they should, we cannot ignore the somewhat natural tendency among the litigants of hurrying to their pleaders when their cases are called on. They expect to find their pleaders and take them in time for the hearing. In most cases, the litigant himself or his pleader appears in court shortly afterwards. In some cases the pleader is not forthcoming or is busy elsewhere and if the case is dismissed in the meantime, the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice which it is intended to subserve. Award of reasonable costs to the opposite party will in general be found to be a sufficiently deterrent penalty on one side and compensation on the other. I should not be understood as laying down a rule of thumb applicable to all such cases. Each case has to be decided on its own facts, but the exercise of discretion should not be divorced from equitable considerations arising from those facts.

In view of all the circumstances of the case, I allow this revision and set aside the order of the lower court refusing to restore the applicant's suit dismissed in default. The learned advocate who appears for the applicant does not press for costs. No order is, therefore, needed in that respect. The applicant's suit shall be re-instated and disposed of on the merits.

Application allowed

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Feb. 22

MUKERJI, J.
BENNET, J.

CHAND REKHA (*Plaintiff*)
versus
JANKI PRASAD (*Defendant*)*

Oaths Act, Sec. 9—Application for an oath—To be without any condition.

An application for an oath under the Oaths Act must be an application without any condition. It is not open to a party to ask the court to adjudicate, and if the court adjudicates against them to then ask the court to start a separate proceeding under the Oaths Act.

Where plaintiff's application stated that "*if the court does not hold the evidence to be sufficient,* defendant should swear by the Ganges water in hand before the court and say "I may be ruined if I speak lie or falsely swear by the Ganges", ***held,*** that the offer did not conform to Sec. 9 of the Oaths Act.

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*F. A. 3 of 1931

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CHAND REKHA *v.* JANKI PRASAD

Bennet, J.

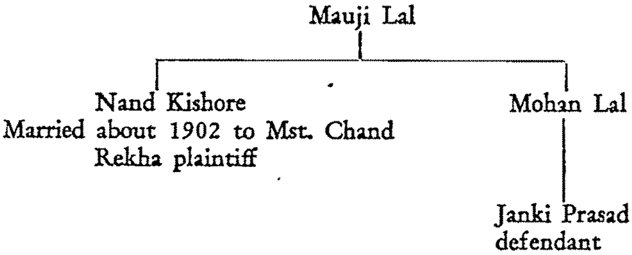
FIRST APPEAL from a decree of BABU ZORAWAR SINGH, Subordinate Judge of Aligarh.

U. S. Bajpai and *N. U. A. Siddiqi* for the appellant.

S. K. Dar and *S. C. Das* for the respondent.

The judgment of the Court was delivered by

BENNET, J.—This is a first appeal by one Mst. Chand Rekha whose suit for Rs.32,000 has been dismissed by the learned Subordinate Judge of Aligarh. The sole defendant is B. Janki Prasad, who is an advocate of that court. The following pedigree is given in the plaint:—



The plaint was filed as a pauper, and it alleged that Nand Kishore and Mohan Lal worked jointly as contractors but learned counsel states that he does not claim that these two brothers formed a joint Hindu family. The plaint further sets forth that at the time of the marriage of the plaintiff to Nand Kishore the father of the plaintiff insisted on Nand Kishore executing a deed of gift to the extent of Rs.30,000 which was in deposit with Mohan Lal in favour of the petitioner. It was further set forth that at some later period two thousand rupees worth of ornaments had been deposited by the plaintiff with Mohan Lal for safe custody. The plaint stated that plaintiff was entitled to get her deposit money from the defendant. The cause of action was stated to arise on November 1, 1929 when the last demand was made from the defendant. The relief asked for was that a decree for Rs.32,000 might be passed in favour of the plaintiff against the defendant. Now the plaint did not set forth what the Rs.32,000 consisted of, and it is left for the court to infer that the suit is for the return of Rs.30,000 deposit and Rs.2,000 the value of the ornaments. The written statement of defendant denied that the plaintiff had ever been married to Nand Kishore, or that any deposit of ornaments or cash had been made with the defendant. Evidence was taken before the lower court, and the finding of the court was that the plaintiff had not proved that she was married to Nand Kishore, and that no ornaments or deposit or cash were proved to have been deposited. There was no deed of gift produced for the plaintiff or Parcha in favour of Mohan Lal. The plaintiff's case was singularly lacking in written evidence and in oral evidence, which consisted merely of the statement of herself and of Nand Kishore. An appeal was filed against a decree of the learned Subordinate Judge on five grounds of fact. When the appeal was presented for admission, an entirely different ground was taken by learned counsel to the effect that the plaintiff applied "to abide by the oath of the defendant before the lower court if taken on Ganges water in hand, and the defendant refused to do so", and therefore a presumption would arise under Sec-

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Bennet, J.

tion 8 of the Oaths Act. This is the only ground which learned counsel has argued in this appeal, and no argument has been made on any of the five grounds in the memorandum of appeal. Learned counsel bases his argument on an application of July 14, 1930, printed on page 5 of the record. In this application paragraph 3 is as follows:—

> If the Court does not hold the evidence to be sufficient, Babu Janki Prasad should swear by the Ganges before the court and say 'I may be ruined if I speak lie or falsely swear by the Ganges'.

Now it is to be noted that this paragraph, which is the only one dealing with the oath, does not say that the plaintiff offers to be bound by the statement on oath made by the defendant. Therefore, in our opinion, this offer would not come within the terms of Section 9 of the Oaths Act, and the Oaths Act would not apply. In fact in the proceeding the court did not refer to the Oaths Act, nor did it record any proceeding under Section 12 of the Oaths Act. All that happened was that the court stated in an order that the defendant was not willing to give an oath on Ganges water, and that he could not be compelled to do so. There was no proceeding before the lower court about the plaintiff applying under the Oaths Act and any presumption being drawn from the action of the defendant. We may also note that paragraph 3 of the application of the plaintiff does not, in our opinion, conform to Section 9 of the Oaths Act for another reason, because paragraph 3 states that if the court does not hold the evidence to be sufficient then defendant should take an oath on Ganges water. An application for an oath under the Oaths Act must be an application without any condition such as if the court does not hold the evidence to be sufficient. It is not open to a party to ask the court to adjudicate, and if the court adjudicates against them to then ask the court to start a separate proceeding under the Oaths Act. There is no further point in the appeal. Accordingly we dismiss this appeal with costs. The court-fee payable on this appeal must be paid by the appellant as if she had not been permitted to appeal as a pauper. The respondent's counsel has undertaken to pay the deficiency in printing within two weeks.

Appeal dismissed

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March 16

BOYS, J.
YOUNG, J.

KING-EMPEROR
versus
BAIJNATH*

Penal Code, Sec. 366—'Seduced to illicit intercourse'—Meaning of—Accused carrying on intrigue with a girl under sixteen (in the custody of her guardian)—He goes away with her—With intention of continuing illicit intercourse—Whether offence under Sec. 366 made out.

The phrase 'seduced to illicit intercourse' in Sec. 366 I. P. C. implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse. These must be two distinct acts, though they may follow in immediate sequence. The words or actions of the accused which induced the girl to submit to the illicit intercourse must precede the actual act.

The term 'seduction' can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the

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*Cr. Rev. 826 of 1931

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accused's part that the girl should be seduced by some different man.

The act of seduction alleged must be subsequent to the kidnapping in order to make S. 366 Penal Code applicable.

Sec. 366 Penal Code cannot apply to a case where the accused is said to have been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian, and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it is with the intention of carrying on that intrigue or in other words, with the intention of continuing illicit intercourse.

Prem Narain v. *Emperor*, 1929 A. L. J. 114 *referred to.*

CRIMINAL REVISION from an order of PANDIT TEJ NARAIN MULLA, Sessions Judge of Allahabad.

R. C. Ghatak for the applicant.

K. D. Malaviya for the opposite party.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

Boys, J.

BOYS, J.—This is a case of some importance in reference to the application of S. 366 of the Indian Penal Code, and that is unfortunately a section which comes before the courts possibly more often than any other particular section in the Code, except those of riot and hurt. The question turns upon what is the meaning of "seduced to illicit intercourse" in S. 366 of the Code.

A young man of 25 has been found, subsequent to a course of intrigue with a girl of 14, to have taken her away out of the possession and control of her father, and he so took her away, or rather went away with her, because his intrigue was beginning to suffer interruption. We state the facts in ordinary language because it is the legal language which we have to interpret. The Magistrate convicted the accused under S. 363 I. P. C., that is to say, of simple kidnapping. The accused appealed, and the learned Judge, while he has expressed his views on some of the merits of the case, did not finally decide the appeal but "set aside the conviction and sentence" and sent the case back to the Magistrate with a direction to him to commit the accused for trial on a charge under S. 366 I. P. C. after giving the parties a further opportunity to produce additional evidence, if they so wished, on the question of the girl's age. We have had an application made to this Court on the revisional side by the father of the girl. We are not limited in this Court to motions made by any particular person, and in this case if anybody was to move the court on behalf of the girl, the father may be well considered to be the proper person. The father, then, asks us to hold that the order of the learned Judge, which was presumably passed under S. 423 (1) (*b*) (2) Cr. P. C. should be set aside and that the Judge should be directed to hear the appeal in the ordinary course under S. 423, and if he considered further evidence necessary he might be directed to act under S. 428 Cr. P. C. This application is supported by the Assistant Government advocate. On the other hand, we have also heard counsel for the accused, and he invites us to maintain the order of the learned Judge. For a clearer appreciation of the case we may briefly state the motives, though they do not of course affect the question of law. The father avowedly does not want further disturbance and scandal in the matter, at any rate more than is necessary. The accused naturally hopes for a further chance of getting a clean acquittal. We concern ourselves, of course, only with the question of law.

The learned Judge has held that the term "seduction" does not apply only to what leads to the first act of illicit intercourse but is applicable in regard to any subsequent acts of illicit intercourse, and on this basis he holds that S. 366 is applicable to a case where though the accused may have seduced the girl and been indulging in illicit intercourse before he went away with the girl, he has further the intention of continuing the illicit intercourse subsequent to going away with the girl. This is we understand from his judgment a fair statement of his views. We have only to say whether we agree with him. An examination of the section suggests the statement of three propositions. Before stating these we may note that we have had a number of cases cited to us.—*Pessumal* v. *Valoo*[1], *King-Emperor* v. *Saran Krishna*[2], *Maharana* v. *Emperor*[3], *Prem Narain* v. *King-Emperor*[4], *Prafulla Kumar Bose* v. *Emperor*[5] and *Suppiah* v. *Emperor*[6].

In the first place we note that the very phrase "seduced to illicit intercourse" implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse. These must be two distinct acts, though they may follow in immediate sequence. The words or actions of the accused which induced the girl to submit to the illicit intercourse must precede the actual act. This does not appear to have been borne in mind in some of the cases which we have mentioned above. The reason for this is possibly that sometimes the word "seduction" is used by itself to include comprehensively the "seducing" and the "intercourse", but where both words are used "seduced to" can only refer to the preliminary act of persuasion.

The more important question is whether the term "seduced to" can properly be applied only to that which leads to the first act of illicit intercourse, or whether it can be properly applied to that which precedes each subsequent act of illicit intercourse. The Oxford dictionary defines "seduction" in this connection as "To induce a woman to surrender her chastity", which suggests at the outset that the term "seduction" can only apply properly to the first act of illicit intercourse, for once that act has been completed, the girl has surrendered her chastity. We would, therefore, hold that the term "seduction" can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man. Neither of these conditions apply to the present case. We have the simple case of a man carrying on an intrigue with a girl, finding his intrigue meeting with obstacles, and deciding in conjunction with the girl that they would go away together, the girl of course being under 16. Next we note that the act of seduction alleged must be subsequent to the kidnapping in order to make S. 366 applicable. The section says "kidnaps any woman in order that she may be seduced to illicit intercourse." This is manifestly wholly different from "kidnaps any woman whom he has seduced to illicit intercourse."

It follows from the views we have expressed above that S. 366 can-

[1] [1927] A. I. R. (Sind) 197
[2] [1927] A. I. R. (Sind) 104
[3] [1929] A. I. R. (Pat.) 651
[4] [1929] A. L. J. 114
[5] [1930] A. I. R. (Cal.) 209
[6] [1930] A. I. R. (Mad.) 980

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Boys, J.

not be applied to a case where the accused is said to have been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian, and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it is with the intention of carrying on that intrigue or in other words, with the intention of continuing illicit intercourse. We do not think it necessary to examine in detail the cases to which we have referred, for, if we may say so with respect, they do not appear to have approached S. 366 from the points of view that we have expressed.

For the accused it has been contended that he has been "acquitted" of the charge under S. 363 I. P. C. That is not so. The Judge set aside the order of the Magistrate and that he had to do before he could order a commitment but he did not "acquit". Even had he used the word, we should have been prepared to hold that it was merely an error and did not in law amount to an "acquittal."

The result is that we hold that the order of the learned Sessions Judge should be set aside, and it is set aside. The case will be restored as an appeal pending in the Sessions Court for disposal in the ordinary course. In view, however, of the fact that the learned Sessions Judge has expressed views adverse to what we may describe as the complainant's side of the case, we think it desirable that upon the appeal being reheard it should be reheard by another Judge. We therefore send the case to the Additional Sessions Judge of Allahabad. If he in the exercise of his own independent discretion considers further evidence necessary, the provisions of S. 428 are of course open to him. *Order set aside*

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March 17
PULLAN, J.
NIAMATULLAH, J.

POSTI MAL THROUGH CHAMPA LAL (*Applicant*)
versus
RADHA KISHAN LAL CHAND THROUGH LAL CHAND (*Opposite party*)*

Civil Procedure Code, Or. 34, R. 14—Suit on promissory note—Compromise—Payment by instalments—Property hypothecated—Decree in terms of compromise—Whether hypothecated property could be sold in execution.

In a suit on foot of a promissory note, a compromise was entered into between the parties which provided that an instalment decree be passed in favour of the respondent and that in default of payment of two consecutive instalments, the decree-holder could obtain execution of his decree in respect of the entire decretal amount remaining unpaid. The appellant further hypothecated certain property which was specified in the compromise; but the compromise was silent as regards the manner in which the sale of such property was to be obtained. A decree was passed on foot of the compromise. Default having been made in payment of all instalments, the decree-holder applied for execution of the decree by sale of the property hypothecated under the compromise. *Held*: (1) that the compromise in which the liability under the promissory note became merged, created a mortgage or charge and the decree which followed it related to the payment of money in satisfaction of the claim arising under the mortgage or charge previously created by the compromise, and Or. 34, R. 14 was applicable even if it be assumed that the mortgage or charge must precede the decree; (2) that the hypothecated property could not be sold

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*E. S. A. 1077 of 1930

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CHAND

in execution of the decree passed on the compromise, and if the decree-holder desired to have the hypothecated property sold, he must institute a suit under Or. 34, R. 4 C. P. C.

Rameshar Upadhya v. *Subhkaran Upadhya,* 8 A. L. J. 418 *relied on. Mukta Prasad* v. *Mahadeo Prasad,* I. L. R. 38 All. 327=14 A. L. J. 385 *distinguished.*

EXECUTION SECOND APPEAL from a decree of BABU RAGHUNATH PRASAD, District Judge of Bulandshahr, reversing a decree of BABU SHANKAR LAL, Subordinate Judge.

Panna Lal for the appellant.

Shiva Prasad Sinha and *Nanak Chand* for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—The decree-holder-respondent instituted a suit against the appellant on foot of a promissory note for recovery of a certain sum of money.

The suit was contested on the ground which it is not necessary to mention for the purposes of this appeal. Eventually the parties entered into a compromise which provided that an instalment decree for Rs.3,100 be passed in favour of the respondent. Rs.500 was made payable every half year, on non-payment of the first instalment, interest at the rate of 9 per cent per annum was made payable. In default of payment of two consecutive instalments, the decree-holder was declared entitled to obtain execution of his decree in respect of the entire decretal amount remaining unpaid. The defendant (the appellant in this Court) further hypothecated certain properties which were detailed in the compromise. A decree was passed on foot of the compromise and embodied all its terms. Default was made in payment of the first and all subsequent instalments. Thereupon the decree-holder applied for execution of his decree by sale of the property hypothecated under the compromise. The defendant-judgment-debtors objected, *inter alia,* on the ground that the hypothecated property could not be sold in execution of the decree passed on the compromise and that unless the decree-holder instituted a suit under O. 34, R. 4 C. P. C. he was not entitled to have the hypothecated properties sold. The court of first instance upheld the objection but the lower appellate court overruled it. Hence this appeal.

The only question which has been argued before us is whether it is open to the decree-holder to obtain satisfaction of his decree by sale of the hypothecated property otherwise than by instituting a suit under O. 34, R. 4 C. P. C. It is argued on behalf of the appellant that Or. 34, R. 14 C. P. C. is a bar to the decree-holder obtaining sale of the hypothecated property in execution of the consent decree. That rule provides that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. Rule 15 extends the operation of Rule 14 to cases of charge. Whether the compromise be regarded as creating a mortgage or merely a charge, a question which it is not necessary to decide, O. 34, Rule 14 read with Rule 15 would stand in the way of the decree-holder obtaining satisfaction of the decree by sale of the hypothecated property otherwise than by instituting a suit under O. 34, R. 4, if other requirements of Rule 14 have been made out in the present case. The learned advocate for the respondent has strenuously argued that it is open to the parties to contract themselves out of the provisions of O. 34, R. 14 C. P. C. and that on a proper reading of the compromise the parties must be deemed to have contracted that the decree-holder can have the hypothecated property sold in execution of the consent decree. We have carefully read the compromise and are of opinion that it does not contain any provision which entitles the decree-holder to have the hypothecated property sold straight away without obtaining a decree under O. 34, R. 4 C. P. C. It merely declares the right of the decree-holder to obtain satisfaction of his decree by sale of the hypothecated property and is silent as regards the manner in which the sale of such property is to.be obtained. It does not contain any words to signify that the decree-holder can have the hypothecated property sold in execution of the consent decree itself nor does it lay down that the decree-holder must institute a suit under O. 34, R. 4. In other words, the compromise is silent in that respect. This being so, the manner in which the hypothecated property is to be sold must be determined in accordance with the provisions of the law on the subject. In our opinion Order 34, Rules 14 and 15 apply to the case. It follows that the decree-holder can proceed against the person and other property of the judgment-debtors in execution of the consent decree, but that if he desires to have the hypothecated property sold, he must institute a suit under O. 34, Rule 4 C. P. C. and give to the judgment-debtors the usual period of grace for payment of the amount charged. on the property sought to be sold.

Another contention put forward on behalf of the respondent is that O. 34, R. 14 C. P. C. contemplates cases in which the mortgage or charge existed anterior to the decree and cannot apply to a case in which the mortgage or charge is embodied in the decree itself. It is not necessary for us to pronounce an opinion on the comprehensive proposition of law involved in this contention. It is perfectly clear that the compromise in which the liability under the promissory note became merged, created a mortgage or charge and that the decree which followed it related to the payment of money in satisfaction of the claim arising under the mortgage or charge previously created by the compromise. In this view, Order 34, Rule 14 is applicable to the case even if it be assumed that the mortgage or charge must precede the decree. Our view is in accord with *Rameshar Upadhya* v. *Subhkaran Upadhya*[1]. Reliance has been placed by the learned advocate for the respondent on *Mukta Prasad* v. *Mahadeo Prasad*[2] which is however clearly distinguishable from the case before us. There was an express provision in the compromise in that case that the decree-holder was entitled to obtain the sale of the hypothecated property in execution of the consent decree.

In the view of the case we have taken, the order of the lower appellate court must be set aside. Accordingly, we allow this appeal with costs throughout, set aside the order of the lower appellate court and restore that of the court of first instance.

Appeal allowed

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[1] 8 A. L. J. 418

[2] I. L. R. 38 All. 327=14 A. L. J. 385

Civil

1932

Jan. 25

Sulaiman, J.
Young, J.

BHAJJA (*Applicant*)
versus
MOHAMMAD SAID KHAN (*Opposite party*)*

Civil Procedure Code, Or. 33, R. 5(d)—Application under—Not to be rejected merely on the ground of limitation—When applicant found to be a pauper—Or. 7, R. 11—'Cause of action'—Meaning of.

When the court finds that the plaintiff is a pauper and is unable to pay the court-fees, it ought not to reject the plaint on the mere ground that, in its opinion, the claim, if entertained, would be barred by time. That is a question which can properly be decided after the plaint has been admitted.

The cause of action as used in Or. 7, R. 11 C. P. C. does not mean a claim which is still enforceable under the law of limitation.

Chattarpal Singh v. *Raja Ram*, I. L. R. 7 All. 661, *Govindasami Pillay* v. *The Municipal Council*, I. L. R. 41 Mad. 620, *Dulari* v. *Vallabhdas Pragji* I. L. R. 13 Bom. 126 and *Allah Wasai* v. *Ramzan*, 1929 A. I. R. Lah. 498 and *Haur Kuar* v. *Munni Lal*, 53 I. C. 441 *referred to.*

A right to sue accrues when a right has been infringed and there is a remedy recognized by law.

Read v. *Brown*, 22 Q. B. D. 128 *referred to.*

Civil Revision from an order of Maulvi Farid-ud-din Ahmad Khan, Subordinate Judge of Shahjahanpur.

N. C. Sen for the applicant.

A. Sanyal for the opposite-party.

The judgment of the Court was delivered by

Sulaiman, J.

Sulaiman, J.—This is an application in revision from an order rejecting an application to sue in *forma pauperis*. The plaint has been drawn up in a most inartistic way, and it is open to many serious objections. The learned Subordinate Judge, however, has not rejected the plaint on the ground that the facts mentioned therein do not show that any right of the plaintiff has been infringed for which there is a remedy in law, but has rejected it on the ground that the suit is barred by limitation. On the question of the applicant's pauperism the finding is in his favour.

The learned advocate for the applicant contends before us that it was not open to the court below to enquire into the question whether the claim, as put forward in the plaint, was or was not barred by the law of limitation. The court below has proceeded under O. 33, R. 5, which makes it obligatory on the court to reject an application for permission to sue as a pauper where, *inter alia*, the allegations of the plaintiff do not show a cause of action. The question for consideration is whether these words include the case where the claim is time-barred.

Section 407(*c*) of the Code of Civil Procedure of 1882 had the following words: "His allegations do not show a right to sue in such court". On those words it was held by a Full Bench of this Court in the case of *Chattarpal Singh* v. *Raja Ram*[1] that the words must not be read as limiting the court's discretion to merely ascertaining whether the "right to sue"

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*Civ. Rev. 204 of 1931

[1] I. L. R. 7 All. 661

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Sulaiman, J.

arose within its jurisdiction, but had a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in court, and calling for an answer, and not barred by the law of limitation or any other law. This ruling was, of course, accepted by a Division Bench of this Court in the case of *Kamrakh Nath* v. *Sunder Nath*[2] and also by the Madras High Court in *Govindasami Pillay* v. *The Municipal Council*[3], the Bombay High Court in *Dulari* v. *Vallabdas Pragji*[4] and the Lahore High Court in *Allah Wasai* v. *Ramzan*[5], as well as some other courts.

The legislature has altered the words of the old section and now they read as "where his allegations do not show a cause of action". It has been suggested by a commentator that the alteration shows the intention of the legislature to affirm the decisions under the old section. On the other hand, it may equally well be suggested that the alteration is intended to make it clear that the court's discretion was not limited to merely ascertaining whether the right to sue arose within its own jurisdiction.

The only case under the new Code in which the Full Bench decision has been directly followed, and which has been brought to our notice, is a single Judge case of the Lahore High Court, *Haur Kuar* v. *Munni Lal*[6]. But the judgment in that case does not consider the effect of the alteration in the law.

The Madras and Lahore High Courts, which have followed the Full Bench decision of this Court, have felt constrained to lay down that the section does not mean that the court should enter into an elaborate examination of the question of limitation, but should throw out the plaint only where the matter is simple. It is very difficult to agree to this partial application of the principle laid down in the old Full Bench case. One does not see where to draw the line. One court may consider the question of limitation simple, while another court may consider it a complicated one. If it is the duty of the court to reject an application where it is barred by time, it would be immaterial whether the conclusion is arrived at summarily or after examining the question in some elaborate detail. A question of limitation is often a substantial question of law, and if decided against the applicant it would deprive him of a right to go to an appellate court and have the matter re-examined. In revision an error of law on a question of limitation cannot be entertained as there would be neither want of jurisdiction, nor illegality nor irregularity.

A plaintiff whose right has been infringed may well have a cause of action against the defendant, and yet his right to sue in a court of law after a fixed period, may have become barred by time. The law of limitation bars the remedy and does not in all cases extinguish the right, for instance, a claim to recover a debt may not be enforceable after a certain period of time, and yet the debt may exist and may furnish sufficient consideration, if the amount is paid. Where, as in Section 28 of the Limitation Act, the right itself is extinguished, the position would be different. There is nothing in the explanation to Section 3 of the said Act, which enjoins upon the court a duty to dismiss the application to sue as a pauper

[2] I. L. R. 20 All. 299

[3] I. L. R. 41 Mad. 620

[4] I. L. R. 13 Bom. 126

[5] 1929 A. I. R. Lah. 498

[6] 53 I. C. 441

merely because in its opinion the suit itself would be barred by time. It merely lays down the date on which the suit is to be deemed to have been instituted.

Their Lordships of the Privy Council, in the case of *Hari Nath Chatterjee* v. *Mothurmohun Goswami*[7] clearly emphasised that "the intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." The bar is created by the law of limitation against a suit to enforce an *existing right*. It is clear that the bar of limitation does not necessarily extinguish the right, but the right, though existing, becomes unenforceable in a court of law. Section 1, Clause (12) of Act XXIV of 1859 laid down that no suit shall be brought to enforce the right after the lapse of 12 years from the time the cause of action arose. Their Lordships of the Privy Council in the case of *Khunni Lal* v. *Gobind Krishna Narain*[8] referred to Section 1, Clause (12) of Act XXIV of 1859, which provided that no suit could be brought after the lapse of 12 years from the time the cause of action arose. Obviously the legislature in that enactment had in mind the distinction between the lapse of the period of limitation and the date when the cause of action arose. The two were not identical. A similar observation might be made with regard to Article 120 of the new Limitation Act, under which the right to sue becomes barred after the expiry of 12 years from the date when the right to sue accrues.

If the court were bound to go into the question whether the suit itself was barred by time, it may decide that it was not so barred. There would be no case decided and no revision would lie *B. B. & C. I. Railway Co.* v. *Mitthu*[9]. Would such an order be binding in the suit or the appeal? Certainly, it would not. It may also be noted that the Court Fees Act is a fiscal measure, and it is the Government which is principally concerned in the matter, the defendant not being directly affected by the grant of a permission to the plaintiff to sue as a pauper.

Unfortunately the term "cause of action" has not been defined anywhere in the Code of Civil Procedure or in any other statutory enactment. In *Read* v. *Brown*[10] Lord Esher, M. R. quoted the definition of "cause of action", as given in L. R. 8 C. P. 107, with approval, and laid down that "cause of action" means:

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to prove.

Literally, of course, "cause of action" means cause which can give rise to an action. A right to sue accrues when a right has been infringed and there is a remedy recognised by law.

An examination of some of the provisions of the Code of Civil Procedure would show that the legislature had this distinction clearly in mind. Section 20 prescribes that every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or *in part*, arises. Here the law of limitation is obviously not in contemplation. Order 2, Rules 3, 6 and 7, which deal with joinder of several causes of

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[7] I. L. R. 21 Cal. 8 at 18

[8] I. L. R. 33 All. 356 at 366

[9] 1931 A. L. J. 727

[10] 22 Q. B. D. 128

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Sulaiman, J.

action, do not also contemplate any rule of limitation barring the claim.

Order 7, Rule 11 also enjoins upon the court the duty to reject the plaint in every case where it does not disclose a cause of action. It is not confined to suits in *forma pauperis*. Rule 13 of that Order allows the plaintiff to present a fresh plaint in respect of the same cause of action. It may be doubted whether the legislature has intended that where a plaint has been rejected on the ground that the claim is barred by limitation the plaintiff would be at liberty to file a fresh plaint either without any new allegations or with new allegations showing an exemption from the law of limitation.

Order 7, Rule 1 (*e*) requires that the plaint shall contain the particulars as to the facts constituting the cause of action and *when it arose.* This obviously requires that the date of the cause of action should be given in the plaint. This date is not identical with the date of the institution of the suit. The question whether the prescribed period of limitation from the date of the cause of action has or has not expired is obviously not a part of the cause of action of the plaintiff. When the suit is barred by time, it cannot be said that the plaint does not disclose a cause of action, but it rather appears that the claim based on the cause of action disclosed by the plaint is barred by the law of limitation.

Where the claim is barred by limitation, Section 3 of the Limitation Act enjoins upon the court the duty to "dismiss the suit". On the other hand, O. 7, R. 11 enjoins a duty to "reject" the plaint when it does not disclose a cause of action. The dismissal of the suit and the rejection of the plaint are not identical terms. In one case a decree is passed, in the other case it is merely an appealable order.

We, therefore, think that the cause of action as used in O. 7, R. 11 does not mean a claim which is still enforceable under the law of limitation. Had such been the intention of the legislature, it could very easily have said: "a right to sue capable of enforcement", the words which were used in the old Full Bench case of this Court.

No difficulty is created by the postponement of the question whether the suit is barred by time, for after the palint has been admitted, the defendant can move the court, or the court may act *suo motu* under Order VII, Rule 11 (*d*), and reject the plaint on the ground that the suit "appears from the statement in the plaint to be barred" by the law of limitation.

In the present case the court below has not only gone into the question of limitation and considered several reported cases, which question in our opinion is wholly unnecessary at this stage, but has also assumed that it was admitted by the applicant that more than three years before the filing of the application he came to know that the opposite party had not entered the items in question in the second sarkhat, which as alleged in the plaint were fraudulently left out. The learned advocate for the respondent is unable to draw our attention to anything on the record which would support this, except the allegation in para 12 of the plaint. But that allegation merely was that "during the course of" suit No. 38 of 1925, etc., the sarkhat was called for, and it was at that time that the plaintiff came to know of the dishonesty and fraud of the defendant. The admission did not amount to saying that the sarkhat was summoned in the year 1925 or that the knowledge came to the plaintiff in that year.

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Bhajja v. Mohammad Said Khan

Sulaiman, J.

We think that when the court found that the plaintiff was a pauper and was unable to pay the court fees, it ought not to have rejected the plaint on the mere ground that in its opinion the claim, if entertained, would be barred by time. That is a question which can be properly decided after the plaint has been admitted. We accordingly allow this revision, and setting aside the order of the court below, send the case back to that court with directions to restore it and dispose of it according to law.

Application allowed

DURGA SHANKER AND OTHERS (*Defendants*)
versus
GANGA SAHAI (*Plaintiff*)*

Civil

1932

March 2

Mukerji, J.
Bennet, J.

Transfer of Property Act, Sec. 76(e)—Mortgagee in possession—Entitled to appropriate wood of fallen tree.

> Under Sec. 76(*e*) Transfer of Property Act, a mortgagee in possession must not commit any act which is destructive or permanently injurious to the property. That means that he must not commit waste, such as felling unripe timber. But there is no prohibition in this clause against taking wood of a fallen tree which fell from natural causes. Such wood is part of the profits of the property and a mortgagee in possession is entitled to take the profits.

Second Appeal from a decree of Babu Raj Behari Lal, Additional District Judge of Aligarh, modifying a decree of Maulvi Mazhar Husain, Additional Munsif.

Panna Lal and *Hari Pal Varshni* for the appellants.

S. B. L. Gaur for the respondents.

This was an appeal by the defendants against a decree for redemption passed by the lower appellate court. The defendants-appellants resisted the suit on the ground that various further sums were due to them. The High Court dismissed the appeal. The portion of the judgment dealing with the right of the mortgagee to appropriate the wood of a fallen tree is reproduced below.

Bennet, J.

Bennet, J.—The cross-objection further dealt with a claim of the plaintiff in regard to a Nim tree alleged to have been appropriated by the defendants. The defendants in their written statement had alleged that they had not appropriated this Nim tree at all and the lower appellate court has disposed of the point by stating

> The mortgagee has purchased the land and I think he was entitled to take the wood of the tree which it appears had fallen on account of wind.

Under Section 76(*e*) a mortgagee in possession must not commit any act which is destructive or permanently injurious to the property. That means that he must not commit waste, such as felling unripe timber. But there is no prohibition in this clause against taking the wood of a fallen tree which fell from natural causes. Such wood is part of the profits of the property and a mortgagee in possession is entitled to take the profits. When the mortgage provides that profits shall be taken in lieu of interest, as in the present case, Section 77 provides that Section 76(*b*) shall not apply and therefore that there shall be no accounting of the profits.

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*S. A. 948 of 1930

Section 63 does not apply to the case, as the fall of a tree does not make the tree an accession to the mortgaged property, as there is no addition to the property. The fall of the tree is like the maturing of a crop, as the tree has become ripe for harvest. Its fall makes it come into the position of the profit, and the person in possession of the property is the person who takes that profit.

In other words the mortgagee in possession is entitled to take the produce of the property, and a tree which falls by natural causes becomes part of the produce. We may note that in English law the rights are more extensive. Halsbury Laws of England, 1912 edition, Volume 21, page 203 says:

> A mortgagee in possession has statutory power to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament.

We hold therefore that the defendants considered as mortgagees cannot be held liable for the value of the Nim tree. We also note that at the time of appropriation the defendants had acquired the zemindari rights in the site of the shops, and the plaintiffs merely claim to redeem the shops, and this is a further reason why the defendants cannot be held liable for the value of the Nim tree.

On the cross-objection a further argument was made in regard to a stable. The order of the court of first instance was that the possession of the stable should be delivered to the plaintiff on payment of Rs.185 in case defendants do not remove its materials. Defendants did remove the materials and the lower appellate court found:

> The stable has already been removed and I am not satisfied that the breaking of the stable has injuriously affected the other property.

The case therefore comes under Section 63 where separate possession or enjoyment is possible. It is only in case separate enjoyment or possession is not possible that the accession should be delivered with the property. Accordingly there is no merit in the cross-objection that the stable could not be legally removed.

We therefore allow the cross-objection with proportionate costs to the extent indicated in regard to the total Takina amount decreed and the interest on that amount.

Cross-objection allowed

JUTHI UPADHYA AND OTHERS (*Defendants*)
versus
KESHO PRASAD SINGH (*Plaintiff*)*

CIVIL

1932

March 8

BANERJI, J.
KING, J.

Tenancy Act (Local Act III of 1926), Sec. 72, Sub-sections (6) and (1)—Remission claimed under alleged local custom—Failure to prove custom—Whether court can grant remission under Sec. 72(1)—Sub-sec. (6)—"Local custom"—Meaning of.

The local custom referred to in Sec. 72(6) of the Tenancy Act of 1926 means an *existing* local custom. In other words, if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion and similar calamities and if a claim for remission is made under such local custom, then the provisions of Sec. 72(1) will not apply. Accordingly, the mere fact that a tenant has claimed a remission under an alleged local custom which he has failed to prove does not prohibit the court from granting a remission under Sec. 72(1).

SECOND APPEAL from a decree of BABU KAMESHWAR NATH, District Judge of Ghazipur, confirming a decree of MAULVI MUHAMMAD WASI, Assistant Collector, first class of Ballia.

M. L. Agarwala and *Jwala Prasad Bhargava* for the appellants.

Haribans Sahai for the respondent.

The judgment of the Court was delivered by

King, J.

KING, J.—This was a suit for arrears of rent payable by an agricultural tenant. The main defence was that the area of the holding had been decreased by diluvion and that the defendant was entitled to remission of rent under a local custom.

The trial court found that the alleged custom, which is described as the custom of Balpanchat and Bijmar, did not prevail in the village. So the defendant was not entitled to any remission by virtue of the alleged custom. The question then arose whether the court should not grant a remission under S. 72 of the Agra Tenancy Act, 1926. The court found that over 33 bighas out of the holding of about 38 bighas had been removed by diluvion and that a further area of the holding was unculturable. The court took the view however that no remission could be granted under S. 72, since that Section does not apply to alluvial tracts and accordingly decreed the plaintiff's claim in full.

The lower appellate court concurred in finding that the alleged custom under which the defendant claimed remission of rent was not proved and held that S. 72 does not apply to this case because remission had been claimed under a particular custom of Balpanchat and Bijmar.

The only question for our decision in this second appeal is whether the courts below have correctly held that in the circumstances of this case, no remission can be given under S. 72 of the Tenancy Act. Although S. 72 reproduces the provisions of S. 50 of the Tenancy Act of 1901 almost word for word, the provisions of the Section do not seem to have been the subject of judicial interpretation. No previous decisions have been cited by either party.

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*S. A. 1986 of 1928

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JUTHI UPADHYA *v.* KESHO PRASAD SINGH

King, J.

Under S. 72 of the present Tenancy Act, the court when making a decree for arrears of rent, can allow whatever remission appears to be equitable on the ground that the area of the holding was decreased by diluvion or otherwise, or that the produce thereof was diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrear is claimed. Sub-section (6) lays down:

> The provisions of this section shall not apply to remissions of rent claimed in alluvial tracts under any local custom providing for such remissions in holdings, the culturable area of which has been decreased by diluvion, deposit of sand or the like causes.

The trial court took this to mean that the provisions of S. 72 are not applicable to alluvial tracts in any circumstances. We think this is clearly wrong, as Sub-section (6) only says that the section shall not apply to remissions of rent claimed in alluvial tracts *under any local custom.*

The view taken by the lower appellate court appears to be that if the tenant makes a claim for remission under an alleged local custom, but is unable to prove the existence of such custom, then no remission can be granted under Sub-section (1). It is possible to read Sub-section (6) in this sense and to hold that if the tenant claims a remission under a local custom, then no remission can be made under S. 72 whether the alleged custom does or does not exist. We think that this a narrow interpretation of the Sub-section and that it does not carry out the intentions of the legislature. In the present case, the lower appellate court has upheld the finding of the trial court that the alleged local custom does not prevail in this village. This is a finding of fact which is binding upon us in second appeal. But, in our opinion, the mere fact that the tenant has claimed a remission under an alleged local custom which he has failed to prove does not prohibit the court from granting a remission under S. 72. We think that the local custom referred to in Sub-section (6) means an *existing* local custom and does not apply to a local custom which is merely alleged to exist but in fact does not exist. We take Sub-section (6) to mean that if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion and similar calamities and if a claim for remission is made under such local custom, then the provisions of this section will not apply. This is a more liberal interpretation of the sub-section and we consider it more likely to give effect to the true intention of the legislature than the narrow construction which has been put upon it by the courts below.

We accordingly allow the appeal and set aside the decree of the court below. The case will be returned to the trial court for taking action under S. 72 if the court, in its discretion considers that the full amount of rent cannot be equitably decreed. The appellant will get his costs in this court and the court below. Costs in the trial court will abide the result.

Appeal allowed

Civil

1932

March 10

Pullan, J.
Niamat-ullah, J.

BASHARAT BEG (*Defendant*)
versus
HIRA LAL AND OTHERS (*Plaintiffs*)*

Tort—Suit for damages—Against joint tort-feasors—Some entered into compromise with plaintiffs by which they agreed to accept a certain sum—Whether compromise operated as a bar to a decree against the other tort-feasors.

In a suit for damages for injuries caused to the persons of the plaintiffs as a result of missiles being thrown at them by the defendants who were acting as a body in pursuance of the common object of stopping the Hindu procession, of which the plaintiffs formed a part, which was passing the mosque, some of the defendants, who were joint-tort-feasors, entered into a compromise with the plaintiffs by which they agreed to accept a certain sum; *held,* (1) that a compromise of this nature was no bar to a decree against the other defendants *Ram Kumar Singh* v. *Ali Husain,* I. L. R. 31 All. 173=6 A. L. J. 135 *followed;* (2) that the plaintiffs were entitled to bring a joint suit for damages against all the defendants (Or. 1, R. 1 C. P. C.).

A release granted to one joint tort-feasor operates as a discharge of the other tort-feasors where the cause of action, which is one and indivisible, has itself been released. *Duck* v. *Mayeu,* 2 Q. B. D. 1892, 511 *referred to.*

First Appeal from a decree of Pandit Kanhaiya Lal Nagar, Additional Subordinate Judge of Banda.

Ram Nama Prasad for the appellant.

Damodar Das for the respondents.

The judgment of the Court was delivered by

Pullan, J.

Pullan, J.—The appellant, Basharat Beg, was one of several defendants in a suit brought by thirteen plaintiffs for damages for injuries caused to the persons of these plaintiffs on August 31, 1925. On that day a Hindu procession passed by the door of a Mohammedan mosque in the town of Rath. It is now not in dispute that bricks were thrown at the procession from the mosque and that numerous Hindus, who are represented by the plaintiffs in this case, received injuries which required medical treatment. First of all a criminal complaint was filed which resulted in a compromise; but subsequently a civil action also was commenced by the plaintiffs against 33 Mohammedans. The plaintiffs asked for a sum of Rs.5,100 by way of damages; but they entered into a compromise, on February 29, 1928, with all the defendants except six. In this compromise they agreed to accept a decree of Rs.1,300, representing the total amount of damages due to all the plaintiffs. Clearly the assessment represents a sum of Rs.100 to each of the thirteen plaintiffs. In the compromise we find that the 27 defendants who signed the compromise agreed also to an apportionment of the damages among themselves, some paying as much as Rs.135 and others as little as Rs.5. One of the defendants appears to have been absent and unsummoned, and he was exempted from the decree. Four of the others were absent, and allowed judgment against them to go by default. The court decreed the balance of the sum of Rs.1,300, after taking into account the amount due from the remaining 27 defendants, against the remaining five defendants. Against the four absentees he decreed the sum altogether of Rs.45; and against the remaining defendant, who is the only appellant before us, he decreed the balance of Rs.130.

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*F. A. 211 of 1928

The main ground of appeal is that no decree should have been passed against the appellant, because the cause of action should have been held to be extinguished as against him together with the other joint-feasors, if not on account of the compromise, at least on account of the fact that one of the defendants was exempted by the plaintiffs from the suit. As far as the compromise is concerned, there is clear authority of this Court in the case of *Ram Kumar Singh* v. *Ali Husain*[1], to the effect that a compromise of this nature is no bar to a decree against the other defendants. That decision is based upon the English law as to torts, and reference may be made in this connection to the case of *Duck* v. *Mayeu*[2]. The principle underlying the English decision is that a release granted to one joint tort-feasor operates as a discharge of the other tort-feasors where the cause of action, which is one and indivisible, has itself been released. In the case cited, the acceptance of a sum of money from one of the two joint tort-feasors in full discharge of his own personal liability was not held to operate as a release as far as the other joint tort-feasor was concerned. It was held that such an acceptance amounted merely to a covenant not to sue; and in the present case, we, on the authority of the decision of this High Court to which we have referred, consider that such a compromise as was effected in this case does not, in any way, discharge the liability of the present appellant. We cannot see that the exemption of another defendant in any way affects the question. That exemption does not bring to an end the joint cause of action against the joint tort-feasors. It does not amount to a decision of any kind. Consequently, we do not consider that there is any legal defect in the present suit on this ground.

An objection was taken that the suit was bad for multifariousness; but we consider that it is covered by the terms of O. 1, R. 1 of the Civil Procedure Code. Each of the plaintiffs received hurts from a body of persons, and each of them could have brought a suit for damages against all those persons. They were acting strictly in accordance with the law in bringing a joint suit against all the defendants.

The appellant himself pleads further that it is not proved that he individually caused any damage to any one; but there is ample evidence in our opinion to show that he was one of the persons who took part in throwing missiles at the Hindus. It is impossible, in a case of this kind, to say that the missiles thrown by one particular person struck any other particular person; and we consider that it is sufficient in such a case to prove that the injuries were caused as the result of throwing missiles and that the person against whom damage is claimed was one of those who threw the missiles, where it is also shown, as in this case, that the defendants as a body were acting in pursuance of a common object. The common object is clear; it was to stop the Hindu procession, which was passing the mosque at approximately the time of the evening prayer. The plaintiffs, therefore, have, in our opinion, made out a case for damages against the appellant, and it remains only to consider what damages should be awarded. The principle adopted by the learned Judge, which we have indicated above, is no doubt a rough and ready one, and *prima facie* there seems no reason why the present appellant should have to pay Rs.130 whereas some of the co-defendants had paid as little as Rs.5; but in this case 13 persons received injuries, and we cannot hold that the liability of any of the assailants is over-assessed in the sum of Rs.130. Consequently, although we might not ourselves have accepted the principle on which these damages have been awarded, we do not see our way, as a court of appeal, to object to the amount decreed.

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[1] I. L. R. 31 All. 173=6 A. L. J. 135

[2] 2 Q. B. D., 1892, 511

We accordingly uphold the decision of the court below and dismiss this appeal with costs.

Appeal dismissed

SAMPAT AND OTHERS (*Judgment-debtors*)
versus
RAM PRASAD (*Decree-holder*)*

CIVIL
1932
March 17
PULLAN, J.
NIAMAT ULLAH, J

Civil Procedure Code (Act V of 1908), Sec. 60(c)—Judgment-debtors belonging to agriculturist caste and doing cultivation—Permission obtained to build houses on a portion of the leased land—Whether ceased to be agriculturists.

Where the judgment-debtors came of an agriculturist caste and cultivated the soil and had no other occupation, the mere fact that they had obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy did not necessarily imply that they had themselves ceased to be agriculturists or that they no longer occupied the house (sought to be attached and sold in execution of the decree against them) in the capacity of agriculturists; and consequently the house was exempt from attachment and sale under Sec. 60(*c*) C. P. C. *Jamna Prasad Raut* v. *Raghunath Prasad,* I. L. R. 35 All. 307 *referred to.*

EXECUTION SECOND APPEAL from a decree of V. MEHTA ESQ., Subordinate Judge of Benares, reversing a decree of BABU BIND BASNI PRASAD, Munsif of Havali.

A. Sanyal for the appellants.

A. P. Pandey for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This is a judgment-debtors' appeal from the decision of the Subordinate Judge of Benares, who allowed the appeal by the decree-holder against the order of the Munsif holding that a house belonging to the judgment-debtors could not be attached and sold in execution of the decree. The plea put up by the judgment-debtors was that this house was held by them as agriculturists and is, therefore, exempt from attachment and sale under Section 60(*c*) of the Civil Procedure Code.

The Munsif held that this was a house occupied by the judgment-debtors as agriculturists; but the Subordinate Judge held that it was not. The view taken by him is that the judgment-debtors are only shown to

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*E. S. A. 1221 of 1929

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1932
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v.
RAM
PRASAD
Pullan, J.

have one holding containing a number of plots, which has already been held to be no longer an agricultural holding but to be a holding let mainly for building purposes. He argues from this that the judgment-debtors have ceased to be agriculturists and they cannot therefore, claim that they hold the house as agriculturists. It does not appear to us that this is a strictly logical conclusion. It may be that the holding is no longer an occupancy holding and it is no longer a holding falling under the strict provisions of the Tenancy Act, because it has been leased to the judgment-debtors under a lease which is not in accordance with the agricultural leases prescribed by that Act. But the mere fact that these persons have obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy does not necessarily imply that they have themselves ceased to be agriculturists or that they no longer occupy this house in the capacity of agriculturists. The Judge himself has found in the connected case, which we have decided today, that vegetables and fodder are grown on the plots which are the subject-matter of the lease; and the Munsif pointed out in his judgment that there were a large number of rent receipts showing that the judgment-debtors did cultivation, in addition to the evidence of the Patwari and other witnesses. We have been referred to a decision of a Bench of this Court in the case of *Jamna Prasad Raut* v. *Raghunath Prasad*[1]. In that particular case, it was held that a judgment-debtor who was both a zamindar and a cultivator had been unable to prove that his main source of income was agriculture, and his decree-holder was permitted to sell a house which was not situated in the village in which the judgment-debtor resided. The only point on which that judgment has any bearing on the present case is the ruling that the burden of proof lay on the judgment-debtor to show that he was in the strict sense of the term an agriculturist. We consider that the judgment-debtors in the present case have been able to show that they are agriculturists in the sense that they come of an agriculturist caste and cultivate the soil, and it is not proved that they have any other occupation, except possibly the letting out of certain land for building purposes. The Judge himself does not ascribe to them any other profession. In the circumstances of this case, we are satisfied that these persons are agriculturists and they occupy this house in that capacity.

We allow the appeal with costs, set aside the decree of the Judge and restore that of the Munsif.

Appeal allowed

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[1] I. L. R. 35 All. 307=11 A. L. J. 437

CHITAR SINGH (*Judgment-debtor*)
versus
LACHMI NARAIN (*Decree-holder*)*

Civil

1932

March 18

Pullan, J

Niamatullah, J.

Civil Procedure Code, Or. 21, R. 86—Decree-holder himself declared purchaser for a sum exceeding decretal amount—Amount due not paid into court within time—Court to resell property—Any interested person can move the court to do its duty.

Once the initial step has been taken by the decree-holder and an application for execution of decree has been made and a sale in pursuance thereof has taken place but the sale becomes abortive in consequence of the decree-holder not fulfilling his obligation as an auction-purchaser, the law casts an imperative duty on the court to have the property re-sold and to recover the balance from him as a defaulting auction-purchaser. There is nothing in law to justify the view that re-sale should not take place unless the court is moved by the decree-holder. Anyone who is interested in having the property re-sold can move the court to do what is its duty.

EXECUTION SECOND APPEAL from a decree of G. O. ALLEN ESQ., District Judge of Agra, confirming a decree of MAULVI MUHAMMAD JUNAID NOMANI, Subordinate Judge.

M. L. Chaturvedi for the appellant.

N. P. Asthana and *B. N. Sahai* for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is a judgment-debtor's appeal and arises in the following circumstances:—

The respondent, Lachmi Narain, obtained a simple money decree on May 18, 1927 against the appellant Chitar Singh. Certain house property was attached in execution of the aforesaid decree, and was sold on October 29, 1927, when the decree-holder himself was declared to be the purchaser for a sum exceeding the decretal amount, so that he was bound to pay the balance in cash within 14 days after the date of sale. The decree-holder found that he had made a bad bargain, and attempted to have the sale set saide. He applied, under O. 21, R. 90, C. P. C., for the sale being set aside on the ground of fraud and material irregularity. The court set aside sale, not on any of those grounds, but on the ground that the auction-purchaser (decree-holder) had not paid the entire purchase money within the time allowed by law. As part of the same order, the court directed resale of the property under O. 21, R. 86, C. P. C. The judgment-debtor was dissatisfied with this order, as he maintained that the sale should have been confirmed and the auction-purchaser made to pay the difference between the decretal amount and the amount of his bid. Accordingly he appealed to the learned District Judge, who held on March 10, 1928 that the sale should be confirmed and the decree-holder directed to pay the difference between the decretal amount and the price. The decree-holder preferred a second appeal to this Court (No. 1393 of 1928) impugning the correctness of the order dated March 10, 1928. This Court ruled that the order confirming the sale was not justified by law and that the order of the court of first instance directing re-sale of the property was the proper order. It was pointed out that the provisions of O. 21, R. 86, C. P. C., are mandatory and that, on the failure of the auction-purchaser to deposit the entire purchase money within the time allowed by law, it is imperative on the court to have the property resold. Sometime after the receipt of a copy of this Court's judgment, the Subordinate Judge recorded an order to the effect that as nothing had been done by the decree-holder for the further progress of proceedings for re-sale, they should be struck off. The decree-holder was unwilling to have the property resold and had, in fact, applied to the court that his application for execution be dismissed. The judgment-debtor appealed to the District Judge from the order of the Subordinate Judge refusing to have the property re-sold. The learned District Judge dismissed the appeal, holding that two previous orders passed by the Subordinate Judge, one dated March 28, 1928 and the other dated March 31, 1928, operated to bar the judgment-debtor's prayer for re-sale of the property. The present appeal is from the order of the District Judge mentioned above.

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* E. S. A. 834 of 1930

It is contended on behalf of the decree-holder that no property can be sold in execution of a decree except on motion made by or on behalf of the decree-holder. We think that this contention is unsound. It is true that an application for execution of a decree should be made, and is generally made, by the decree-holder, who alone is interested in obtaining satisfaction of the decree; but once the initial step has been taken by the decree-holder and an application for execution of decree has been made and a sale in pursuance thereof has taken place but the sale becomes abortive in consequence of the decree-holder not fulfilling his obligation as an auction-purchaser, the law casts an imperative duty on the court to have the property re-sold and to recover the balance from him as a defaulting auction-purchaser. There is nothing in law to justify the view that re-sale should not take place unless the court is moved by the decree-holder. Indeed in a case like this the decree-holder is interested in avoiding the re-sale of the property. If no further proceedings take place, there will be no occasion for the deficiency in the price being made good by him. On the other hand, there will be nothing to prevent the decree-holder from making a second application for execution by attachment and sale of the same property. If the view contended for by the decree-holder is correct, the provisions of O. 21, R. 86, C. P. C., can be easily circumvented where the decree-holder is the purchaser. We have no doubt that such a reading of O. 21, R. 86, C. P. C., is wholly unwarranted. As already stated, the law has laid a duty on the court to resell the property, and anyone who is interested in having the property resold can move the court to do what is its duty. For these reasons, we hold that the learned District Judge was wrong in upholding the order of the Subordinate Judge, who refused to re-sell the property in the absence of a prayer by the decree-holder in that behalf.

The orders, dated March 28 and 31, 1928 do not, as the learned District Judge is inclined to think, operate as a bar to the judgment-debtor applying to the court to re-sell the property. These orders were passed shortly after the order of the Subordinate Judge dated March 10, 1928,

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1932
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v.
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Niamatullah, J

which had been challenged by the judgment-debtor in appeal to the District Judge. His position then was that no re-sale should take place but that the sale already held should be confirmed. Accordingly he could not appeal from those orders consistently with his appeal from the order dated March 10, 1928. These orders were passed on miscellaneous applications, one presented by the judgment-debtor, who complained that the decree-holder was not willing to deposit the expenses of re-sale and that he should be permitted to pay such expenses, and the other made by the decree-holder praying for execution proceedings to be shelved. The order dated March 28, 1928 refused to allow the judgment-debtor to pay the expenses of re-sale and incidentally remarked that it is the decree-holder who, if he desires to have the property re-sold, should deposit the expenses of the sale. The order, dated March 31, 1928, allowed the application of the decree-holder praying for execution proceedings being struck off. The order of this Court, passed in second appeal on April 13, 1929, must be deemed to have abrogated all interlocutory orders passed since the order dated March 10, 1928. Moreover such interlocutory orders can be challenged in the appeal from the final order refusing to resell the property. We are of opinion that the orders of March 28, 1928 and March 31, 1928 did not, in any way, bar the judgment-debtor's application asking the court to act in accordance with the mandatory provisions of O. 21, R. 86, C. P. C.

The result is that this appeal succeeds. It is accordingly allowed with costs throughout. The orders of the courts below, refusing to have the property re-sold, are set aside. The court of first instance shall proceed with proceedings for re-sale according to law.

Appeal allowed

CRIMINAL
1932
March 29
BOYS, J.

MADAN MOHAN LAL
versus
SHEORAJ KUNWAR*

Criminal Procedure Code (Act V of 1898), Sec. 145 (1)—Not mandatory—Order under Sec. 145—Not to be set aside unless one of the parties prejudiced by absence of formal order—No question of jurisdiction arises—Court of competent jurisdiction—Characteristics of.

Sec. 145 (1) Cr. P. C. is not mandatory except in this sense that the court will set aside an order passed under the latter clauses of Sec. 145, if there is any reason to believe that the omission of an order or the passing of an order not strictly in the terms of Sec. 145 (1) led to some prejudice to one or other of the parties.

It would be quite unjustifiable and unreasonable to set aside lengthy proceedings under Sec. 145, when the facts indicate that the parties could not conceivably have been prejudiced by the absence of a formal order, where it is manifest that they knew well all the facts and contested the matter with the advantage of the knowledge of the whole of the facts.

The omission to draw up an order under Sec. 145 (1) has nothing to do with the question of jurisdiction.

*Cr. Ref. 6 of 1932

CRIMINAL

1932

MADAN MOHAN LAL
v.
SHEORAJ KUNWAR

Dan Prasad v. *Ganeshi*, 11 A. L. J. 696, *Nathu Ram* v. *Emperor*, 15 A. L. J. 270 and *Banke Singh* v. *Gokul*, 25 A. L. J. 246 *referred to.*

The characteristics of a court of competent jurisdiction are:

(*a*) power conferred to deal with offences or matters of the class in question.

(*b*) power conferred to deal with the offences or persons of the class in question.

CRIMINAL REFERENCE made by the Sessions Judge of Agra.

Krishna Murari Lal for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Boys, J.

BOYS, J.—In my view there should be absolutely no difficulty in administering the provisions of Section 145 nor in dealing on the revisional side of this High Court with any orders that may have been passed under Chapter XII. The difficulty only arises in the courts of Magistrates because possibly owing to pressure of work they do not read Section 145 carefully. In the present case though I propose to pass an order under Section 145 I shall have to vary the order passed by the Magistrate, because he did not read the section and pass his order in accordance with its terms. On the other hand, in my opinion difficulty has been created even in this Court, if I may say so with respect to other learned Judges, by a failure to appreciate the difference between jurisdiction to entertain a matter and the power to pass particular orders in that matter. I may illustrate this immediately. The present case has been referred by the learned Sessions Judge to this Court because no order was passed by the Magistrate strictly conforming to the terms of Section 145 (1). The learned Judge has considered that he has been directed by certain decisions of this Court to hold that where an order has not been passed precisely in the terms of Section 145 (1), the Magistrate had no "jurisdiction" to proceed. I have been referred to the cases of *Dan Prasad* v. *Ganesh*[1]; *Nathu Ram* v. *Emperor*[2] and *Banke Singh* v. *Gokul*[3]. In the first two of these cases the word "jurisdiction" was specifically used. In the third case the word "jurisdiction" was not used. In my view the omission to draw up an order under Section 145 (1) has nothing whatever to do with the question of "jurisdiction" at all. I had the occasion in another place* to make a careful study of the scope of this word and I came to the conclusion and I have had no reason to depart from that conclusion, that the characteristics of a court of competent jurisdiction were:

(*a*) power conferred to deal with offences or matters of the class in question

(*b*) power conferred to deal with the offenders or persons of the class in question.

In some cases it has been suggested that the question of venue is also a determining factor of jurisdiction but the better opinion is to the contrary. That question does not arise at any rate in the present case.

In the present case there can be no question whatever that the Magistrate had power to deal with the matter in question and with the persons in question, and he had therefore jurisdiction in the case.

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[1] 11 A. L. J. 696

[2] 15 A. L. J. 270

[3] 25 A. L. J. 246

*Criminal Procedure Code by G. P. Boys.

This, however, does not conclude the matter. I note that in the case referred to me, the word "jurisdiction" was only as it were casually used and it may be that the learned Judges really meant no more than that the provisions of Section 145 (1) are mandatory or, in other words, that prejudice must be assumed. I am not prepared to go so far as that. It appears to me that if an order has not been formally drawn up exactly in the terms of Section 145 (1) there may or may not be according to the circumstances of the case great prejudice to the parties. But it appears to me that it would be quite unjustifiable and unreasonable to set aside lengthy proceedings under Section 145, when the facts indicate that the parties could not conceivably have been prejudiced by the absence of a formal order, where it is manifest that they knew well all the facts and contested the matter with the advantage of the knowledge of the whole of the facts. Now to deal with the first objection in the present case, it appears that disputes have arisen between the wife on one side and her husband and her two sons on the other. There was a house which was purchased in the name of the wife and which was registered in the Municipality in name of the wife. On March 18, 1931, the wife filed a complaint against her husband and sons saying that she had been turned out of the house, property misappropriated, and that she herself had been beaten and she asked for an order for maintenance against her husband. The application was clearly a complaint within the terms of Section 4 (1) (h) of the Code of Criminal Procedure. The lady clearly wanted action to be taken in regard to the offences committed against her though no section of the Penal Code was specified and she clearly wanted action under Section 488 of the Code of Criminal Procedure. The Magistrate on March 23, 1931 referred the matter to the Police and they reported on March 29, 1931. I have not the report before me nor is it necessary. It is manifest that the Magistrate had information that there was likely to be a breach of the peace in regard to this house and thought it desirable to take proceedings under Section 145 of the Code of Criminal Procedure. It is here that it would have been well for him to look again at the section. No Judge of this Court has any hesitation in refreshing his memory from the law, and it would save in the end a great deal of the time of the magistracy if they would glance at a section before passing an order under it. The only order passed by the Magistrate was to direct the issue of a notice fixing a date for the parties to file their written statements and documents and the parties did proceed to file their written statements and to lead a lot of evidence and there is not a hint that either of them did not know what the trouble was about, nor is there a hint of any request by them for further information as to what charges they were to answer to nor is there a hint when they pleaded that there was no likelihood of a breach of the peace. In other words, they fought the whole matter out knowing perfectly well what they were asked to meet. I am of opinion that Section 145 (1) is not mandatory at all, except in this sense that the Court will set aside an order passed under the latter clauses of Section 145, if there is any reason to believe that the omission of an order or the passing of an order not strictly in the terms of Section 145 (1) led to some prejudice to one or other of the parties. Still less is there any question of jurisdiction in the matter. I would therefore decline to accept the reference on this ground and it is the only ground which has been the basis of the reference, and the only ground which has been urged before me by the counsel for the husband in whose interests the reference was made upon his application in revision to the Sessions Judge.

There is however a point which I have to notice for myself and that is the form of the final order which has been passed. That order reads as follows:—

> B. Madan Mohan Lal (the husband) will therefore give joint possession to Musammat Sheoraj Kunwar (the wife) or file a suit in the civil court and inform this court that he has done so within a fortnight. If it is not possible for both parties to keep possession, then possession to stay as at present till the decision of the civil suit?

That order is neither intelligible nor workable as it stands nor is it in accordance with Section 145. After referring to the fact that the house stood in the name of the woman the Magistrate says that she had at least as much right as her husband and refers to the fact that whatever rights the husband might have had he was failing to give effect to them, because he was so frequently away at Agra, and in one place the Magistrate finds definitely:—

> I find the fact of her possession at the time alleged about the middle of March established.

His judgment might have been perhaps more clear but it is clear that at any rate the weight of evidence was in his opinion in favour of the woman. He should then have proceeded to declare her possession by forbidding the other parties to disturb her until they had established their rights, if they had any, in their civil court. I notice that the Magistrate in his explanation admits his technical mistake in omitting to pass a complete order in the terms of Section 145 (1) and he adds "This is an unfortunate case. I hope it will be finally settled satisfactorily by the appropriate party." I am satisfied that the magistrate did his best and did justice in the matter as far as he could, and that he was in substance right with the exception that it is necessary to vary his final order to bring it within the terms of the Code. Setting aside his order, I declare Musammat Sheoraj Kunwar to be entitled to exclusive possession of the house until evicted therefrom in due course of law and I forbid all disturbance of such possession, and if she is not now in possession, I direct that whoever of the parties may be in possession do restore to her exclusive possession of the house. I reject the reference acting under Section 439 of the Code of Criminal Procedure of my own motion.

Reference rejected

SUNDER LAL (*Plaintiff*)
versus
SUBEDAR SINGH (*Defendant*)*

Civil

1932

April 1

Pullan, J.
Niamatullah, J.

Tenancy Act (III of 1926), Sec. 265(1)—Lambardar of a mahal—Mahal *sub-divided into* pattis—*Suit for arrears of rent—Land situated in a* patti *in which lambardar was not a co-sharer—Whether lambardar empowered to collect rent—Part of arrears in respect of a period prior to passing of Act III of 1926.*

The lambardar of a *mahal*, which was sub-divided by an imperfect partition into a number of *pattis*, brought a suit for arrears of rent against the defendant. The land for which rent was claimed was situated in a *patti* in which the lambardar himself was no co-sharer and had no proprietary interest. *Held*, that the lambardar was not empowered to collect rent in respect of such land, as he had no proprietary interest in such land. *Khan Ali Khan* v. *Masihulzaman Khan*, 1931 A. L. J. 1068 *relied on.*

In view of the procedure laid down by Act III of 1926 in Ss. 265 and 266 for the collection of rent, decisions under the previous enactment cannot operate as *res judicata*.

Any authority which a lambardar might have had before the passing of the Act of 1926 became subject to the limitations imposed by Ss. 265 and 266, regardless of the fact whether arrears were in respect of a period subsequent to the passing of that Act or prior to it.

SECOND APPEAL from a decree of L. V. ARDAGH ESQ., District Judge of Shahjahanpur, confirming a decree of ALI SAJJAD HUSAIN, Assistant Collector, first class.

Haribans Sahai for the appellant.

Shiva Prasad Sinha for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This appeal arises out of a suit for arrears of rent brought by the appellant, professing to act as 'lambardar' of 'mahal' No. 3 in village Chaurihanpur, District Shahjahanpur. It is not disputed that this 'mahal' stands sub-divided by an imperfect partition into a number of 'pattis' one of which is patti Pem Singh. It is also not in dispute that the plaintiff-appellant has no proprietory interest in Patti Pem Singh. The land for which rent is claimed from the defendant-respondent, Subedar Singh, who is alleged to be the tenant, is in its entirety situate in Patti Pem Singh. The suit was contested *inter alia* on the ground that the plaintiff-appellant is not empowered to collect rent in Patti Pem Singh. Both the lower courts have dismissed the suit, holding that the plaintiff-appellant is not entitled to sue the defendant-respondent for rent, assuming it is payable by him, in respect of the holding in dispute which is also in controversy.

In second appeal by the plaintiff-appellant, it is contended on his behalf that the 'lambardar' of a 'mahal' is the only person authorised to collect rent in respect of land within that 'mahal' though it may be situated in a 'patti' in which the 'lambardar' himself is no co-sharer and has no proprietory interest. We are clearly of opinion that this contention is

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*S. A. 994 of 1929

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1932

SUNDER LAL
v.
SUBEDAR SINGH

Niamat-ullah, J.

not warranted by the language of Section 265 of the Agra Tenancy Act on which the contention is based. Sub-section 1 of that Section runs as follows:—

> The lambardar in an undivided mahal or in the common land of the mahal, thok or patti of which he is the lambardar is entitled in the absence of any contract or usage to the contrary to collect rents and other dues.

The plaintiff-appellant is not a lambardar in an undivided mahal. It is argued that he is entitled to collect the rent payable in respect of land in Patti Pem Singh, which is 'common land' so far as co-sharers of that patti are concerned, and that it is not necessary that the lambardar should be one of the co-sharers *qua* such land. In our opinion, a lambardar is not entitled to collect rent, unless the land for which rent is claimed belongs to all the co-sharers of the mahal, if he is the lambardar of the mahal, or to all the co-sharers of the patti, if he is the lambardar of the patti. In every case it is necessary that the lambardar should have a community of interest with other co-sharers in the land for which rent is claimed. If the lambardar has no proprietory interest in such land, as is the case before us, he is not empowered, by S. 265 (1) of the Agra Tenancy Act, to collect rent in respect of such land. Another Division Bench of this Court has taken the same view of S. 265 in *Khan Ali Khan* v. *Masihul-zaman*[1]. Accordingly we uphold the view on which the decree of the lower appellate court proceeds.

Reliance is also placed on S. 132 of Act III of 1926. That Section, however, merely provides that arrears of rent shall be recovered "by suit, or by distraint, or by notice through the tahsildar, in accordance with the provisions of this Act, or in any one or more of such ways." It does not enable the lambardar to free himself from the trammels of S. 265, already referred to.

The plaintiff-appellant claimed rent for years 1332 to 1334 Fasli. The present Tenancy Act (No. III of 1926) was passed in September 1926, that is to say, after the commencement of the Fasli year 1334. The learned advocate for the plaintiff-appellant argues that he is at any rate entitled to collect rent for the period preceding the passing of Act III of 1926 inasmuch as under the law as it existed before that enactment a lambardar was entitled to sue in the circumstances like those of the present case. The plaintiff-appellant obtained decrees against the defendant-respondent for arrears of rent in respect of past years before Act III of 1926 was passed. These decrees are relied on as concluding all questions in respect of the plaintiff-appellant's right to sue for arrears of rent. In view, however, of the procedure laid down by Act III of 1926 in Ss. 265 and 266 for the collection of rent, decisions under the previous enactment cannot operate as *res judicata*. The suit, which has given rise to this appeal, was instituted on October 31, 1927, long after the passing of Act III of 1926. Any authority which the lambardar might have had before the passing of this Act became subject to the limitations imposed by Ss. 265 and 266, Agra Tenancy Act, regardless of the fact whether arrears were in respect of a period subsequent to the passing of that Act or prior to it. We are concerned with the extent of his authority when he attempts to collect rent and not when he could have exercised it but failed to do so. In this view, the plaintiff-appellant was not empowered to institute the present suit for recovery of rent for the years 1332 to 1334 F.

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[1] [1931] A. L. J. 1068

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed

CIVIL
1932
SUNDER LAL
v.
SUBEDAR SINGH
Niamat-ullah, J.

LARAITI (*Applicant*)

versus

SHIAM SUNDER LAL AND ANOTHER (*Opposite party*)*

CIVIL
1932
April 5
PULLAN, J
NIAMAT-ULLAH, J.

Civil Procedure Code, Or. 23, R. 3—'Lawful compromise'—Meaning of—Compromise as between parties that suit be dismissed—Purchaser of plaintiff's rights thereupon asks court not to record compromise, and make him a party—Whether he can object to passing of a compromise decree.

In a contested suit the parties filed a compromise (after the arguments were concluded) that the suit be dismissed. The present respondent, who had purchased the rights of the plaintiff during the pendency of the suit, thereupon presented an application asking that he should be made a party to the suit and that the compromise should not be accepted. The court took evidence as to the execution of the sale deed in favour of the respondent, made him a party, refused to accept the compromise and decided the suit on its merits in favour of the respondent; *held,* that the compromise was not in its terms or nature 'unlawful', and a compromise is not unlawful because it is alleged by some third person that his rights were infringed by the compromise, and a decree must be passed in accordance with the compromise, and the application of the respondent should have been rejected by the court *in limine. Qadri* v. *Fazal,* I. L. R. 50 All. 748 *relied on.*

FIRST APPEAL from an order of PANDIT PRAN NATH AGHA, Additional Subordinate Judge of Moradabad.

K. N. Katju and *K. C. Mital* for the appellant.

Iqbal Ahmad, S. *N. Seth* and *Shyam Kumari Nehru* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This appeal challenges an order passed by the Subordinate Judge in two particulars. The Subordinate Judge has refused to accept a compromise filed by the parties in a civil suit and he has also ordered a third party, Shiam Sunder, to be made a co-plaintiff in the suit after the original parties had filed the compromise.

A man named Basant Rai died in the month of August 1922 and his widow Mst. Laraiti applied for a succession certificate. Her application was opposed by one Kishun Sarup who pleaded, first, that he and Basant Rai were members of a joint Hindu family, and, secondly, that Basant Rai had executed an unregistered will in his favour on August 8, 1922. Kishun Sarup was unsuccessful in these proceedings and the District Judge called upon him to show cause why he should not be prosecuted in a criminal court. Criminal proceedings were dropped because Kishun Sarup, who

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*F. A. F. O. 49 of 1930

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was at the time, little more than a youth, threw himself on the mercy of the court. These proceedings terminated on March 23, 1929 and on July 10, 1929 Kishan Sarup filed a suit against Mst. Laraiti based on the same allegations as he had made before the District Judge on Mst. Laraiti's application for a succession certificate. Three days later on July 13, 1929 Kishun Sarup executed a document purporting to transfer his rights for a sum of Rs.7,000 in cash to one Shiam Sunder. This Shiam Sunder did not become a party to the suit. The suit was contested, evidence was recorded and arguments heard in the month of February 1930. On February 8 at the close of the arguments, the court reserved judgment. On February 10 Kishun Sarup and Musammat Laraiti who were the only contesting parties in the suit filed a compromise that the suit should be dismissed. The court directed that Kishun Sarup should verify the compromise in its presence on the following day and on that day, namely, February 11, 1930, Shiam Sunder presented an application asking that he should be made a party to the suit and that the compromise should not be accepted. The court took evidence as to the execution of the sale deed in Shiam Sunder's favour, made Shiam Sunder a party, refused to accept the compromise and decided the suit on its merits in favour of Shiam Sunder.

Order 23, Rule 3 of the Civil Procedure Code runs as follows:—

> Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

From the wording of the section it appears that as long as a court is satisfied that the suit has been adjusted between the parties wholly or in part and that the compromise is a lawful compromise, a decree must be passed in accordance with the compromise. It has been argued before us that this compromise was not a lawful compromise because it was entered into in fraud of Shiam Sunder, the purchaser of the plaintiff's rights. Now, when this compromise was filed there was nothing to indicate that Shiam Sunder claimed to be the purchaser of the plaintiff's right and he himself had abstained from being made a party in the suit. It appears to us to be most improper to hold a compromise to be unlawful because it is alleged by some third person that his rights are infringed by the compromise. This High Court has never accepted such an argument. On the contrary, it was held in the case of *Qadri Jahan Begam* v. *Fazal Ahmad*[1] that the word "lawful" in Rule 3 of Order 23 refers to agreements which in their very terms or nature were not "unlawful" and might therefore include agreements which were voidable at the option of one of the parties on the ground of undue influence, coercion or fraud. *A fortiori* a compromise will be lawful if the only charge brought against it is that it is voidable at the instance of a third party on the ground of fraud. We need not concern ourselves with the rulings of other High Courts where persons who were already parties to the suit have successfully objected to the acceptance, by the court, of a compromise. In this case clearly,

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[1] I. L. R. 50 All. 748

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when the compromise was filed, Shiam Sunder was no party to the suit and his right to be made a party to the suit was open to question. In our opinion therefore the application of Shiam Sunder that the compromise should not be accepted should have been rejected by the court *in limine*. This being so the compromise was bound under the law to be accepted by the court for there is no question that as between Kishun Sarup and Mst. Laraiti it is a lawful compromise. This being so the case was at an end and the court should not and could not have made Shiam Sunder a party to the suit. In so doing the court acted wrongly, and the order of the court is one which can be set aside in appeal. It was represented to us by the learned counsel for the respondents that in view of certain judicial decisions notably the case of *Basappa Budappa Halavalad* v. *Bhimangowda Shiddangowda Patil and another*[2] the fact that a decree will be passed in the terms of this compromise may debar the respondent as a purchaser *pendente lite* from any future suit. This may or may not be so but if the respondent suffers this disability it will only be because in his excess of caution he failed to become a party to the suit before the compromise was filed. We note that the learned Subordinate Judge has not come to any conclusion that the respondent actually paid any money for the sale deed executed in his favour and we cannot help observing that the respondent when he purchased this litigation was on somewhat delicate ground. His vendor was a man who had previously set-up this will and had only escaped a prosecution for perjury by throwing himself on the mercy of the court and it may well be that having regard both to the character of his vendor and to the nature of the suit, the respondent thought it advisable to keep his name out of it as long as possible. Over caution is often fatal to gamblers. In our opinion his appeal must be decreed. We therefore set aside the order of the Subordinate Judge and direct that a decree be passed as between Kishun Sarup and Mst. Laraiti in the terms of the compromise. The appellant will receive her costs throughout.

Appeal allowed

[2] I. L. R. 52 Bom. 208

SARJU PRASAD SONAR (*Plaintiff*)
versus
MAHADEO PRASAD PANDEY AND ANOTHER (*Defendants*)

Civil
1932
April 8
Boys, J.
Young, J.

Civil Procedure Code, Sec. 11 and Tenancy Act (II of 1901), Sec. 199—Suit for money on a mortgage—In a former ejectment suit it was decided by the revenue Court that plaintiff was not a mortgagee—Whether decision operated as res judicata.

Before a matter can be held to be *res judicata*, it must be found, among other things, that the first court was competent to try the subsequent suit and not merely a subsequent issue.

Kuh Lal v. *Gulzari Lal*, [1927] 25 A. L. J. 564 and *Baru Mal* v. *Sunder Lal*, 21 A. L. J. 330 *referred to.*

There is nothing in Sec. 199 of Act II of 1901 to justify the suggestion that the revenue court deciding a question of title "must be deemed to be a civil court". Even if the revenue court might for the immediate purpose

*S. A. 228 of 1930

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be deemed to be a civil court, it does not become a civil court competent to try a particular whole suit.

The plaintiff having lost possession as a usufructuary mortgagee, brought a suit for money on the mortgage. Previous to this suit the mortgagor had brought a suit against the present plaintiff in the revenue court to eject him from a plot. The present plaintiff pleaded that he was a mortgagee, and his plea was rejected and the suit decreed. It was contended in the present suit that this question of whether the present plaintiff was a mortgagee or not having been decided against him by the revenue court, the matter was *res judicata*. *Held*, that while the revenue court was competent to try the issue as to whether the present plaintiff was a mortgagee or not (Act II of 1901, Section 199), it was not competent to try the subsequent suit, and therefore the terms of Section 11 C. P. C. were not satisfied, and the decision of the revenue court did not operate as *res judicata*.

SECOND APPEAL from a decree of BABU RAM UGRAH LAL SRIVASTAVA, Subordinate Judge of Basti, confirming a decree of BABU MOHAN SHANKAR SAXENA, Additional Munsif.

N. Upadhiya for the appellant.

P. L. Banerji for the respondents.

The judgment of the Court was delivered by

Boys, J.

BOYS, J.—This is a plaintiff's appeal arising out of a suit for money on a mortgage. It would appear that Mahadeo Prasad executed a usufructuary mortgage on June 10, 1899 in favour of Sarju Prasad, who lost possession and has brought the present suit. No question is really material in the matter, except the single question of whether the suit is barred as *res judicata*. There were two previous decisions which were said to bar the present suit; but in this appeal we are concerned with only one of them—that of a revenue court. Mahadeo Prasad had brought a suit against Sarju Prasad in the reveune court to eject him from a plot. Sarju Prasad pleaded that he was a mortgagee, and his plea was rejected and Mahadeo's suit decreed. It was contended in the present suit that this question of whether Sarju Prasad was a mortgagee or not having been decided against him by the revenue court, the matter was *res judicata*. Both courts have held that the suit was barred.

We are of opinion that the answer is to be found in the plain terms of Section 11, and whether or no in some special types of cases a suit may be held to be barred, as it is put sometimes, by an extension of the principle to be found in Section 11, we can see no possible ground for going beyond the section in the present case. A careful reading of Section 11 makes it, in our view, perfectly plain that before a matter can be held to be *res judicata* it must be found, among other things, that the first court was competent to try the subsequent suit. Whether we take the words "competent to try such subsequent suit," or the words "competent to try the suit in which such issue has been subsequently raised," it must be found that the first court was competent to try, not merely a subsequent issue, but the subsequent "suit."

Now it is manifest that in the present case while the revenue court was competent to try the issue as to whether Sarju Prasad was a mortgagee or not, it was not competent to try the subsequent suit. One of us, sitting

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Boys, J.

with another Judge, considered this point in *Kub Lal* v. *Gulzari Lal*[1]. We have been referred by counsel for the respondents to the decision in *Baru Mal* v. *Sunder Lal*[2]. We do not consider, however, that this question was there directly considered. In that case in a previous suit in the revenue court the defendant had sued to eject the plaintiff, and the question of proprietary title arose, based upon the sale deed which was the basis of the second suit. It was pointed out that the revenue court could in the first case have adopted one of two courses; that "it might have referred the parties to the civil court or it might have constituted itself a civil court and tried the question itself." In fact the revenue court did not refer the parties to the civil court, but tried the question of title itself. The learned Judge remarked:

> The decision in that suit must be deemed to be the decision of a civil court . The question of the plaintiff's title must be deemed to have been decided in that suit As we have stated above, the court, in the previous suit, was, by reason of the action taken by it, equivalent to a civil court which could have tried the subsequent suit.

We are unable to find in the terms of Section 199 of Act II of 1901 anything to justify the suggestion that the revenue court deciding a question of title "must be deemed to be a civil court." Section 199(3) merely says that the revenue court, if it decides to determine the question of title itself, "shall follow the procedure laid down in the Code of Civil Procedure for the trial of suit, and, notwithstanding anything contained in Section 193 of this Act, all the provisions of the said Code shall apply to the trial of such question of title."

There is nothing in this more than a statement of the procedure to be followed.

But even if it be conceded that the revenue court might for the immediate purpose be deemed to be a civil court, there does not appear to be any basis for the suggestion that it becomes a civil court competent to try any particular whole suit, or anything more than, at most, a civil court competent to try a particular issue of title.

If we were fully satisfied that the learned Judges had had in view the point to which we have referred earlier in this judgment, we should perhaps have deemed it advisable to send this case for consideration by a larger bench. But in fact there is throughout the judgment nothing to indicate that the learned Judges' attention was particularly directed to the words "competent to try such subsequent suit or the suit etc." It is true that they used the phrase "could have tried the subsequent suit," but there is nothing to show that their attention was particularly directed to the difference between "competent to try the subsequent suit," and "competent to try the subsequent issue." We have been referred to certain other cases, but the two that we have mentioned are the only two which may be considered to be more or less directly in point. The trial court having decided the whole case, we set aside the decree of the lower appellate court and direct it to readmit the appeal under its original number and to dispose of it according to law. The appellant will have the costs of this appeal.

Case remanded

[1] [1927] 25 A. L. J. 564

[2] 21 A. L. J. 330

CIVIL

1932

March 18

SULAIMAN, C. J.
MUKERJI, J.

BIKRAM SINGH (*Defendant*)
versus
DIP SINGH (*Plaintiff*)*

Tenancy Act (Local Act III of 1926), Sections 264 and 247, and Civil Procedure Code, Order 21, Rule 63—Order of Assistant Collector, second class under Order 21, Rule 58—Appeal to Collector under Section 247 of Tenancy Act—Appellate order against claimant—Whether claimant has a right to institute a suit under Order 21, Rule 63.

In execution of a decree for arrears of rent (passed by the Assistant Collector, second class) the decree-holder attached certain property as belonging to the judgment-debtor. The present plaintiff intervened with the claim that the property belonged to him. His claim was allowed by the Assistant Collector, second class, but on appeal to the Collector under Section 247 of the Agra Tenancy Act, the appellate court held that the property belonged to the judgment-debtor. Thereupon the present plaintiff instituted the present civil suit under Order 21, Rule 63 C. P. C. *Held*, that there was no inconsistency between the right to file a civil suit and a right to appeal under the Tenancy Act, and the present suit was, therefore, maintainable.

LETTERS PATENT APPEAL against the decision of the HON'BLE MR. JUSTICE SEN.

The following judgment was delivered by

SEN, J.—This and the connected appeal arise out of two suits instituted by Thakur Dip Singh in the court of the Munsif of Moradabad against Bikram Singh, Raghubir Singh and others and against Kallu Singh and others for a declaration that certain she-buffaloes and a calf were not liable to attachment and sale in execution of decrees Nos. 512 and 515 of 1927 obtained by Bikram Singh against Raghubir Singh and others for arrears of rent from the court of an Assistant Collector, Second Class. Bikram Singh in execution of his decrees attached these buffaloes as the property of his judgment-debtors. Dip Singh, plaintiff intervened with the objection that the buffaloes in question belonged to him and did not belong to the judgment-debtors. His objections were allowed by the Assistant Collector, second class. Bikram Singh appealed to the Collector under Section 247 of the Agra Tenancy Act (Act III of 1926). His appeals were allowed and the appellate court held that the buffaloes were the property of the judgment-debtors. This led to the institution of the present suits. The court of first instance decreed both the suits. The defendant appealed and the lower appellate court has affirmed both the decisions. The finding of the lower appellate court in concurrence with the trial court is that the buffaloes are the property of Thakur Dip Singh, plaintiff-respondent.

Bikram Singh appeals and the sole point urged is that having regard to the provisions of Section 264 of the Agra Tenancy Act, the suit in the civil court is misconceived and that no suit lies. It has been argued that an order under Order 21, Rule 58 of the Code of Civil Procedure passed by an Assistant Collector of the second class was open to appeal to the Collector under Section 247 of the Agra Tenancy Act and that in such a case the appellate order of the Collector is final and that it is not within the competence of the civil court to entertain a suit under Order 21, Rule 63 of the Code of Civil Procedure with a view to overset the appellate order of the Collector. Reliance has been placed upon Section

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*L. P. A. 48 of 1931

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264 of the Agra Tenancy Act in support of this contention. Section 264 provides that "the provisions of the Code of Civil Procedure, 1908, except (*a*) provisions inconsistent with anything in this Act so far as the inconsistency extends . . . . shall apply to all suits and other proceedings under this Act, subject to the modifications contained in list II of the Second Schedule." The suits instituted by Thakur Dip Singh for a declaration of title to the buffaloes in controversy are not suits or proceedings under Act III of 1926 (Local) but are suits instituted under Order 21, Rule 63 of the Code of Civil Procedure. Section 264 of the Agra Tenancy Act does not provide that the right of suit which a party has under Order 21, Rule 63 of the Code of Civil Procedure is not exercisable in cases where the orders of the Assistant Collector, second class, in proceedings under Order 21, Rule 58 are appealable to the Collector and have been taken in appeal before that officer and disposed of by him. The policy of the Legislature was not to give conclusiveness to orders passed in summary proceedings under Order 21, Rule 58 of the Code of Civil Procedure. There is nothing in the texture of Act III of 1926 to indicate that the Legislature intended to invest the appellate order of the Collector with finality. Moreover, the right of suit given under Order 21, Rule 63 of the Civil Procedure Code is in no way inconsistent with Section 247 of the Agra Tenancy Act or any other section of that Act. Where, therefore, on an objection raised by a party in a suit or proceeding cognizable by the revenue court, the Assistant Collector, second class, has decided the objections in a particular way and his order has been affirmed or reversed by the Collector under Section 247 of the Agra Tenancy Act, the appellate order of the Collector is not final and the party aggrieved thereby has a right of suit under Order 21, Rule 63 of the Code of Civil Procedure. I therefore overrule the contention of the appellant and hold that the suit which has given rise to the present appeal was maintainable. I accordingly dismiss this appeal with costs on the higher scale.

Janki Prasad for the appellant.

N. P. Asthana and *B. N. Sahai* for the respondent.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—The facts of the case and the reasons for holding that a civil suit lies are fully set forth in the order of the learned single judge of this Court, with whose view we agree.

By virtue of Section 104(1) and Order 43 C. P. C. no appeal would have originally lain from an order made under Order 21, Rule 58 C. P. C. dismissing the objection of a party to the execution proceedings. Section 247 of the Agra Tenancy Act, however, allows an appeal from every order of an Assistant Collector of the second class. In this way an appeal has been provided for where there will be no appeal under the C. P. C.

Order 21, Rule 63 lays down that

> where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

Even if it be assumed that the provision of a right to appeal from an order of an Assistant Collector second class is somewhat inconsistent with the provisions of Rule 63, that rule will be inapplicable only so far as the inconsistency extends. That is to say, an appeal would be entertained where no appeal would otherwise have lain. But there is no inconsistency between the right to file a civil suit and a right to appeal under the Tenancy

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Sulaiman, C. J.

Act. It is to be noted that Order 21 C. P. C. has been made applicable with two exceptions to execution proceedings under the Agra Tenancy Act (Schedule II, List 2, Serial Nos. 12 and 13).

It is obvious that a very large property may well be attached in execution of a very small amount. The policy of the Legislature could not have been to make an order passed by an Assistant Collector or by a Collector in appeal final in such matters. Agreeing with the view explained by the learned single Judge of this Court, we dismiss this appeal with costs.

Appeal dismissed

CIVIL

1931

July 6

SULAIMAN, A. C. J.
SEN, J.

LACHHMI NARAIN (*Objector*)

versus

PIAREY LAL AND ANOTHER (*Decree-holder*)*

Civil Procedure Code, Order 21, Rule 49—Partner—Judgment-debtor—Interest charged—Receiver appointed—Whether receiver can be appointed manager of entire partnership.

While charging the interest of a partner who is a judgment-debtor and vesting it in the receiver under Order 21, Rule 49 C. P. C., the court cannot appoint the receiver as the manager of the entire partnership as this will involve the dispossessing of the other partners.

CIVIL REVISION against the order of the Munsif of Hathras.

M. A. Aziz for the applicant.

S. K. Dar, Panna Lal, S. N. Gupta and *H. P. Varshni* for the opposite parties.

The judgment of the Court was delivered by

Sulaiman, A. C. J.

SULAIMAN, A. C. J.—This is an application in revision from an order dated, November 8, 1930, passed by the Munsif of Hathras in the execution department.

Kedar Nath is a partner of a firm of which Lachhmi Narain is the other partner. The interest of Kedar Nath in this firm was attached by the decree-holder and the court passed an order under Order 21, Rule 49 charging the interest of the judgment-debtor partner in the partnership property and appointing a receiver of his share. It has to be admitted that no previous notice of the application as required by Sub-rule (4) was issued to the other partner. This was undoubtedly irregular. The learned Munsif seems to suggest that this was cured by a subsequent notice dated, June 24, 1930. But that notice related to the question whether the partners should not be prohibited from realising any debts in future. The irregularity, however, is not now of any significance because the applicant does not object to the appointment of the receiver, nor wants that he should be removed.

The court did not make any express order directing accounts and enquiries, but it was understood that this followed from the appointment of the receiver. The court did order that the receiver should take over the books of the firm. As the applicant was the manager of the firm and he was no party to the execution proceedings, there was an irregularity in directing the receiver to take possession of the books, for it was intended that he should do so even against the will of the managing partner. The books were filed in court by the receiver and were ultimately taken away by the managing partner. Later on at the instance of the decree-holder the books were ordered to be produced in court and they were produced at one time. They were taken back by the manager but were again filed in court. They have accordingly been brought into court under its order. They had not been seized by the receiver. In this there was no irregularity. It is open to the learned Munsif not to allow these books to be returned to the managing partner if he has any reasonable ground for suspecting that they have in any way been tampered with.

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*Civ. Rev. 471 of 1930

The order of November 8, 1930 contains an expression of opinion that the court has wide powers and the only proper course open to an execution court is 'to vest all management of the partnership in the receiver.' That this was the intention of the learned Munsif appears from the subsequent order passed by him on November 8, 1930 under which he directed that in future none of the partners should realise any of the outstanding debts.

We find no justification for holding that under Order 21, Rule 49 while charging the interest of a partner who is a judgment-debtor and vesting it in the receiver the court can appoint the receiver as the manager of the entire partnership which will involve the consequence of the dispossessing of all the other partners. It is only the interest of the partner in the partnership property which vests in the receiver and which can be dealt with by the court, and not the entire partnership itself. This part of the order is wholly unauthorised and is without jurisdiction.

The order sought to be revised by this application is one disallowing the applicant's objection and holding that all the management of the partnership should vest in the receiver. We allow this revision in part and set aside this portion of the order. The result is that although the receiver will continue and the court will be at liberty to retain the account books, the applicant will not be prevented from realising, if he so chooses, the debts of the firm, nor will the receiver be authorised to manage the whole partnership firm. The parties will bear their own costs.

Application allowed in part

DAN SAHAI (*Defendant*)
versus
JAI RAM SINGH (*Plaintiff*)*

CIVIL
1932
March 21
PULLAN, J.
NIAMATULLAH, J.

Tenancy Act (Local Act III of 1926), Section 44—Decree for ejectment of tenant—'Dakhalnama' obtained but defendant still in physical possession—Suit for possession in Civil Court treating defendant as trespasser—Whether maintainable.

Plaintiff obtained a decree for ejectment against defendant, who was then his tenant, on May 26, 1927, but failed to take possession prior to June 30, 1927 as required by Section 94 of the Tenancy Act. He, however, obtained a 'dakhalnama' giving formal possession on July 14, 1927 but defendant was still in physical possession in July 1928. On September 1, 1928 plaintiff brought the present suit for possession in the civil

*S. A. 954 of 1930

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v.
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court describing the defendant as a trespasser. *Held*, that the 'dakhalnamah' either operates as a break in the tenancy of the defendant or it does not. If it does not, the defendant is still a tenant and there is no question that proceedings against him must be taken in the revenue court. If, on the other hand, the 'dakhalnamah' does operate as a break in the tenancy and determines the tenancy, then the defendant is a person who has taken possession of the plot without the consent of the landholder and in contravention of the provisions of the Tenancy Act, and he is liable to ejectment on a suit by the landholder in the revenue court. In either case, the civil court has no jurisdiction to determine the dispute between these parties.

SECOND APPEAL from a decree of BABU KASHI NATH, Subordinate Judge of Bulandshahr, modifying a decree of BABU YUDHISHTIR SINGH GAHLAUT, Munsif of Khurja.

Panna Lal for the appellant.

Nanak Chand for the respondent.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This appeal arises from a suit brought by a 'zamindar' for possession of an agricultural plot occupied by a person who is described by him as a trespasser and who was formerly his tenant. The suit was brought in the court of the Munsif of Khurja, who acting under Section 271 of the Agra Tenancy Act (No. III of 1926) remanded an issue to the Assistant Collector for the determination of the question whether the defendant was or was not a tenant of the plaintiff. The Assistant Collector returned a finding that the defendant was a trespasser, and the Munsif decreed the suit in favour of the plaintiff. This finding was affirmed in appeal by the Sessions and Subordinate Judge of Bulandshahr.

Neither of the courts below appear to have considered the question as to whether this was a suit which under the New Tenancy Act can be tried in a civil court. The facts were as follows:—The plaintiff obtained a decree for ejectment against the defendant, who was then his tenant, on May 26, 1927. Under Section 94 of the Agra Tenancy Act, delivery of possession in execution of that decree had to be obtained prior to June 30, 1927. The plaintiff failed to obtain delivery of possession by that date, but he obtained a 'dakhalnamah' giving formal possession on July 14, 1927. It does not appear that the defendant actually vacated possession. During that succeeding year other litigation was engaged in by the parties, and the upshot was that even after the commencement of the following agricultural year, that is, in July 1928, the defendant was still in physical possession of this plot, and it was on September 1, 1928 that the plaintiff brought the present suit.

It appears to us that the 'dakhalnamah' of July 14, 1927 either operates as a break in the tenancy of the defendant or it does not. If it does not, the defendant is still a tenant and there is no question that proceedings against him must be taken in the revenue court. If, on the other hand, the 'dakhalnamah' does operate as a break in the tenancy and determines the tenancy, then the defendant is a person who has taken possession of the plot without the consent of the landholder and in contravention of the provisions of the Tenancy Act, and he is liable to ejectment on a suit by the landholder in the revenue court. In either case, the civil court has, in our opinion, no jurisdiction to determine the dispute between these parties. It is a matter for regret that a dispute of this nature should have been hanging on for no less than five years; but we find ourselves unable to remedy this grievance. All that we can do is to return this plaint for presentation in the revenue court. We do not consider that this is a case in which either party should be made to pay the costs of the other. We allow the appeal, set aside the orders of the courts below and direct the plaint to be returned for presentation in the revenue court. The parties to bear their own costs throughout.

Appeal allowed

JIWA RAM (*Applicant*)
versus
KING-EMPEROR THROUGH LT.-COL. PENGELLEY (*Opposite party*)*

Criminal
1931
Aug. 11
Sulaiman, J.

Penal Code, Sec. 279 and Motor Vehicles Act, Section 16—Accused's negligence and failure to observe the rule of the road—Collision—Conviction under Section 279 I. P. C.—When conviction under special Act more appropriate.

Where the offence falls *strictly* within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. In such a case it may be assumed that the legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course.

Where the fault of the accused did not lie merely in not observing the rule of the road by driving the lorry on the right side of it, but he was negligent in continuing to drive on the wrong side of the road in spite of due warning and in going fast, *held*, that when the ingredient of negligence entered into the offence, the conviction under Section 279 I. P. C. was not only proper but more appropriate. Rule 27 of the Motor Vehicles Act Rules merely lays down the rule of the road, and a breach of it need not necessarily involve rashness or negligence.

Criminal Reference made by Babu Kashi Prasad, Additional Sessions Judge of Aligarh.

S. B. L. Gaur for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Sulaiman, J.—This is a Criminal Reference by the Sessions Judge of Aligarh recommending that the conviction of the accused under Section 279 I. P. C. be altered into one under Section 16 of the Motor Vehicles Act, and the fine be reduced from Rs.200 to Rs.100. *Sulaiman, J.*

The applicant was driving his motor lorry in a wrong direction keeping to the right side of the road. From the opposite direction Lt.-Col. Pengelley was coming in his car and he very properly kept to the left side of the road. He blew his horn when at a distance of 50 yards, but the accused Jewa Ram did not turn back to the left side of the road but moved

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*Cr. Ref. 247 of 1931

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Sulaiman, J.

on compelling the complainant to leave the road and move on to its left side. Even then he did not escape safely but his car was hit at right angles and was dashed against a tree and was smashed. The complainant received a few bruises also. The Magistrate found that although the accused applied his brakes he could not, in spite of his efforts, avoid the accident. This implied that he was going at a fast speed and through a dusty atmosphere when the visibility was not good. He distinctly found that Jewa Ram's negligence and failure to observe the rule of the road were responsible for the collision.

As the case was tried summarily there was no appeal, but the accused filed a revision before the Sessions Judge. The learned Sessions Judge did not of course overrule these findings, but considered that the conviction under Section 279 I. P. C. was illegal. He relied on the case of *In re Mohanlal Saxena* v. *King-Emperor*[1] and concluded that where there is a special law making a particular act an offence and proving penalties, the general law is inapplicable. He has accordingly referred this case to the High Court because he considers that the conviction under the general law is illegal.

It is not necessary for me to express any opinion on the decision in the Oudh case because in that case the question considered was whether a person could be convicted of abetment under Section 117 I. P. C. when the offence also fell under Section 9 of the Salt Act of 1882. I may, however, remark that that case has not been followed by a bench of this Court in *Joti Prashad* v. *King-Emperor*[2] and has also been doubted by the Bombay High Court in *Emperor* v. *Ganesh Vaman Joshi*[3].

I am only concerned with the observation made by the learned Judges of the Oudh Chief Court on which reliance has been placed by the learned Sessions Judge. With great respect, I am unable to hold that it can be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts, and both may be applicable simultaneously, and the offender may be prosecuted and convicted under either Act. It may, however, be conceded that where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. In such a case it may be assumed that the legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course.

The fault of the accused in the present case did not lie merely in not observing the rule of the road by driving the lorry on the right side of it. If he had done nothing worse than that, I would have felt inclined to alter his conviction as recommended by the Sessions Judge. But on the finding of the Magistrate he was negligent in continuing to drive on the wrong side of the road in spite of due warning and in going fast. The case undoubtedly fell within the scope of Section 279 I. P. C.

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[1] 1930 A. I. R. (Oudh) 497

[2] 1931 A. L. J. 986

[3] 1931 A. I. R. (Bom.) 140

Section 16 of the Motor Vehicles Act, has not any necessary ingredient of rashness or negligence in it. Rule 27 of the Motor Vehicles Act Rules merely lays down the rule of the road, and a breach of it need not necessarily involve rashness or negligence. When the ingredient of negligence entered into the offence, the conviction under Section 279 I. P. C. was not only proper but more appropriate.

I accordingly decline to interfere. Let the papers be returned.

Reference rejected

CIVIL
1932
March 17
MUKERJI, J.
BENNET, J.

DUIJI KUNWAR (*Plaintiff*)

versus

BAILA KUNWAR AND OTHERS (*Defendants*)*

Tenancy Act (Local Act III of 1926), Section 230—Civil suit—Revenue court could substantially grant the relief for which plaintiff asked under Sections 121 and 44 of the Tenancy Act—Suit not maintainable.

The allegations in the plaint were that plaintiff and defendant No. 1 were joint occupancy tenants, that the defendant No. 1 had made without plaintiff's consent a perpetual lease to defendants 2 and 3 and that plaintiff was still in possession. The relief sought was that on establishment of plaintiff's right a decree invalidating the lease may be passed in plaintiff's favour, and her possession may be maintained and in case of proof of dispossession, a decree for possession may be passed. *Held,* that the civil court had no jurisdiction to entertain this suit as the revenue court could substantially grant the relief for which plaintiff asked under Sections 121 and 44 of the Tenancy Act.

SECOND APPEAL from a decree of BABU KRISHNA DAS, Subordinate Judge of Ghazipur, confirming a decree of BABU MATHURA PRASAD, Munsif of Muhammadabad.

U. S. Bajpai and *G. S. Pathak* for the appellant

M. L. Agarwala for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a second appeal by the plaintiff whose suit has been dismissed by the lower appellate court on the ground of want of jurisdiction. The plaint set forth that the plaintiff was the daughter of one Ram Shukul who died some 13 years ago and his brother Deo Saran had previously died. The plaintiff claimed that she had entered into possession of certain occupancy plots which had originally belonged to the two brothers. The plaintiff stated that defendant No. 1, Mst. Baila Kunwar, widow of Deo Saran, had been entered for the occupancy holding. Further that on September 18, 1918 zemindars of the mahal admitted the rights of the plaintiff and defendant No. 1 as occupancy tenants. Paragraph 5 set forth that on August 3, 1927 defendants second party Nand Kishor and Ram Adhar instigated Mst. Baila Kunwar to give them a perpetual lease which she did in respect of the plots mentioned in the plaint, and that the plaintiff had not consented to that lease. The plaint further set forth that the defendants 2 and 3 had not obtained possession of any of the plots and that the plaintiff was still in possession. The relief asked for was that

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*S. A. 269 of 1929

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Bennet, J.

on establishment of the plaintiff's rights a decree invalidating the perpetual lease, dated August 3, 1927, registered on September 7, 1927, may be passed in favour of plaintiff, and her possession over the plots specified below may be maintained and in case of proof of dispossession, a decree for possession may be passed.

The principal question before us is whether the suit of the plaintiff should be brought in the revenue court or in the civil court. It was filed in the court of the Munsif who decreed the suit in part. Both parties appealed and on first appeal the lower court adopting the plea of the defendant in appeal held that the revenue court alone had jurisdiction. Under Section 230 U. P. Act III of 1926 if the cause of action is one in respect of which adequate relief might be granted by the revenue court, it is immaterial that the relief asked from the civil courts may not be identical with that which the revenue court could have granted. We, therefore, have to see whether the revenue court could substantially grant the relief for which the plaintiff asks. To ascertain jurisdiction, as has been frequently held, we should regard allegations in the plaint. The allegations are that the plaintiff and defendant No. 1 are joint occupancy tenants and that the defendant No. 1 has made without the consent of the plaintiff a perpetual lease to defendants 2 and 3. We consider that under Section 121 of the Agra Tenancy Act it is open to the plaintiff to sue defendant for a declaration in regard to plaintiff's rights in this tenancy. It is further open to the plaintiff to sue under Section 44 of that Act for the ejectment of persons such as defendants 2 and 3 whom she alleges to be occupying the plots of land without her consent. As the plaintiff does not definitely say that the defendants 2 and 3 are in possession through a lease, the plaint could allege, as the present plaint does, that the relief of ejectment of defendants 2 and 3 should be granted if they are found to be in possession. We consider that this would substantially cover all the reliefs for which the plaintiff asks. Under Order 1, Rule 3, C. P. C., which applies to revenue suits under general provisions in the Tenancy Act (Section 264), all persons might be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist. In the present case the cause of action is the perpetual lease and the remedies against all the defendants arise out of that one transaction. We consider, therefore, that on the allegations in the plaint adequate remedy can be granted by the revenue court. We, therefore, hold that the civil court has no jurisdiction to entertain this suit, and we direct that the plaint should be returned to the plaintiff to file in the proper court if so advised. As the appeal has substantially failed, we allow costs.

Appeal allowed

CRIMINAL

1931

Sep. 30

NIAMATULLAH, J.

SARJU AND OTHERS
versus
EMPEROR*

Criminal Procedure Code, Sections 539B and 537—Accused alleged to have cut and stolen gram crop—Magistrate visits the field—But omits to make a memorandum of what he observed on the spot—Whether omission amounts to irregularity.

The accused who were alleged to have cut and stolen gram crop, were charged under Section 379 I. P. C. They examined the village patwari in defence to establish that there had been no gram crop in the field in question in that year and that wheat had been sown. This surprise was sprung on the prosecution at a late stage of the case. No suggestion of the kind was made when the complainant was examined, nor did the accused state in their defence that the field had not been sown with gram at all. The Magistrate made an inspection of the field and discovered stumps of dried gram plants. He however did not give any previous intimation of his intention to visit the field and he did not record the result of his inspection in a note which, as required by Section 539B Cr. P. C., should have been made part of the record. *Held,* that the 'omission' of the Magistrate to act in accordance with Section 539B Cr. P. C. was an irregularity, and did not in fact occasion a failure of justice. *Forbes* v. *Ali Haider Khan,* I. L. R. 53 Cal. 46; *Khushal Jeram* v. *Emperor,* I. L. R. 50 Bom. 680 *followed.*

CRIMINAL REVISION from an order of BABU KRISHNA DAS, Sessions Judge of Ghazipur.

A. P. Pandey for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—The applicants Sarju, Manki and Baram with two others Dhari and Chandrajit, were convicted by a Magistrate first class, Ghazipur, of an offence under Section 379 I. P. C. in that they cut the gram crop belonging to one Ramdeo in village Sarauli. Chandrajit, aged 16, was released on his executing a bond under Section 562 Cr. P. C. On appeal by the remaining four accused the learned Sessions Judge acquitted Dhari.

The complainant found on several occasions that his gram crop in a certain field was partly removed over night. On the night between March 3 and 4, 1931 he in company of one Hardeo kept a secret watch on the field. After midnight according to the case for the prosecution, the five accused entered his field and began to cut the crop standing thereon. The complainant and Hardeo quietly advanced towards the field, and when they were sufficiently near the spot, the complainant made a rush towards the thieves. Basram was caught on the spot but the others made good their escape. A report was made at the thana next morning. The investigation resulted in the prosecution of all the five accused.

The evidence in the case was direct. There was no question of identification the accused being all known to the complainant and Hardeo. The accused examined the village patwari in defence to establish the fact that

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*Cr. Rev. 447 of 1931

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v.
EMPEROR
Niamat-ullah, J.

there had been no gram crop in the field in question in that year. The field in which theft is alleged to have been committed is No. 415-1. The patwari showed from the records in his possession that wheat had been sown and not gram. This surprise was sprung on the prosecution at a late stage of the case. No suggestion of this kind was made so far as the record shows, when the complainant was examined, nor did the accused state in their defence that the field had not been sown with gram at all. The learned Magistrate made an inspection of the field and discovered stumps of dried gram plants. A grievance is made of the fact that the learned Magistrate did not give any previous intimation of his intention to visit the field and that he did not record the result of his inspection in a note which as required by Section 239-B, Cr. P. C. should have been made part of the record.

The learned advocate for the applicants has argued before me that the omission on the part of the learned Magistrate to make a record of what he saw on the spot and to file it as required by Section 539-B, Cr. P. C. is not a mere irregularity but an illegality which vitiates the trial, apart from any prejudice to the accused resulting from the non-observance of the aforesaid provision. He argues in the alternative that even if it was no more than an irregularity, in its very nature it is calculated to prejudice the accused in so far that he was deprived of an opportunity of satisfying the Magistrate that what he found on the spot were not the stumps of gram crop since gathered but of wheat crop. He has referred to a number of authorities in support of his contention. It is true that a Bench of the Calcutta High Court held in *Hriday Govinda Sur* v. *Emperor*[1] that non-observance of the provisions of Section 539-B amounts to an illegality which vitiates the trial. This case was, however, not followed in the subsequent case of *Forbes* v. *Ali Haidar Khan*[2] in which it was observed by one of the learned Judges who formed the Bench that "there is no universal rule that disobedience of a mandatory provision of a statute results in nullification of all proceedings irrespective of any question of prejudice."

In *Khushal Jeram* v. *Emperor*[3] it was held that an omission to record any relevant facts that may be observed by a Magistrate at an inspection made under Section 539-B, Cr. P. C. 1898, is not an illegality vitiating the whole trial, but is an irregularity which can be remedied under Section 537 of the Code. The case of *Hirday Govind Sur* v. *Emperor* was expressly dissented from, and the later case above referred to was followed.

In many cases it may be difficult to distinguish between an illegality and irregularity, but it may be safely said that a mere error of procedure arising out of inadvertence will amount to no more than an irregularity. In the case before me I have no doubt that if the attention of the learned Magistrate had been drawn to the necessity of making memorandum of his observations on the spot and making it a part of the record, he would have done so. The safest guide is the language of Section 537 Cr. P. C. which provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed on account of any error, omission or irregularity in any proceeding unless such error, omission or irregularity

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[1] I. L. R. 52 Cal. 148

[2] I. L. R. 53 Cal. 46

[3] I. L. R. 50 Bom. 680

has in fact occasioned a failure of justice. In the case before me there was an 'omission' on the part of the Magistrate trying the case to make a note of his observation and to place it on the record. If such 'omission' has in fact occasioned a failure of justice, the trial is vitiated, otherwise the 'omission' is condoned. I am unable to say, having regard to the circumstances of this case, that a failure of justice was occasioned in consequence of the omission of the kind referred to. I asked the learned advocate for the applicants to mention definitely how his clients were prejudiced and to illustrate the action they would have taken in their defence if such an omission had not occurred. He gave the only possible reply, viz., that the accused would have made an attempt to establish that what the Magistrate found in the field were not the stumps of gram plants. It appears from the evidence of the Patwari that according to him wheat had been sown in field No. 415-1. It is impossible to make a mistake as regards the stumps where the question is whether they are of wheat plants or gram plants. The learned Magistrate has largely relied in support of his finding on certain circumstances mentioned in his judgment and has used his own observation merely to disprove the patwari's evidence. He has pointed out that the accused never hinted before the patwari who was examined that the field had not been sown with gram crop at all. He also emphasised the fact that if wheat had been sown in the field the complainant could not possibly have alleged that the accused stole gram crop. His purpose could have been equally served, if he desired to falsely implicate the accused, to allege that they were out to steal his wheat crop. In view of all these circumstances I am satisfied that the omission on the part of the learned Magistrate to make a memorandum of what he observed on the spot and to make it a part of the record did not in fact occasion a failure of justice.

The finding of the learned Magistrate as to whether the applicants had stolen the complainant's crops on the night in question is based on good evidence and has not been seriously challenged, apart from the question of law discussed above. The learned advocate for the applicants strenuously contended that in view of the value of the crop, viz., Rs.2-8-0 the sentences of three months' R. I. and a fine of Rs.50 in case of Basram, and 1½ months and a fine of Rs.25 in case of the other applicants are unduly severe. Basram is a previous convict, and in his case, at any rate, the sentence is not severe. As regards the other accused the sentences should not be judged solely with reference to the value of the crop stolen on that occasion. But for the complainant and Hardeo interrupting their operations, the major part of their gram crop might have disappeared in course of the night. I do not think any interference in the sentence is called for. The revision is dismissed. The accused shall surrender to their bail bonds to undergo the sentence.

Revision dismissed

CIVIL

1932

Feb. 15

SULAIMAN, J.
YOUNG, J.

CHHOTEY LAL PANNA LAL THROUGH PREM DIAL MODI (*Plaintiff*)

versus

R. K. RAILWAY THROUGH THE AGENT R. K. R., BAREILLY AND ANOTHER (*Defendants*)*

Railway—Consignment of 'wrought timber' despatched at owner's risk—Rate charged by Booking Clerk—Lower than Tariff rate (company's risk)—No rate for carriage at owner's risk—Whether Company entitled to freight at Tariff rate—Mistake in classification—Conditions of contract noted on back of Railway Receipt did not provide for right of re-classification—Whether Company protected.

In the Goods Tariff of the Railway Company there was only one class of rate fixed for 'Wrought timber', viz., those at the Company's risk, and none at the owner's risk. The plaintiff handed over planks ('Wrought timber') to the Company to be despatched from Shahjahanpur to Agra. Owing to the mistake of the booking clerk the consignment was despatched at the owner's risk, and the consignor was charged at a rate lower than that notified in the Tariff for 'Wrought timber.' *Held,* (1) that the rate actually charged was within the limits fixed by the Railway Board and the Company could without any previous sanction of the Railway Board have fixed that rate as the rate of 'Wrought timber' and notified the same in the Tariff which they issued, and it could not therefore be said that the charging at the lower rate was contrary to any rule or regulations issued by the Railway Board which had the force of law; (2) that so far as the rules and noifications of Railway Companies issued under the authority of the Railwav Board are concerned, it might possibly be assumed that there was constructive notice to the public, but the same assumption cannot be made as regards the rate entered in Tariff issued by the Railway Company without reference to the Railway Board; (3) that the consignor was not responsible for the mistake made by the clerk in not charging at the Tariff rate, because private instructions issued by a principal to an agent are not binding on a third party unless the latter has notice, and the Company must be deemed to be bound by the rate of contract entered into on their behalf by their agent, viz., the Booking Clerk, and it could not charge a higher rate; (4) that as there was no separate rate for 'unwrought timber' there could have been no mistake in classification.

Under the rules issued by the Railway Board the Company can seek protection if there was a mistake in classification (Rule 15, General Rules, 1926). The conditions of the contract noted on the back of the Railway Receipt stated that the Company had the right of re-measurement, reweighment and recalculation of charges at the place of destination, but the paragraph did not contain the word 're-classification' which occurred in Rule 15; *held,* that the term of the written contract as notified to the consignor did not protect the Company from a mistake made in classification of goods.

CIVIL REVISION from an order of MAULVI MUHAMMAD JUNAID NOMANI, Subordinate Judge of Agra.

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*Civ. Rev. 100 of 1931

CIVIL

1932

CHHOTEY LAL
v.
R. K. RAILWAY

Sulaiman, J.

B. Malik for the applicant.

R. N. Gurtu (with him *L. P. Zutshi*) for the opposite parties.

The judgment of the Court was delivered by

SULAIMAN, J.—This is a civil revision from a decree of the court of small causes dismissing the plaintiff's claim for refund of an excess amount charged by the Railway Company. A consignment of planks was despatched from Shahjahanpur which is on the R. K. R. Line to Agra on the B. B. & C. I. Railway Line under several receipts. For the sake of convenience we may take up one receipt, No. 74156, by way of illustration. The weight charged was 272 maunds, which was obviously the carrying capacity of the whole wagon and the rate at which the freight was charged was 0-2-9. Apparently the consignment was not weighed at the receiving station but was weighed at Pilibhit and again at Agra and the actual weight was noted at one of these two stations. The Railway authority at Agra demanded freight at the rate of 0-4-8 per maund on the ground that there had been an undercharge. The plaintiff paid the amount under protest. Subsequently he was given a refund of a small amount, but not the whole of the excess amount charged. Accordingly he brought the suit to recover Rs.470 which he was compelled to pay in addition to what had been charged at Shahjahanpur. It may also be noted that the receipt granted to the consignor was on Risk Note Form B and the consignment was despatched at the owner's risk.

Part of the journey was across the B. B. & C. I. Railway on which planks can be carried both at the owner's risk and at the Railway company's. There was no demand made by the Railway for any excess amount as regards the part of the journey on the B. B. & C. I. Railway. There is therefore no dispute about it before us.

According to the Goods Tariff for the R. K. R. Railway, planks are included under the classification 'Wrought timber' and not 'Un-wrought timber'. There is also no doubt that for Wrought timber there is only one class of rate fixed, namely, those at the Company's risk, and none at the owner's risk. There is also no doubt that the Booking Clerk at Shahjahanpur charged the plaintiff at the rate of 0-2-9 which was not the rate notified in the Tariff for Wrought timber, and the consignor handed over the goods to the Company at the owner's risk.

The contention on behalf of the Railway Company is that there being only one rate for Wrought timber and no separate rate for unwrought-timber, the clerk had no authority to charge at a rate lower than 0-4-8 fixed for wrought timber, and he had no right to accept goods at the lower rate merely on the ground that they were understood to be carried at the owner's risk, and that as a mistake was made by the clerk concerned, the Company is entitled to recover the full amount authorised.

On the other hand the learned advocate for the applicant contends that the Company had originally charged a lower rate at the owner's risk and is therefore not entitled to alter the basis of that rate and charge on the supposition that the goods were to be carried at the risk of the Company and therefore the amount charged was at the wagon rate and the

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v.
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Sulaiman, J.

Company cannot alter the basis of the contract by demanding freight at the maund rate.

It was laid down by the Full Bench in the case of *Chunni Lal* v. *The Nizam's Guaranteed State Railway Company Ltd.*[1] that a Railway Company 'is not entitled to alter the basis of the contract by demanding freight calculated per maund when the goods had been accepted for carriage at the wagon rate for the whole distance.' Apparently in that case the rate originally charged was Rs.270 per wagon load for the whole distance. This case has naturally been followed by this Court in subsequent cases of *Alla-uddin* v. *The G. I. P. Railway Company*[2] and *Gulab Dei* v. *G. I. P. Railway*[3].

On behalf of the Railway Company it is however pointed out that in the present case the clerk had not charged at the wagon rate, i.e., so much per wagon for the entire distance, but that the charge was so much per maund per mile. Our attention has been drawn to the Rule 16 (General Rules, 1926) under which the Company is entitled to have the goods reweighed and to charge for the actual weight even though it be different from the computed rate. It is also pointed out that if there had been goods of mixed quality, namely, both Wrought and Un-wrought timber, the Company was entitled to charge at the highest class of rate for the entire weight under Rule 77 (General Rules, 1926). It is therefore argued that the mistake was due to a wrong classification of the goods on the part of the clerk concerned. It is suggested that the goods being planks were admittedly wrought timber, but the clerk committed a mistake in supposing that they were not wrought timber and did not charge at 0-4-8 the rate for Wrought Timber. But it has to be conceded that there was no rate like 0-2-9 for Un-wrought timber at all.

In our opinion the mistake was not merely one of a wrong classification, and even if it had been such a mistake it would not have helped the Company in this particular case.

Under Rule 59 (General Rules, 1926) the Railway Board have fixed certain maxima and minima for various class of goods beyond which limits the Railway Companies cannot be allowed to go without the previous sanction of the Railway Board. Within these limits the Railway can fix their own rates which are notified in the form of Railway Tariffs. For class I the maximum rate is .39 pie per maund per mile and minimum rate is .10 pie per maund per mile. Between these limits the Railway Company can fix any rate it considers competent, having regard to the extent of the traffic. It cannot be denied that from time to time the Railway Company alters the rates within these limits, but all such alterations are entered in the Tariff which is notified. The rate charged at Shahjahanpur, namely, 0-2-9 was more than the minimum rate of .10. The rate demanded at Agra, namely, 0-4-8 per maund was the maximum amount, namely, .38. It is therefore obvious that the R. K. R. Company could without any previous sanction of the Railway Board have fixed 0-2-9 as the rate of Wrought timber and notified the same in the Tariff which they issued. But it is a fact that no such rate had been notified and the actual rate notified was that of 0-4-8 for Wrought timber.

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[1] I. L. R. 29 All. 228

[2] 14 A. L. J. 494

[3] 24 A. L. J. 129

The mistake made by the clerk therefore was not that he mistook the planks to be Un-wrought timber (as there was no separate rate for Un-wrought timber) but the mistake was that he charged at a rate lower than that mentioned in the Tarrif.

So far as the rule and notifications of Railway Companies issued under a authority of the Railway Board are concerned, one might possibly have assumed that there was constructive notice to the public. The same assumption can not be made as regard the rate entered in Tariffs issued by the Railway Company without reference to the Railway Board. In order to fix knowledge of the rate mentioned therein, it must be shown that the attention of the other contracting party was specifically drawn to it, inasmuch as the question of notice is a question of fact and not of law.

As pointed out above it would have been open to the Railway Company without previous sanction of the Board to charge at the rate of 0-2-9 for Wrought timber. In some cases, e.g., *The Secretary of State for India in Council* v. *Harbans Prasad Viash*[4] the Railway Companies have allowed concession rates to individual traders within the prescribed limits. It therefore cannot be said that the charging at the rate of 0-2-9 was contrary to any rule or regulation issued by the Railway Board which had the force of law. The breach committed by the clerk was of a provision in the Tariff issued by the Railway Company itself, of which the consignor cannot be deemed to have constructive notice.

It seems to us that in these circumstances the Railway Company must be deemed to be bound by the rate of contract entered into on their behalf by their agent, viz., the Booking Clerk. The consignor believed that he was sending the goods at his own risk at the rate of 0-2-9. There was another route by which the goods might well have been consigned, and the Company therefore should not be allowed to go back upon its own contract and charge a higher rate. The consignor was not responsible for the mistake made by the clerk in not charging at the Tariff rate, because private instructions issued by a principal to an agent are not binding on a third party unless the latter has notice. We are therefore of opinion that the Railway Company was not entitled to demand any freight in excess of what had already been charged. It is not necessary for us to suggest how the claims between the two Companies on whose lines the goods were carried are to be adjusted.

We have remarked above that even if there had been a mistake in the classification of goods the Company would not be entitled to demand a higher freight in this particular case. Under the rules issued by the Railway Board the Company can seek protection if there was a mistake in classification. This was also the case before the Full Bench—*Chunni Lal* v. *The Nizam's Guaranteed State Railway Company Ld.*[5]. But unfortunately for the Company the conditions of the contract noted on the back of the Receipt left out the word 're-classification'. It was stated therein that the Railway Company had the right of re-measurement, reweighment and recalculation of charges at the place of destination. That paragraph does not contain the word 're-classification' which occurs in

[4] 28 A. L. J. 206

[5] I. L. R. 29 All. 228

Rule 15. On behalf of the Railway Company it is suggested that that word had been left out owing to a mis-print. The fact remains that the term of the written contract as notified to the consignor did not protect the Company from a mistake made in classification of goods. We therefore doubt very much whether the Company would be justified in adding to the terms of this particular contract by interpolating the word 're-classification' in paragraph 6, simply because it occurs in the Rule though it does not find any place in the written contract relied upon.

It may be noted that in two receipts the plaintiff was charged at the right rate at Shahjahanpur. The counsel for the parties are agreed that on the basis of our finding the plaintiff is entitled to a decree for Rs.320. We think that the plaintiff is entitled to interest at the court rate of 6 per cent per annum, from the date of institution of the suit till realisation. We direct that the parties should receive and pay costs in proportion to success and failure.

Appeal allowed

CRIMINAL
1931
Sep. 29
NIAMATULLAH, J.

BHIKUGIR AND ANOTHER (*Applicants*)
versus
KING-EMPEROR (*Opposite party*)*

Penal Code, Section 332, and Criminal Procedure Code, Section 103—Search of applicant's house—Police constables prevented applicants from entering into house at the time of search—Scuffle—Constables hurt—Whether Section 332 applicable.

On receiving information that the applicants were in possession of illicit liquor, the Excise Inspector with the assistance of the police, searched the house of the applicants. Two constables who had been posted near the house prevented the applicants from entering into the house saying that they should enter it after the search was over. On a scuffle which ensued there was an exchange of blows between the applicants and the constables, with the result that the applicants and the constables received injuries. The applicants were subsequently convicted under Section 332 I. P. C. *Held,* that the constables acted not in the discharge of their duty, which was to allow the applicants to enter into the house and be present at the time of the search, but in contravention of the mandatory provisions of Section 103 Cr. P. C., and were not justified in offering physical resistance when the applicants attempted to go into their house and therefore Section 332 I. P. C. did not apply.

CRIMINAL REVISION from an order of I. B. MUNDLE ESQ., Sessions Judge of Saharanpur.

Akhtar Husain Khan for the applicants.

M. *Waliullah* (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an application for revision by Bhiku Gir and Narottam Gir from an order of the learned Sessions Judge, Saharanpur, who dismissed their appeal from an order of conviction passed by a Magistrate first class of that District, sentencing the applicants to six months' R. I. for an offence under Section 332 I. P. C. The sentence was reduced to three months' R. I. on appeal by the learned Sessions Judge.

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*Cr. Rev. 505 of 1931

It appears that on March 24, 1931, B. Munshi Lal, the Excise Inspector, received information that the applicants were in possession of illicit liquor. He obtained the assistance of the police inspector, the sub-inspector and two constables for the purpose of raiding the house of the applicants and searching it. They sent for four witnesses who, it should be noted, were not men from the locality but from different villages. This was a contravention of the provisions of the Code of Criminal Procedure, but it is explained that the witnesses from the locality were considered liable to be won over by the applicants. At this stage, however, this aspect of the matter is not material.

It is in the evidence of the excise inspector that the police officers, the excise inspector and the four search witnesses formed themselves into two parties and proceeded to enter the house through two different entrances. The police constables Tafazzul Husain and Lokram had been posted near the house to prevent anyone entering into the house. The applicants, who had been previously made to search the persons of the witnesses, the police officers and the excise inspector and were sitting at their baithak a short distance away, proceeded to enter into their own house, which was about to be searched by the party. The constables prevented them from entering into the house saying that they should enter it after the search was over. This conversation was heard by the police officers present, as is apparent from the evidence of the excise inspector, but none of them declared that the applicants were entitled to be present inside the house at the time of the search though not before it. On the other hand they tacitly endorsed the insistence of the constables that the applicants should not enter the house before the search was over. On a scuffle which ensued there was an exchange of blows between the applicants and the constables, with the result that the applicants received no less than 12 injuries and the two constables received two "slight but definite injuries." (This is the description of the injuries given by the learned Magistrate). The applicants were overpowered by the police party. They were held in custody outside the house during the time search was made inside their house. Subsequently the applicants were prosecuted for an offence under Section 332 I. P. C.

The learned counsel for the applicants contends that an offence under Section 332 I. P. C. is not made out in view of the evidence led on behalf of the prosecution. He points out that the learned Sessions Judge, who reduced the sentence, was inclined to the view that the action of the police was somewhat highhanded. He remarked:—

> It is easy to understand that appellants did not like the idea of the house being searched in their absence, especially when they had some money buried under the floor. The police were perhaps not quite justified in keeping the appellants out of their house, but they did so before the search began when they wanted to keep out all strangers and even the inmates of the house from rushing inside and destroying all traces of excisable articles.

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I have been through the evidence of the excise inspector and of the sub-inspector, and think that the learned Sessions Judge has not quite accurately represented what happened when the scuffle ensued. It is not, and this fact is to be emphasised, that the applicants were directed not to enter the house before the search and that they were permitted to be present at the time of the search. If this had been the position and the applicants had intended to forestall the search party with the intention of removing excisable articles, the case would have been different. The view of the police, obviously based on the ignorance of the provisions of Section 103 Cr. P. C. was that they were entitled to keep out every one including the owner or occupier of the house before and at the time of the search. They persisted in this view and attempted to debar the applicants absolutely from entering into the house till after the search was over. This was in the teeth of the provisions of Section 103 Cr. P. C. which lays down that

> the occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

The question at which the applicants on the one side and the police constables supported by the police officers and possibly the excise inspector, on the other, were at variance was whether the applicants had a right to go inside the house at the time of the search. The question, of course, arose before the search party entered into the house. The applicants maintained that they had; the search party, on the other, held otherwise. The result was an exchange of blows between the constables and the applicants who had the worst of it, having received many more injuries than the constables did.

The facts being as stated above, the next question is whether the applicants should be considered to be guilty of an offence under Section 332 I. P. C. which makes causing

> hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant,

punishable. If public servants, in this case the constables, acted not in the discharge of their duty, which was to allow the applicants to enter into the house and be present at the time of the search, but in contravention of the mandatory provisions of Section 103 Cr. P. C. and were obstructed, Section 332 I. P. C. cannot apply. The applicants were justified in insisting on their right to go inside the house and be present throughout the search. Their anxiety, as pointed out by the learned Sessions Judge, was natural, in view of their money being buried underground in many parts of the house which was to be searched. If, therefore, they caused hurt in attempting to go into their own house on physical resistance being offered by the constables, who were not justified in doing so, they cannot be held guilty of any offence under the Indian Penal Code. I am fortified in the view I have taken by the case of *Nirmal Singh* v. *Emperor*[1].

The applicants have already served about 2½ months out of three months' R. I. awarded by the learned Sessions Judge,

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[1] 17 A. L. J. 1047

In the view of the case I have taken this revision is allowed. The conviction and sentence passed on the applicants are set aside. They shall be forthwith set at liberty.

Revision allowed

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SULAIMAN, J.
MUKERJI, J
YOUNG, J.

GAJADHAR PRASAD AND OTHERS (*Defendants*)
versus
GAURI SHANKAR AND ANOTHER (*Plaintiffs*)*

Hindu Law—Inheritance—Mitakshara—'*Heritable* bandhus'—*Rules for determining—Last male owner's father's father's daughter's son's daughter's son—Whether his heritable bandhu.*

The last male owner's father's father's daughter's son's daughter's sons are not his heritable *bandhus*.

Per SULAIMAN, J.—Rules laid down by Sarvadhikari in his Tagore Law Lectures for determining heritable bandhus re-stated as follows:—

(I) Heritable bandhus can belong only to three classes mentioned in the *Mitakshara* (and cannot be added to). The *Atma bandhus* are now well known to be included (1) within the circle of grand-parents in the ascending line, and their descendants under certain limitations including certain descendants of the owner himself. For *Pitri* or *Matri bandhus* we go outside the circle and higher, but in accordance with the ordinary conception we must travel upwards along agnatic lines, that is (2) the father's father's agnatic ascendants (*Pitri, ex parte paterna*), (3) the father's mother's agnatic ascendants (*Pitri, ex parte materna*), (4) mother's father's agnatic ascendants (*Matri, ex parte paterna*) and (5) mother's mother's agnatic ascendants (*Matri, ex parte materna*), and not in the agnatic ascendants of the mothers of these ancestors.

(II) There must be at least one female between the given person and the deceased, and there cannot be more than two females between the propositus and the common ancestors on the one side, and not more than two females between the common ancestor and the claimant on the other side, and if two females exist on either side they must be related as mother and daughter to each other. This holds good in the case of *Pitri* and *Matri bandhus*, whether *ex parte paterna* or *ex parte materna* and also in the case of *Atma bandhus* whether in the ascending line or in the descending line.

Per MUKERJI, J.—A *bandhu* who has a right to inherit to a propositus, otherwise known as heritable bandhu, must possess the following qualifications:—

(I) He may be one (1) in the propositus's father's line which would include his own line, either ascending or descending because descending line also would be his father's line through the propositus himself, (2) in the propositus's maternal grandfather's line, (3) in the propositus's father's maternal grandfather's line, (4) in the propositus's mother's maternal grandfather's line.

(II) Both the claimant and the deceased must be related to each other as *sapindas*.

Keshar Singh v. *Secretary of Estate*, I. L. R. 49 Mad. 652 *dissented from; Ram Chandra* v. *Vinayek*, I. L. R. 42 Cal. 384 *explained; Sheo Nandan* v.

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*F. A. 96 of 1927

Manni, 21 A. L. J. 288, *Ram Sia* v. *Bua,* I. L. R. 47 All. 10 *approved.* Texts of *Mitakshara* examined.

FIRST APPEAL from the decision of BABU GOVIND SARUP MATHUR, Subordinate Judge of Mirzapur.

The following Referring Order was made by

SULAIMAN and YOUNG, JJ.—One important question raised in this appeal is that even if the dedication made by Mst. Rajwanti, a Hindu widow, was without the oral authority of her deceased husband, the alienation was only voidable at the option of the next reversioner, and therefore the defendants have no *locus standi* to challenge the alienation. This is based on the contention that according to the pedigree, as printed on page 3 of the paper book, the defendants Nos. 4 and 5 are not the heritable bandhus of the last male owner Suraj Prasad. The latter question is undoubtedly a substantial and important question of Hindu law which requires an authoritative pronouncement. The learned advocate for the plaintiffs strongly relies on the statement of the law as contained in Dr. Sarvadhikari's book on the Principles of the Hindu Law of Inheritance, 2nd Edition, p. 571-72, where he emphasised that if there are two females (on the father's side, these two again must be related as mother and daughter. He also strongly relies on the classification of the cognate sapindas who can be heritable bandhus given by the same learned author on p. 591-92. Further reliance is placed on the case of *Sheo Nandan* v. *Munni,* 21 A. L. J. 288, decided by a Bench of this Court. In that case the plaintiff was the great grandson of the sister of the father of the propositus. The learned Judges relying on the passage in Dr. Sarvadhikari's Principles of Hindu Law of Inheritance, held that he was not an heir. With great respect we would say that we have some doubts as to the correctness of this decision. It is, however, pointed out that the test laid down by Dr. Sarvadhikari, and the rule of law in *Sheo Nandan's* case were approved of by another Bench of this Court in *Ram Sia* v. *Bua,* I. L. R. 47 All. 10 where the previous decision of this Court in *Shib Sahai* v. *Saraswati,* I. L. R. 37 All. 583 was also explained.

On the other hand, there can be no doubt that a Bench of the Madras High Court in *Kesar Singh* v. *The Secretary of State for India,* I. L. R. 49 Mad. 652 has expressly dissented from Dr. Sarvadhikari's view. The judgment of their Lordships of the Privy Council in the case of *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar,* 41 I. A. 290, which was incorrectly reported in 12 A. L. J. 1281, does not reproduce the tests laid down by Dr. Sarvadhikari.

As the case is of a high valuation, we think that the following question of law should be decided by a larger Bench:—

"On the pedigree as given on page 3 of the paper-book, are the defendants Nos. 4 and 5 heritable bandhus of Suraj Prasad in the absence of any nearer heir?"

We direct that the record be placed before the Hon'ble the Chief Justice for the constitution of a larger Bench.

K. N. Katju, Iqbal Ahmad, Ambika Prasad, A. P. Bagchi, Jagdamba Prasad and *Mahadeo Prasad Verma* for the appellants.

B. E. O'Conor, Sir Tej Bahadur Sapru, P. L. Banerji, U. S. Bajpai, N. Upadhiya, Ram Nama Prasad and *K. L. Misra* for the respondents.

The following judgments were delivered:—

Sulaiman, J.

SULAIMAN, J.—The question for consideration in this reference is whether the last male owner's father's father's daughter's son's daughter's sons are his heritable *bandhus.* The admitted pedigree is as follows:—

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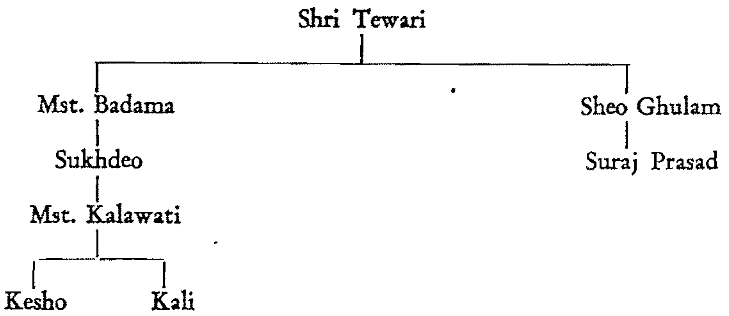

The learned advocate for the claimants contends that inasmuch as Kesho and Kali are within five degrees of the common ancestor Shri Tewari, (when the claimants, their female ancestor and the common ancestor are all included in counting), and Suraj Prasad was within only three degrees of the common ancestor, the case is covered by the rule laid down by their Lordships of the Privy Council in *Ramchandra* v. *Vinayek*[1]. He has to concede that their Lordships laid down the further condition as to the mutuality of sapinda relationship. But he contends that no other restrictions should be placed on heritable *bandhus*. He relies strongly on the case of *Keshar Singh* v. *The Secretary of State*[2], in which the pedigree was exactly the same as is before us, and the learned Judges of the Madras High Court dissenting from certain conclusions of Prof. Sarvadhikari held that the claimant was a heritable bandhu. He also adopts the line of reasoning followed by a writer in Volume IX of the Madras Law Journal (1899) page 54 onwards. On the other hand, the learned advocate for the respondents places his strong reliance on the conclusions arrived at by Prof. Sarvadhikari in his Tagore Law Lectures (1880) dealing with the principles of the Hindu Law of Inheritance, pp. 591-92 and pp. 517-72 (Second Edition). His conclusions were:—

(1) that the heritable bandhus can belong only to three classes mentioned in the Mitakshara and they fall within five groups, namely (*i*) the owner's descending line, (*ii*) owner's father's family, (*iii*) owner's maternal grandfather's line, (*iv*) father's maternal grandfather's line and (*v*) mother's maternal grandfather's line; and

(2) that there must be at least one female between the given person and the deceased; and that (in the case of bandhus *ex parte paterna*) there could not be more than two females between them; and if there are two females (on the father's side) these two again must be related as mother and daughter to each other.

A bandhu is a cognate relation, i.e., one related through a female. The institutes of Manu do not refer to bandhus at all. The claim of bandhus as heirs was apparently first recognised by Yajnavalkya, who lived about the second century A.D. The Mitakshara by Vijnaneswara, who flourished about the 12th century, is a commentary on Yajnavalkya's text. The Viramitrodaya is a commentary by Mitra Misra on the Mitakshara. These commentaries are of high authority in the Benares School.

The relevent texts of the Mitakshara as translated by Colebrooke are as follows:—

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[1] 41 I. A. 290=42 Cal. 384

[2] I. L. R. 49 Mad. 652

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Chapter II, Section vi, p. 1:—

> (1) On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother: as is declared by the following text. 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own aunt, and the sons of his mother's maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred'.
>
> (2) Here, by reason of near affinity, the kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred or, if there be none his mother's cognate kindred. This must be understood to be the order of succession here intended.

The original words in the texts indicating the three classes are (1) *Atma bandhus,* i.e., own bandhus (2) *Pitri bandhus,* i.e., bandhus on the father's side or as they are sometimes called the father's bandhus and (3) *Matri bandhus,* i.e., bandhus on the mother's side or as sometimes called the mother's bandhus. It was laid down by their Lordships of the Privy Council in *Greedharee Lall Roy* v. *Bengal Government*[3], that the enumeration of bandhus in the Mitakshara is illustrative and not exhaustive. It has been further laid down by their Lordships in *Muthusami* v. *Simambedu*[4], and in *Aditnarayan* v. *Mahabir Prasad*[5] that among the three classes, the Atma bandhus succeed before Pitri bandhus who succeed before Matri bandhus.

Again, it is now also well-settled that the bandhu relationship under the Mitakshara is based on propinquity or affinity, i.e., community of blood, or, to be more accurate, of particles of the same pinda or body. (Community of blood is not a Hindu conception, as a child is supposed to inherit some materials from his father and some from his mother; and he inherits blood from his mother only. Ghosh's Hindu Law, Vol. I, 190 3rd edition). In contrast with this, under the Dayabhaga the principle underlying succession is one of spiritual efficacy, based on community in the offering of pinda or funeral cake. It may be noted here that the word 'pinda' means both body and also cake or ball.

The leading case on this point is that of *Ramchandra* v. *Vinayek*[6]. It is necessary to give a brief summary of the judgment in this case, as counsel for both the parties rely upon it strongly. Their Lordships quoted the text of Manu that "the property of a near sapinda shall be that of a near sapinda" and pointed out that this refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals is dependent on the existence of sapinda-relationship between the propositus and the claimant. The author of the Dayabhaga considers that sapinda means 'community in the offering of funeral oblations, a sapinda literally signifies a ball of rice offered at the performance of obsequial rites'. The author of the Mitakshara abandoned the ancient doctrine and construed sapinda-relationship to arise from community of blood, i.e., of particles of the same body. The bandhus are distant kinsmen related to the deceased through females. They make their appearance as heirs first in the

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[3] 12 Moore's I. A. 448 (1868)

[4] 23 I. A. 83

[5] 48 I. A. 86

[6] 41 I. A. 290

Yajnavalkya's enunciations. Their Lordships quoted from the third chapter of the Achara Kanda, the first book of the Mitakshara on Established Rules of Conduct. In laying down that a man should marry a girl who is his non-sapinda it is stated that she is called his sapinda who has particles of body of some ancestor in common with him. Their Lordships then quoted "verse 53: 'after the fifth ancestor on the mother's and after the seventh on the father's side.'. 'On the mother's side' in the mother's line, after the fifth, 'on the father's side' in the father's line after the seventh (ancestor) the sapinda-relationship ceases etcetera." (I have put the words 'on the mother's side' and 'on the father's side' within quotation marks to indicate that they are mere reproduction from the original text quoted first, the comments upon them being in mother's line and in the father's line respectively. This is made clear in Prof. Sarvadhikari's translation of the text, as well as in a Poona translation of the original).

Their Lordships had no manner of doubt that in this quotation Vijnaneswara was laying down rules for the limitation of sapinda-relationship generally, and not with regard to marriage only. Their Lordships closely examined the doctrine of the Mitakshara, and pointed out that the word 'bandhu' in its system has a distinctive technical meaning signifying the Bhinna-gotra sapindas. Their Lordships then quoted the relevant texts of the Mitakshara. Referring to the earlier case of *Greedharee Lall*, their Lordships remarked that:

> the remark of the Board that the text did not purport to be exhaustive enumeration of all bandhus capable of inheriting and was not cited for that purpose by the author but simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus, hardly warranted the contention that the classes specified by Vijnaneswara can be added to.

But in that case it did not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended. They held that, 'the limitation of five degrees clearly applies and can only apply to the 'Bhinna-gotra sapindas, and that the limitation is not restricted to matrimonial affinity only'. Their Lordships rejected the opinion expressed by Shastri Golap Chandra Sarkar in his work on Hindu Law that the word 'bandhu' in the Mitakshara means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side. Their Lordships concluded that the right of inheritance is founded on sapinda-relationship which, under the Mitakshara, means consanguinity; but this bond comes to an end with the fifth degree when the descent is through a female, as the right to inherit could not continue after the relationship on which it is founded has come to an end.

The next proposition which their Lordships considered was the doctrine of the mutuality of sapinda-relationship, based on the rule enunciated by Manu. They referred to Prof. Sarvadhikari's Lectures and to Bhattacharyya's Hindu Law with approval for the proposition that in order to determine whether any persons are heritable cognates of the propositus it is necessary to see whether they are sapindas to each other. This had been laid down in *Umaid Bahadur* v. *Udoichand*[7]. Their Lordships also referred to *Babu Lal* v. *Nanku Ram*[8] where it had been held that a man in order to be a heritable sapinda of the propositus must be so related to him that they are sapindas of each other.

The general conclusions to which their Lordships came were in the following terms: (1) that the sapinda relationship on which heritable right of collaterals is founded ceases in the case of Bhinna-gotra sapinda with the fifth degree from the common ancestor, and (2) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other.

In the case before their Lordships the claimants were the deceased's paternal grandfather's son's son's daughter's daughter's sons. They were Bhinna-gotra beyond the fifth degree, and the element of mutuality was wanting. Their claim was accordingly rejected.

The learned advocate for the appellants contends that the two tests laid down by their Lordships in *Ramchandra's* case are exhaustive. Their Lordships no doubt laid down that no Bhinna-gotra sapinda beyond the fifth degree from the common ancestor can be a heritable bandhu on the ground of sapinda-relationship. The learned advocate for the appellants urges that it was necessarily held that all persons within five degrees are heritable bandhus. The converse proposition does not follow. There are two circumstances which conclusively show that no exhaustive definition of bandhu was intended to be laid down, and the other restrictions also are possible. First on page 298 it was pointed out that females inherit by express rules only. They must therefore be excluded as heirs. Secondly, their Lordships left the question open whether the three classes of bandhus could be added to.

It seems convenient now to examine the analysis put forward by Prof. Sarvadhikari. It must be noted that the Lectures were delivered in 1880, and although in the second edition they have been revised and brought up to date by incorporating the various rulings, the main body of the text could not be substantially altered. There are certain points which compel one to hold that the propositions laid down by Prof. Sarvadhikari should not be accepted off-hand without a close investigation. At page 594 the first conclusion arrived at in *Ramchandra* v. *Vinayek* is quoted wrongly and it is stated that the sapinda-relationship ceases in the case of Bhinn-gotra sapindas with the fifth degree from the propositus. The report of the judgment as originally received had misprints which were corrected subsequently. The conclusion is obviously quoted from the incorrect copy of the judgment. The Editor thought that it fitted in very well with the general scheme put forward by Prof. Sarvadhikari. The conclusion as quoted in the report of the full judgment in the foot-note is however correct. On page 610 he thought that, if instead of applying the rule of affinity in regulating the order of succession, he had applied the principles of religious benefit, the results would have been exactly the same and that this was an additional proof that the doctrine of religious benefit and the doctrine of affinity are not really different from each other; but they are inseparably connected with each other and when properly applied

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[7] I. L. R. 6 Cal. 119

[8] I. L. R. 22 Cal. 339

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they yield the same results. This proposition can no longer be said to be quite correct when the order of preference among bandhus has to be determined. Their Lordships of the Privy Council have distinctly laid down in *Vedachela* v. *Subramania*[9] that in each class propinquity is the governing factor and the nearness in blood determines the right to succeed, though as between the bandhus in the same class and in the same degree of nearness, the spiritual benefit conferred upon the propositus may be a ground of preference. Prof. Sarvadhikari's classification of Atma bandhus apparently follows the line adopted under the Dayabhaga Law, where the capacity for conferring spiritual benefit is the governing test. The pinda is offered to the three immediate paternal ancestors, and the three immediate maternal ancestors, the pinda-lepas are offered to the three paternal ancestors above them. The ascent both through the father and the mother are exclusively in the agnatic lines. He takes the father's agnatic ascendants as well as the mother's agnatic ascendants as the owner's Atma bandhus. These he divides into *ex parte paterna* and *ex parte materna,* according as they are on the father's or the mother's side. He then takes up the father's own bandhus. He naturally identifies the father's father's agnatic ascendants with the line of the owner's father's agnatic ascendants, and takes the father's mother's agnatic ascendants as the second class, namely, Pitri bandhus. Similarly he identifies the mother's father's agnatic ascendants with the line of the owner's mother's agnatic ascendants, and takes the mother's mother's agnatic ascendants as the Matri bandhus. The descendants of the ancestors in each class are of course included in that class. In Table 1 (*a*) showing the Atma bandhus (*ex parte paterna*), page 606A he shows the owner's great grandfather's daughter's son as an Atma bandhu (*ex parte paterna*). In the same way in Table 1 (*b*), page 607B he shows the owner's mother's grandfather's daughter's son as an Atma bandhu (*ex parte materna*). But this classification is inconsistent with the Mitakshara and cannot be accepted. In the text of the Mitakshara quoted above the sons of the father's paternal aunt, are described as Patri bandhus, and the sons of his mother's paternal aunt are described as Matri bandhus. These are the identical relations given in the two Tables.

The extension of the Atma bandhus in the father's and the mother's lines above the grand-parents would make a considerable difference when the order of preference is to be considered, as all Atma bandhus come before the Pitri bandhus. That the Table of succession as given by Prof. Sarvadhikari and followed by other learned authors is wrong as regards the place assigned to the maternal uncle, is clear from the pronouncement of their Lordships of the Privy Council in *Vedachela* v. *Subramania*[10] (*vide,* the last paragraph but two in the judgment). It follows that according to the Mitakshara the cognates connected through the ascendants above the paternal grandfather just as much as those above the paternal grandmother must be regarded as Pitri bandhus. Similarly cognates connected through the ascendants above the maternal grandfather just as much as those above the maternal grandfather must be regarded as Matri bandhus. Atma bandhus are either in the descending line of the propositus or in his line up to the grand-parents. As we go upwards from the grandfather in the father's line or the paternal grandmother in her paternal line we get Pitri bandhus. If we go above maternal grandfather in his ancestral line or the maternal grandmother in her paternal line we get Matri bandhus. There are of course certain restrictions which will be mentioned later, bandhus in the father's father's agnatic line are Pitri bandhus (*ex parte paterna*), those in the father's mother's agnatic line are Pitri bandhus (*ex parte materna*), those in the mother's father's agnatic line are Matri bandhus (*ex parte paterna*) and those in the mother's mother's agnatic line are Matri bandhus (*ex parte materna*). These classifications alone appear to be consistent with the text of the Mitakshara. This division is in perfect accordance with that given in the Smriti Chandrika, Chapter XI, Section V, Paragraph 14 and the Saraswati Vilasa, Paragraph 595, which are books of high authority in southern India, and which are quoted by their Lordships of the Privy Council in *Vedachela* v. *Subramania.* They show clearly that the descendants of ancestors above the grand-parents on the father's and the mother's side are Pitri and Matri bandhus respectively.

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[9] 48 I. A. 349

[10] 48 I. A. 349=44 Mad. 753

It will however be shown presently that in spite of the divergence in the classification, Prof. Sarvadhikari's conclusions and the fixing of the five groups are both substantially correct, though his propositions have to be restated in new terms in view of the pronouncement by their Lordships of the Privy Council in *Ramchandra's* case.

The learned advocate for the defendants-appellants adopting the line of argument taken by the writer in the Madras Law Journal contends that the Mitakshara speaks of one's *own* or Atma bandhus and one's father's and mother's bandhus, but not one's father's own bandhus or mother's own bandhus. The contention is that the father's bandhus are spoken of generally and should be further divided into father's own bandhus (Pitri Atma), father's father's bandhus (Pitri Pitri Atma), and father's mother's bandhus (Pitri Matri Atma.). Similarly he would divide mother's bandhus into three sub-divisions, viz., mother's own (Matri Atma) mother's father's bandhus (Matri Pitri Atma) and mother's mother's bandhus (Matri Matri Atma). In this way the relationship of heritable bandhus would extend beyond the grand-parents of the owner and would include all the male and female great grand-parents.

It seems to me that the extension is fantastic and is based on an obvious fallacy, that the words 'father' and 'mother' have been used in a generic sense. If this were so then mother would stand not only for mother's mother's mother but also for mother's mother's father, which is untenable. Another error, which would be pointed out later on, is the assumption, that the words 'father' and 'mother' have been used in the possessive sense.

The language of the text of the Mitakshara itself makes it clear that the bandhus are to be divided into three classes. They are of three kinds only. There is no justification for adding another class to these three classes. When the text says that they are of three kinds, the classes must be three, neither more nor less. As has been pointed out by Prof. Sarvadhikari on page 591 even the additional bandhus mentioned by Mitra Misra fall within the same three classes. "In fact no commentator within the last eight hundred years has ever suggested that there may be a class of heritable bandhus other than the three specifically mentioned in the

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Mitakshara." In *Amrit Kumari* v. *Lakhi Narayan*[11] the Full Bench remarked that Vijnaneswara's enunciation is used simply in establishment of the proposition that there are three classes of bandhus. The three classes are therefore exhaustive and not illustrative.

The case of *Keshare Singh* v. *Secretary of State*[12] is directly in favour of the appellants. The mistakes in Prof. Sarvadhikari describing the father's father's sister's son and the mother's father's brother's son and mother's father's sister's son as Atma bandhus contrary to the text of the Mitakshara where they are called Pitri bandhus and Matri bandhus respectively, were pointed out and so also the wrong place assigned to the maternal uncle. The learned Judges thought that for the five groups prepared by Prof. Sarvadhikari, there was no support in the texts or ancient commentaries. They considered that there was no justification for narrowing the class of heritable bandhus however logical and rational the theory may be.

If the Madras view were accepted the necessary result would be to include great grand-parents within the Atma bandhus, and father's mother's agnatic ascendants as well as mother's mother's mother's agnatic ascendants may become bandhus. It is urged on behalf of the appellants that Mr. Mulla has adopted this view in his Hindu Law, pp. 48 and also pp. 52-53 (Sixth Edition.). But Mr. (now the Rt. Hon'ble Mr.) Mulla has merely incorporated the result of the decision without expressly saying that it is a right decision.

The words in the text of the Mitakshara are Pitri bandhus and Matri bandhus. They have sometimes been translated as 'father's bandhus' and 'mother's bandhus'. Had the words been 'Pituh' bandhu or 'Matuh' bandhu, the translations would have been undoubtedly correct. But the words are Pitri bandhu and Matri bandhu, which, when translated word for word' mean 'father bandhu' and 'mother bandhu'. As pointed out by Mukerji, J. these are samasa or shortened forms, and may stand for one out of several forms as the context may demand. That the words Pitri and Matri have been used in the adjectival sense and not in the possessive, and they do not mean father's bandhus and mother's bandhus, but the person's bandhus through the father, i.e., on the father's side or in the father's line, and the person's bandhus through the mother, i.e., on the mother's side or in the mother's line, is obvious from the fact that they must still be the person's bandhus and not bandhus of only the father or the mother. The words cannot mean that a cognate who is the father's bandhu or the mother's bandhu, though not a bandhu of the propositus, is an heir. It cannot therefore be urged that the words father's bandhus and mother's bandhus include the same Atma relations of the father and the mother as the Atma relations of the owner.

It is well known that the Hindu conception of sapinda relationship is primarily along the agnatic line. When one talks of the father's line, he generally implies the father's father's agnatic line or at most father's mother's agnatic line, and not father's mother's mother's line. Similarly the mother's line would be the mother's father's agnatic ascendants or the mother's mother's agnatic ascendants and not the mother's father's mother's line or the mother's mother's mother's line.

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[11] 10 W. R. (F.B.) 76

[12] I. L. R. 49 Mad. 652

As pointed out in *Umaid Bahadur* v. *Udoi Chand*[13]: the sapinda-relationship has been defined in Achara Kanda. Verse 52 contains the following passage:—"So also (is the nephew) a sapinda-relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs): likewise (does he stand in sapinda-relationship) with paternal uncles and aunts and the rest." This is followed by Verse 53 which fixes the limit of the fifth ancestor on the mother's side. The commentary on this verse also shows agnatic ascent or descent. The Full Bench in *Umaid Bahadur's* case in order to explain the doctrine of the mutuality of sapinda-relationship gave an illustration showing that the common ancestor's daughter's daughter's son's son was not a bandhu. Though their statement was not absolutely necessary, it cannot be said that it was altogether an ***obiter dictum.*** It is entitled to great weight.

In *Babu Lal* v. *Nanku Ram*[14] the learned Judges pointed out who according to the explanation or definition given in the Mitakshara was a sapinda. The fourth group was stated in the following words: 'Any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line, that is any of the four maternal ancestors, namely, the mother, her father, her grandfather and the rest.' Here too the mother's ancestors are in her agnatic line. This is how the learned Judges understood the definition of a sapinda.

The owner's bandhu may be in his father's agnatic line or in his mother's agnatic line or he may be in father's line or the mother's line, which would include the father's mother's agnatic line and mother's mother's agnatic line. They cannot be in the father's mother's mother's agnatic line or in the mother's mother's mother's agnatic line.

There is one more circumstance which also conclusively narrows the group of bandhus, i.e., only male ancestors beyond the circle of grandparents. If bandhus were intended to include descendants of all ancestors, males and females, limited by the only restriction that they should be within five degrees, then there would have been no necessity to mention the last two classes, namely; bandhus on the father's side and bandhus on the mother's side. All of them could have been described as bandhus of the owner himself limited by the sole restriction of five degrees. It would then have been quite sufficient to say that all the cognatic relations of the owners within five degrees are bandhus. The fact that in addition to the Atma bandhus, the two other classes of bandhus are mentioned, shows that the Atma bandhus of the owner would not have included his father's mother's father and higher ancestors, nor his mother's mother's father and higher ancestors, although they may be within five degrees of the propositus.

Yet another strong circumstance points to the same conclusion. If the second and third classes had meant father's bandhus and the mother's bandhus just as the first class, the owner's own bandhus, then as bandhu-relationship ceases in the fifth degree, one would have to count to a common ancestor up to the fifth degree from the father and the mother, and therefore up to the sixth degree from the propositus. *Ramchandra's* case has now settled that this cannot be done.

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[13] I. L. R. 6 Cal. 119 (F.B.)

[14] I. L. R. 22 Cal. 339 at 345

There is only one conclusion to which one can come and that is that the father's mother's mother's father and the mother's mother's mother's father are not included in one's heritable bandhus. The ancestral lines going outside the grand-parents are purely agnatic and not cognatic.

It may be noted in this connection that there is no other authority in support of the contrary view except the opinion of Dr. Golap Chandra Sarkar who thought that the limitation of degrees was applicable to marriage only and not to inheritance and that mutuality of sapindaship was unnecessary, and accordingly concluded that a bandhu may be taken to mean any relation, however distant, belonging to a different family whose relationship can be traced (Hindu Law, 6th Edition 479). This view has been definitely rejected by their Lordships of the Privy Council in *Ramchandra* v. *Vinayek.*

It may also be stated that all other modern writers like Mayne, Bhattacharyya and Ghosh, not to mention living authors like Dr. Gaur, have all excluded female ancestors above the circle of grand-parents. In an earlier edition of Mr. Mayne's Hindu Law the father's sister's son's daughter's son was included in the Table on the authority of *Parot Bhupalal Sevakram* v. *Mehta Hari Lal Surajram*[15]. But he has been deleted from the Table in the 9th edition, obviously because the Bombay case is no authority for his inclusion in the Table of bandhus. The Table excludes father's mother's mother's ancestors and mother's mother's mother's ancestors.

We can now group together the Atma bandhus of the owner first. These are now well known to be included (1) within the circle of grand-parents in the ascending line, and their descendants under certain limitations including certain descendants of the owner himself. For Pitri or Matri bandhus we go outside the circle and higher, but in accordance with the ordinary conception we must travel upwards along agnatic lines, that is (2) the father's father's agnatic ascendants (Pitri, *ex parte paterna*) (3) the father's mother's agnatic ascendants (Pitri *ex parte materna*), (4) mother's father's agnatic ascendants (Matri *ex parte paterna*) and (5) mother's mother's agnatic ascendants (Matri *ex parte materna*), and not in the agnatic ascendants of the mothers of these ancestors.

These groups correspond with the five groups of families enumerated by Prof. Sarvadhikari, and establish his first proposition. It will however be noticed that the order of precedence is not identical with that given by him.

As regards the method of counting the five degrees, Prof. Sarvadhikari's statement in Chapter II, p. 72 on his Hindu Law (second edition) may be conveniently quoted.

> Accordingly, it is to be understood that the fifth from the mother is she who is (the fifth) in the line of descent from (any ancestor of the mother, up to) the fifth ancestor (and counting her and such ancestor, each as one degree) in the computation—beginning with the mother (and counting her as one degree)—and the mother's father, paternal

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[15] I. L. R. 19 Bom. 631

grand-father, and the like.

As a necessary result of the mutuality of sapindaship, if it involves a similar counting from the side of the claimant also, the seven degrees in the owner's father's line have also to be reduced to five degrees. In view of the ruling in *Ramchandra's* case the bandhus beyond the fifth degree from the common ancestor shown in Prof. Sarvadhikari's book or Mayne's book would most probably not be heritable bandhus. Their Lordships have clearly laid down that the sapinda relationship on which the heritable right of collaterals is founded *ceases* in the case of the Bhinna-gotra sapinda *with the fifth degree from the common ancestor.* On the same principle, the restriction against the inclusion of a great grandmother will apply in the case of the owner's Atma bandhu in the descending line as well.

Thus certain propositions are now quite clear (1) As females inherit only under express rules, no females can be a heritable bandhu. (2) The common ancestor can always be taken to be a male, because a female ancestor's husband will always be the nearer and an equal ancestor of the descendants of his wife. (3) The relationship in the mother's line ceases with the fifth degree. It follows that an ancestor beyond the fifth degree from the propositus would be outside the circle. (4) The only exception which was recognised before *Ramchandra* v. *Vinayek* appears to have been the case of the father's mother's great grandfather, who is included on the theory of what is called a 'frog's leap', by which the father's mother is excluded in the counting. (5) There must be a mutuality of sapindaship and the deceased and the claimant must be so related that they are sapindas of each other.

The mutuality of sapindaship enables us to reverse the process and, applying the same rules to the claimant, deduce the converse propositions, viz.: (*i*) The propositus may be a male or female, for instance, a maiden leaving stridhan property. (*ii*) The common ancestor will always be a male. (*iii*) The claimant must be within five degrees of the common ancestor. (*iv*) The owner's father's mother is counted in calculating the number of the degrees, because she becomes like a daughter in the reverse process. (*v*) The propositus must be a sapinda of the claimant.

From these it is obvious that between the propositus and the claimant there must be at least one female relation otherwise the latter would not be a bandhu at all. There however may be more than one female. Indeed, the maximum number of females may be five, viz., the propositus, two females between her and the common ancestor (not treating her as a female) and two more between the common ancestor and the claimant. It follows that between the propositus and the common ancestor on the one side and the common ancestor and the claimant on the other side there can be only three intermediary relations. We have already seen that there can be only a male ancestor above the grand-parents. This is true as regards both sides of the ancestor. This means that there cannot be any mother's mother's mother or mother's father's mother, for in such a case, these would be a female above the grand-parents. If these conditions are not fulfilled the claimant cannot be an heir.

It necessarily follows that the claimant in order to be a heritable bandhu cannot be lower than the common ancestor's daughter's grandson or

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the common ancestor's son's great grandson. The proposition may be stated in a simple way by saying that there should be no great grandmother in the line on either side of the common ancestor.

This conclusion bears out the correctness of the second proposition laid down by Prof. Sarvadhikari, although it has to be re-stated in the following form:—

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There must be at least one female between the given person and the deceased, and there cannot be more than two females between the propositus and the common ancestor on the one side, and not more than two females between the common ancestor and the claimant on the other side, and if two females exist on either side they must be related as mother and daughter to each other. This holds good in the case of Pitri and Matri bandhus, whether *ex parte paterna* or *ex parte materna*, and also in the case of Atma bandhus whether in the ascending line or in the descending line.

Applying these principles to the case before us it at once becomes obvious that Keshore and Kali cannot be the heritable bandhus of Suraj Prasad. Their great grandmother Mst. Badama intervened. Bandhus cannot come down lower than Sukhdeo's son, if any.

As I was one of the referring Judges I must point out that our doubt as regards the decision in *Sheo Nandan* v. *Manni*[16] arose because the claimant there was within five degrees of the common ancestor, and the judgment did not give any reasons except relying on the authority of Prof. Sarvadhikari's opinion which in its turn proceeded on grounds some of which as pointed out above, were not sound. In the light of the conclusions now reached, the actual result of the decision in *Sheo Nandan's* case was correct; and so were the decisions in *Ram Sia* v. *Bua*[17] and *Hari Har Prasad* v. *Ram Daur*[18]. These cases were in accordance with the ruling in *Krishna Ayyangar* v. *Venkatrama Ayyangar*[19]. In neither of these cases any great grandmother intervened.

My answer to the question referred to us is therefore in the negative.

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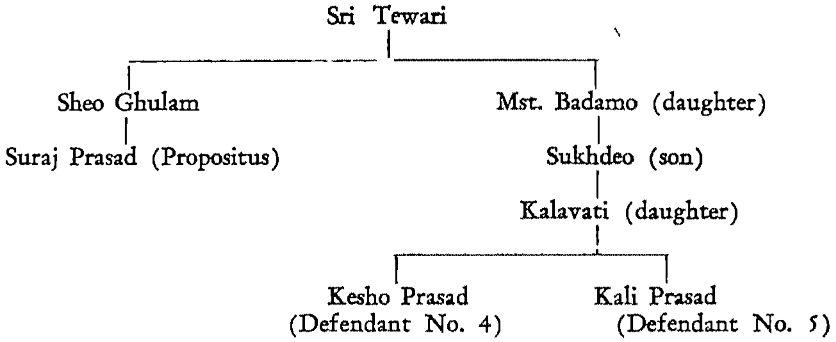
MUKERJI, J.—The point of law that has been referred to the Full Bench would require the following pedigree for its proper statement:—


Sri Tewari
Sheo Ghulam
Suraj Prasad (Propositus)
Mst. Badamo (daughter)
Sukhdeo (son)
Kalavati (daughter)
Kesho Prasad (Defendant No. 4)
Kali Prasad (Defendant No. 5)

The question for determination is whether the defendant Nos. 4 and 5, namely, Kesho Prasad and Kali Prasad are heritable bandhus to Suraj Prasad, and are his heirs, in the absence of any nearer heir.

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[16] 21 A. L. J. 288

[17] I. L. R. 47 All. 10

[18] I. L. R. 47 All. 172

[19] I. L. R. 29 Mad. 115 (P.C.)

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This is an abstract question of law, and before I can answer it, I have to see who are the bandhus, according to the Mitakshara Law, which governs the case.

The Mitakshara, Chapter II, Section 6 lays down as follows:—

> On failure of gentiles the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother. (The word "cognate" is a translation of the word "bandhu").

In Chapter II, Section 5, Clause (3) we find the definition of the term "cognate" or "bandhu". It is stated, "for kinsmen sprung from a different family but connected by funeral oblations are indicated by the term "cognate" (bandhu) (Colebrooke's Translation).

Putting the two definitions together we find that kinsmen sprung from a different family but connected by funeral oblations are to succeed after the failure of "gentiles".

The expression "connected by funeral oblations" used by Mr. Colebrooke is a mis-translation. The word in the original is sapinda, which, in the case of Bengal Law, may properly be translated by the expression "connected by funeral oblations", but, in the case of the Mitakshara Law, the meaning is somewhat different. According to Vijnaneshwar, the word "Pind" means "body or particles of body". Without going into the discussions raised and answered by Vijnaneshwar, we may take it as settled law that under the Mitakshara Law, a sapinda is one who is connected by means of blood.

It follows that a bandhu is a blood relation but belonging to a 'different' family.

The 'different' family "is a family which is connected with the propositus through a female or females." A 'cognate', therefore, is a blood relation who is connected with the propositus through a female or females.

A blood relation as defined above may include almost the whole world and, therefore, a limitation had to be put to the words "blood relation" or "sapinda".

A sapinda relationship has been defined by Vijnaneshwar in that portion of his commentary on the Institutes of Yajnavalkaya which deals with Achar or rules of conduct.

In Chapter I, Sloka 53, the sage Yajnavalkaya defines who a sapinda is by the following rule:—

पञ्चमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा

The translation of the commentary of Vijnaneshwar on this passage, as given by several writers, is not very happy. The writer of the Mitakshara first puts down the word "matrito" and then gives its meaning as Matuh Santane. The three words "Matrito" "Matuh" and "santane" are not to be taken together. As I have said, the first word is taken from the text and the next two words are its meaning. This would indicate that, according to Vijnaneshwar, the word "Matrito" means "in mother's line". Then come the words "Panchamat Urdhwam", which mean "above the No. 5". Then comes the word "Pitritah",—which is quoted from the text, and it is followed by its meaning given by Vijnaneshwar as "Pituh Santane", which when properly translated would mean "in father's line". Then follow

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the words "Saptamat Urdhwam", that is to say, "above the seventh degree." Then follow the words "Sapindam Nivartata". The whole commentary taken together means "in the case of a child claiming through its mother and in the case of a child claiming through its father the sapinda relationship ends with the fifth and seventh degree respectively." The translation that we find given by English text-writers is "on the mother's side in the mother's line after the fifth, and on the father's side in the father's line after the seventh ancestor the sapinda relationship ceases; (West and Buhler, Vol. 1, 120). This translation, however, does not affect the true meaning. What Vijnaneshwar means is that where sapinda relationship is to be considered of a person, who claims through his mother, we have to count up to the fifth degree, inclusive of the said person, and in the case of a person claiming through his father, we have to count up to the seventh degree, inclusive of the said person.

Vijnaneshwar further lays down that the six paternal ancestors are one's sapindas and so are the six lineal male descendants, himself being counted as the seventh. He further lays down that where the ascending or descending lines branch off,—'santan bhede' (संतानभेदे)—the seven degrees are to be counted from where the lines branch off, inclusive of the person from whom the lines branch off. Similarly, it would follow that where a person is claiming through his mother, and the line ascending or descending branches off, five degrees are to be counted from where the break occurs, inclusive of the person from whom the line branches off. Thus a person who is in the seventh degree, descending, say, from the third male ancestor of the propositus, will be a sapinda (of the propositus). Vijnaneshwar also explains that in the case of one claiming through one's mother, one's sapindas are the mother, the maternal grandfather, his father and so on, all on the male line. The text is as follows:—

तथा च मातरमारभ्य तत्पितृपितामहादिगणनायां पञ्चमी पुरुषवर्तिनी मातृतः पञ्चमीत्युपचर्यते

The definition of 'sapinda' having occurred in the part of the Mitakshara dealing with rules of 'Achar' or 'Conduct' at one time it was contended that the definition could not hold good for the second part of the book, which dealt with inheritance. But this contention is no longer regarded as valid. Vijnaneshwar himself says (*See* his commentary on verse 52 of Chap. I of the Institutes of Yajnabalka) that the word 'sapinda' is to be understood in the sense explained by him, *wheresoever the same may occur*. It is a rule of construction of Hindu Law texts that a word once used in one sense is to be taken as having been used in the same sense throughout the book, unless a clear intention to the contrary is established. It may be mentioned that their Lordships of the Privy Council, in the case of *Ram Chandra* v. *Vinayek*[20] have ruled that the word 'sapinda' in the chapter on Inheritance has the same meaning as in the chapter on 'Achar'.

Putting together, then, the definitions of all the words with which the term 'bandhu' has been defined, we find that bandhu is one who is related to the propositus within seven or five degrees, as the case may be, through a female or females. The fact must not be lost sight of that the lines of relationship must be through males and males only, and in the case of a claim

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[20] I. L. R. 42 Cal. 394

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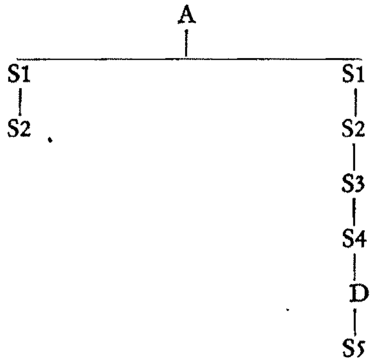
through the mother, it is the mother's father her paternal grandfather and so on who constitute the line for sapindaship.

According to Manu (Chap. IX, verse 187) a sapinda alone can take a sapinda's property. This means that for the purposes of inheritance by a sapinda, both the claimant and the deceased must be related to each other as sapindas.

At the outset, this may appear to be a mere truism, but this is not always the case. We have seen that a sapinda relationship, where it is traced through the mother stops at five degrees and when it is traced through the father it stops at seven degrees. It will, therefore, follow that while *A* may be a sapinda of *B*, *B* may not necessarily be a sapinda of *A*. I shall give the most familiar illustration to be found in text books. In the following diagram *A* is the common ancestor and on the right and left are his two branches of descendants. *S* represents sons and *D* represents daughter.



S5 on the right hand side being seventh in degree from the common ancestor *A*. would be S2's (on the left) sapinda, but counting, from S5 who claims through his mother D, five degrees would be the limit of his sapindaship and, therefore, S5's sapindas would terminate with S2 on the right. In this case S5 cannot inherit to S2, on the left.

We have then discovered that there is an additional qualification which a claimant must possess before he can claim, as a bandhu, the property of a deceased person. This qualification is that the claimant and the deceased must be related to each other as sapindas.

Now comes a matter which is the most controversial of the whole rule as to inheritance by a bandhu in Hindu Law. Vijnaneshwar says:

> "गोत्रजाभावे बन्धवो धनभाजः । बन्धवश्च त्रिविधाः आत्मबन्धवः पितृबन्धवो मातृबन्धवश्चेति ।"

This, when translated means, in the absence of a cognate, bandhus get the inheritance. Bandhus are of three kinds, namely, Atma-bandhu, Pitri-bandhu and Matri-bandhu. Then follows an *example*, being a quotation, "One's father's sister's sons, one's mother's sister's sons and one's maternal uncle's sons are Atma bandhavas; one's father's father's sister's sons, one's father's mother's sister's sons and one's father's maternal uncle's sons are Pitri bandhavas and then mother's father's sister's sons, mother's mother's sister's sons and mother's maternal uncle's sons are Matri bandhavas." I have stated that these are examples given by Vijananeshwar and are not to be taken as an exhaustive list of bandhus. Vijnaneshwar puts this list as if the list were a quotation, which under modern times, would be put within a pair of inverted commas. This follows from the fact that the list is prefaced with the words, (यथोक्तम्) which means "as has been said."

It is too late in the day to contend that the list of the three *kinds* of bandhus is exhaustive, for the Privy Council have laid it down in clearest terms that the list is not so, (see *Girdhari Lal* v. *Government of Bengal*[21]).

The question, however, is: can we add to the three classes of bandhus? The question arose before their Lordships in the Privy Council in the case of *Ram Chandra* v. *Vinayek*[22] quoted above, but their Lordships did not decide the question although it appears that their Lordships were inclined to the view that the classes could not be added to. My own opinion is that the classes cannot be added to, and, for this reason, that by the statement that bandhus were of three kinds, Vijnaneshwar limited the number of classes. These classes, as already stated, are Atma-bandhus, Pitri-bandhus, and Matri-bandhus. If we could add to the classes there would be no sense in stating that the classes were only three.

The fact should not be lost sight of that Pitri-bandhus and Matri-bandhus are the bandhus of the propositus himself and *have no status except as the bandhus of the propositus.* We have to find out the bandhus of the propositus. We are told that we would find them under three descriptions, and under three descriptions alone. The text quoted by Vijnaneshwar, to explain the nature of a bandhu, does not at all use the word 'bandhu'. The word used is 'bandhav', which only means a 'relation' or 'connection.' The word 'bandhu' has been used by the Mitakshara in a 'technical' sense, while the word 'bandhav' has been used in a non-technical sense. The commentary of Vijnaneshwar and the text quoted by him, taken together, indicate that 'bandhus' of the propositus are to be found among the persons who were related directly to the propositus, through a female, and among persons who were similarly related to him through his mother and father.

So far as the term 'Atmabandhu' goes, it is not capable of having two meanings. It must be taken as meaning 'direct relations.' The expressions, 'Pitribandhu' and 'Matribandhus' are compound words, formed by the process known in Sanskrit grammar, as 'Samasa' or 'shortening process'. On breaking up the 'samasa', we may have the words, Pitooh bandhu or Matooh bandhu or Pitra bandhu or Matra bandhu. The two words relating to father and mother having the same form, I will take one only, for the sake of brevity. Now 'Pitooh bandhu' if we treat the expression as a 'shashthi tatpurusha samasa' (षष्ठी तत्पुरुषसमास) it would mean 'father's bandhu'. If we treat the expression as a "panchmi tatpurusha' (पंचमी तत्पुरुष) the word would mean 'bandhus through or by reason of the father', according to the rule. 'Hetau cha' (हेतौ च), which means that the suffix *Panchami,* which gives the same form as Shashthi to the words pitri and matri, may be used where 'the reason is to be assigned.' Then again if we treat the words as 'Tritia tatpurush samasa' तृतीया तत्पुरुष समास then by the rule 'Tritia karane' तृतीयाकरणे we still have the same meaning, viz.,

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[21] 1 B. L. R. 44 (P.C.)=10 W. R. 31

[22] I. L. R. 42 Cal. 384 at 407

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"through" the father. So it cannot be asserted with any show of reason that the words 'Pitri bandhu' and 'Matri bandhu' must mean "father's bandhu" and "mother's bandhu."

The analysis or breaking up of the words which would give them the meanings, 'by reason of' or 'through' father or mother appeal to me, as the correct rendition. If we adopt the analysis which would mean "father's or mother's bandhus" we shall find that the classification becomes useless and meaningless, if we should further say that the word 'bandhu' is used there in the technical sense, and not as having the same meaning as the word 'bandhav' in the text quoted. Then all relations of the propositus, howsoever remote, would come in as his 'bandhu' either through himself or through his father or mother or *through the paternal and maternal ancestors of the father and mother and the paternal and maternal ancestors of those ancestors* subject to no limit, or to the limit imposed by 7 and 5 degrees. If that was the object, what was the use of stating with all solemnity that there were three classes of 'bandhus'?

I am clearly of opinion that the three classes of bandhus mean three classes alone and cannot be added to. The great Sanskrit scholar Jogendra Siromani, whose untimely death is still mourned, is of the same opinion and founds it, among other grounds, on the fact that the commentary and the text of the quotation do not use the same word. (*See* Shiromani's Hindu law, pp. 299 and 300).

Then the question is: how are the bandhus to be ascertained?

We find that one's Atmabandhus are to be found in one's father's line and in one's mother's line; for we find that father's sister's son is an Atmabandhu and he is descended from the grandfather of the propositus. Again we find that one's mother's sister's son and maternal uncle's son are Atmabandhus, and they are the descendants of the maternal grandfather. These three instances lead us to the conclusion that one's Atmabandhus are to be found among the descendants of one's paternal and maternal grandfathers.

In the case of Pitribandhu we have three similar examples—Father's father's sister's son is a Pitribandhu and he is a descendant of father's grandfather. Again, father's mother's sister's son and father's maternal uncle's son, who are one's bandhus, are to be found among the descendants of the father's maternal grandfather. We have, therefore, a further indication that for bandhus, we have to search the lines of paternal great grandfather and father's maternal grandfather. Similarly we find that mother's father's sister's son is a bandhu and he is to be found in the branch of mother's paternal grandfather. Again we have mother's mother's sister's son and mother's maternal uncle's son, as bandhu and they are to be found in mother's maternal grandfather's line. If we put all these branches together, we find that four descriptions will suffice for tracing out the bandhus of a propositus. He, the bandhu, may be one in propositus's father's line which would include his own line, either ascending or descending because descending line also would be his father's line through the propositus himself. Secondly we shall find the bandhus in the propositus's maternal grandfather's line. Thirdly we shall find a bandhu in propositus's father's maternal grandfather's line and fourthly we shall find a bandhu

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in propositus's mother's maternal grandfather's line.

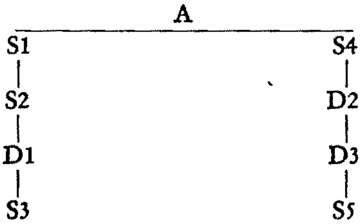
As pointed out by the learned author of the Mitakshara, when we talk of a "line", in dealing with Hindu Law, we must understand, that a line can only mean male ancestors and their descendants; for lineage is traced through the male ancestors and male descendants and nobody else. Mother's father's line would mean maternal grandfather, his father, his father and so on. Maternal grandfather's line or even mother's line would not mean mother's mother, her mother, her mother and so on. This view is supported by the rules by which cakes and oblations are offered to one's ancestors. A person offers cakes to his maternal grandfather, his father and to his father and not to the maternal grandmother and to her mother and to her mother. Sir Guru Das Banerji, in his book on Marriage and Stridhan, takes the same view; see his book, 4th edition, page 68.

Putting together now all the rules that go to define a bandhu who has a right to inherit to a propositus, otherwise known as a 'heritable bandhu', we find that he must possess the following qualifications:—

(*a*) He must belong to one of the four classes deduced by me from the statement of Vijnaneshwar as to the bandhus being of three classes and from the illustration quoted by him;

(*b*) The claimant must be a sapinda coming within the seven and five degrees as described above.

It will be noticed that many of the bandhus would not be a sapinda of the propositus, except for the definition that he (a bandhu) is a "Bhinna gotra sapinda", i.e., a sapinda who belongs to another family. Let us take this example:



In the above diagram, *A* is the common ancestor and S represents a son and *D* a daughter. S5 is not a sapinda of *A*, for *A* is not in the line of S5's mother. S5's mother's line would be the line of D3's father in which D2 is not, being only a mother. But S5 is a bandhu of *A*, inasmuch as *A* is in the line of the maternal grandfather of D3, the mother of S5, and is therefore a 'matribandhu' of S5. If S5 is a bandhu of *A*, it follows from the definition that S5 is a sapinda of *A*. It further follows that if two persons are not related with each other as sapindas *in the ordinary way*, but if they be each other's bandhu, they would *thereby* be the sapindas of each. It again follows that the relationship of bandhu virtually expands the definition of sapinda in particular cases. In such cases we may say that S5 is a sapinda of *A* through his mother D3 in whose mother's line (paternal, of course) *A* is.

We may now conclude that if the claimant to heirship be a bandhu of the deceased person but if the deceased person be not a sapinda of the claimant, the claim will fail, for Manu says, "A sapinda's property shall be taken by a sapinda". But if the deceased be related to the claimant as a bandhu, i.e., if both the deceased and the claimant be each other's bandhu, the claim will succeed.

So far I have examined the texts and have tried to come to my own conclusions. Let me now examine the decided cases.

We find that their Lordships of the Privy Council in the case of *Ram Chandra* v. *Vinayek*[28] laid down the *test of mutuality as to sapindaship* and the *test of sapindaship* itself as two of the matters to be established for a successful claim as a bandhu. In the actual case before their Lordships of the Privy Council, the claim having failed on the ground that the claimants were claiming through their mother, and to succeed, must have been within five degrees of the common ancestor, Timaji, but were in the sixth degree, it did become unnecessary for their Lordships of the Privy Council to consider whether the claimants were or were not bandhus. Nor was it necessary for their Lordships to consider what would have been the merits of the claim if the claimants had been claiming through their father and not through their mother. Their Lordships' general conclusions at page 420 of the report are based on the supposition that the claim is through the mother. This was pointed out by Rao, J. in I. L. R. 49 Mad. 652 at 690 and by me in the case of *Harihar Prasad* v. *Ram Daur*[24].

A bandhu, as we have seen, must be related to the propositus, in a particular way, besides being a sapinda. In the case before their Lordships, the sapinda test failed, and it did not become necessary to go into the question of the particular relationships which came within the definition of bandhu. At pp. 403 and 404 of the report their Lordships lay down the only issue before them, in the following language:—

> What we have to determine in this appeal is whether the term Bandhu has to be construed as the plaintiffs argued in the broadest sense or whether it is subject to any limitation. In the latter case what that limitation is, according to the law by which the parties are governed?

Their Lordships found that one limitation to bandhuship was that imposed by the definition of sapindaship. That test having sufficed for the failure of the plaintiffs, their Lordships made the following observations:—(*see* p. 417 of the Report):

> These remarks (based on the case of *Girdharilal* v. *Government of Bengal*, 12 M. I. A. 448=1 B. L. R. 44=10 W. R. 31) hardly warrant the contention which is attempted to be based on them that the classes specified by Vijnaneshwar can be added to.
>
> In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

This case, therefore, is no authority for the proposition for which the learned counsel for the appellants contends, namely, we have to see only one thing and one thing alone, namely, whether the claimant and propositus are or not within the prescribed degrees from the common ancestor. In other words, the contention of the appellants' counsel is that, if the propositus is related to the common ancestor through his father, we must see whether the propositus is or not within seven degrees from the common ancestor (including both the common ancestor and the propositus), and we have

[28] I. L. R. 42 Cal. 384

[24] I. L. R. 47 All. 172 at 178 and 179

to see whether the propositus, if he is connected through his mother with the common ancestor is within five degrees of the common ancestor or not. Similarly we have to apply the test in the case of the claimant. If the test of "degrees" is satisfied, according to the learned counsel for the appellants, the claimant would be entitled to succeed.

Let us now consider the facts of this present case. Sri Tewari, the common ancestor of the propositus and of the defendants 4 and 5 is not in the 'line' of the claimants' mother Kalawati. For although Sukhdeo is Kalawati's father, Mst. Badamo is not the father of Sukhdeo, but only his mother. Then let us see if Kesho Prasad and Kali Prasad are bandhus of Sri Tewari. Sri Tewari is not in the direct father's line of the claimants nor is he in the line of maternal grandfather of them: he is therefore not an Atma-bandhu. He is not in the line of the claimants' father's maternal grandfather. He is not in the claimants' mother's maternal grandfather's line. The result is that the claimants are not related to Sri Tiwari as bandhus and are therefore not bandhus of the deceased Suraj Prasad, and are not his heirs.

Coming to authorities again I find that a Full Bench of the Calcutta High Court, in the case of *Umaid Bahadur* v. *Udai Chand* applied this test now applied by me, *vide* p. 128 and 129.

The conclusion at which I have arrived is the same at which that eminent though much maligned modern writer Mr. Sarvadhikari arrived. People have not been able to follow his reasonings because he has put them in the shape of rules, as if they were framed by himself. But such is not really the case. He has tried to find some formulae by which lay men can arrive at the right result, in the question of a bandhu who may inherit. If we apply the tests deduced by me from a consideration of the texts, we shall find that the table of heirs framed by Mr. Sarvadhikari and adopted by all other important writers like Mayne, on Hindu Law, is in accordance with my conclusion. I need hardly mention that I am not considering the question of preference among the bandhus. That question does not arise in this case.

It will, however, be interesting to consider the method adopted by Mr. Sarvadhikari in finding out who a heritable bandhu is, and to find out the order of preference among them.

Mr. Sarvadhikari lays down three rules, for finding out a heritable bandhu. The first two rules cover, between them, a wide range of relations and the third rule excludes some of these. Those who fulfil all the three tests are, according to the learned author, a bandhu. These rules are to be found at pages 597, 599, 601 and 602 of the 2nd Edition of the book.

No exception can be taken to the first rule. Let us take the case of the first ancestor. When a line passes through a female the number of sapindas is five. As sapindaship has to be mutual, counting from a claimant, who claims through a female, you can go only 5 degrees and descend to only 5 degrees, including the propositus, though the latter may be claiming entirely through a male line. In the case of the ancestors Nos. 2, 3 and 4 (*see* p. 597) the ascendants are counted through a female and therefore the limit has been again put at 5 degrees, i.e., at four excluding the propositus.

The second rule is equally unexceptionable. The father's 'bandhavas' as mentioned in the text quoted by Vijananeshwar, or 'connections' being included among bandhus of the propositus, as also the 'connections' of the mother, the sapindas of these parents are likely to come in as bandhus of the propositus, but this inclusion of all the sapindas widens the circle of relations too much. These may be sapindas but they are not necessarily bandhus, bandhus must be in certain lines of ancestors. Those, that are not, have to be excluded. Hence the third rule. I have already pointed out that the definition of a bandhu, as we deduce it from the rules framed by the author widen the list of sapindas, strictly so called. What Mr. Sarvadhikari has done is to widen the circle of the sapindas by including all the sapindas of the parents and then to exclude those who do not fulfil the test of bandhuship.

I prefer the method of argument and drawing of the conclusion, mentioned by me, as the result of my own examination of the original texts. The result is the same as that arrived at by Mr. Sarvadhikari.

As regards the method of finding out the comparitive merits of the bandhus for the purpose of preference of inheritance, the question does not arise in this case, and I need not express any opinion. I may however mention what—according to my reading—Mr. Sarvadhikari has done, *only for the purpose of finding out the nearness of relationship,* for it is the nearness that gives the claim to inheritance. Mr. Sarvadhikari has divided the bandhus into

1. Atma bandhus *ex parte paterna.*
2. Atma bandhus *ex parte materna.*
3. Pitri bandhus, all *ex parte materna.*
4. Matri bandhus, all *ex parte materna.*

This method has not been adopted to contradict Vijnaneshwar or to improve on his method, but it is in keeping with his method. The persons who claim through the father in the paternal line or through the mother in the mother's paternal line have all been classed as Atma bandhus. Those that claim through the father's mother have been classed at Pitribandhus, and those that claim through the mother of the mother have been classed as Matri bandhus. As I have said, this has been done solely for the purpose of finding out the nearness of relationship. This method does not in any way clash with the opinion of Vijnaneshwar that the Atma-bandhus (as described by him, by means of the quotation) take first and then Pitri bandhus and then the Matri bandhus.

However, all these matters do not arise for discussion in this case. My object in entering into the discussion was to show, that my conclusions, being the same as that of Mr. Sarvadhikari, receive corroboration from him and that corroboration by Mr. Sarvadhikari is not to be discounted on the ground that Mr. Sarvadhikari is full of mistakes or that he has laid down arbitrary rules. I may mention that this division of the Bandhus for the purpose of finding out the nearness has been adopted by Jogendra Shiromani also.

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It now remains for me to consider the few cases cited on behalf of the claimants to bandhuship, the appellants.

The case of *Kesar Singh* v. *The Secretary of State for India in Council*[25] entirely supports the appellants' case. But with all respects, I have not been able to accept it as having been correctly decided.

Spencer, J. based his decision on several considerations. One of these is that the words 'santan' which has been translated as a 'line' by all translators, does not mean male ascendants alone. Santans, no doubt, has another meaning, viz., issue, i.e., either male or female. But it also means a 'line'. Vijnaneshwar himself interprets it as meaning male line alone. I have quoted his very words. Then the learned Judge brushes aside the case of *Umaid Bahadur* as an *obiter dictum*. But it has already been cited with approval in the Privy Council case of *Ram Chandra*. Then he appears to have accepted an extention of the classes of bandhus. Rao, J. busied himself with an examination of the reasonings (for his conclusions) of Mr. Sarvadhikari, and did not examine the texts himself.

The next case that was cited was the case *Umashankar* v. *Nageswar*[26]. The observations of Malik, J. were relied on, where he examined the book by Mr. Sarvadhikari. The point before the Patna Court was one of relative title of two claimants, both of whom were bandhus. But the question before us did not at all arise in the case. The question was which of the two claimants had the better title. I am not concerned with the defence of Mr. Sarvadhikari. He can take care of himself. But when all is said, it would still appear that—questions of precedence apart—the table of bandhus prepared by him and adopted by other writers, is substantially correct. I am using the word 'substantially' because this *case* is not concerned with each of the numerous cases of bandhus shown in the tables, and I have not examined each of them separately. Excluding the cases in 49 Mad. and 6 Cal. there is no other case directly in point. As the result of my own reading of the original Mitakshara and relevant texts, and on the authority of the case in 6 Cal., I have arrived at the conclusion that the Madras case does not lay down the correct law.

My answer to the question before the Full Bench is that Kesho Prasad and Kali Prasad are not heritable bandhus of Suraj Prasad.

Young, J.

YOUNG, J.—I concur and have nothing to add.

BY THE COURT—The answer to the question referred to us is in the negative.

Reference answered in the negative

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[25] I. L. R. 49 Mad. 652

[26] 3 P. L. J. 663

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April 21

PULLAN, J.
NIAMAT-
ULLAH, J.

MAHTAB SINGH (*Defendant*)

versus

THE COLLECTOR OF SAHARANPUR (*Plaintiff*)*

Transfer of Property Act, Sec. 55 (5) (b)—Agreement to sell—Suit for specific performance—Court had sale deed executed—Liability to pay unpaid consideration arose at once—Limitation Act, Art. 120—Vendee agreed to pay balance of consideration to mortgagees—Delay in payment—Vendor had to pay interest—Suit for recovery of sum so paid—Limitation.

One *B* agreed to sell a village (this village and another village were subject to a mortgage) to the defendant, who paid earnest money in cash; but later *B* sold the village to other persons. The defendant instituted a suit for specific performance making the vendees also parties. The suit was decreed, and the court had the sale deed executed and completed in favour of the defendant. An appeal to the High Court by the vendees was dismissed. The defendant then deposited under Sec. 83 T. P. Act the balance of the sale consideration to the account of the mortgagees—this they had agreed to do under the terms of the agreement of sale—who agreed to accept the same in part satisfaction of the money due to them. The Court of Wards who had taken over the estate of *B* had to pay a large sum to the mortgagees as interest accruing between the date of the execution of the sale deed in favour of the defendant and the date of deposit under Sec. 83. The Court of Wards thereupon sued the defendant for recovery of the sum paid with interest from the date of demand. *Held,* (1) that it was the duty of the defendant to pay the amount to the mortgagees on the date the sale deed was executed in his favour, and the fact that an appeal was preferred to the High Court in the specific performance suit, could not suspend his liability. He insisted on the immediate execution of the sale deed and must accept his liability arising from it; (2) that the defendant was not entitled to retain the balance of purchase money, as there was no plea that the payment of this sum was conditional on the remaining incumbrance being discharged *Muhammad Siddiq Khan* v. *Muhammad Nasirullah Khan,* I. L. R. 21 All. 223 *distinguished;* (3) that the cause of action arose on the date the mortgagees were paid off, and the suit was governed by Art. 120, Limitation Act, and was within time.

FIRST APPEAL from a decree of A. P. GHILDIAL ESQ., Additional Judge of Moradabad.

Panna Lal for the appellant.

U. S. Bajpai for the respondent.

The judgment of the Court was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This is an appeal by the defendant Mahtab Singh, and arises out of a suit brought in the following circumstances:—

Raja Balwant Singh, whose estate is now under the superintendence of the court of wards, owned villages Nejabatpur and Jamaluddinpur which were subject to a common charge of Rs.75,625 on August 5, 1921, under a mortgage-deed in favour of Kunwar Sen and Bansidhar. On July 26, 1921, Raja Balwant Singh agreed to sell village Nejabatpur to the appellant Mahtab Singh for a sum of Rs.73,725. Similarly he agreed on the same

*F. A. 117 of 1928

date to sell village Jamaluddinpur to Raghuraj Singh for a sum of Rs.17,000. It was agreed that out of the consideration of Rs.73,725 payable by the appellant for village Nejabatpur, a sum of Rs.58,625 would be paid to the mortgagees Kunwar Sen and Bansidhar. The village was in possession of a lessee who had paid rent in advance and who was entitled to retain possession for six years. The rent for the six years thus received by the vendor in advance amounted to Rs.14,100, which was to be credited to the vendee and deducted from the price payable by the latter. This was to compensate Mahtab Singh for not obtaining possession for six years during which the lessee would retain possession in terms of her lease. Rs.1,000 was paid in cash as earnest money. These three sums make up the total of Rs.73,725.

Raghuraj Singh, who had agreed to purchase the village Jamaluddinpur, was to pay the entire sum of Rs.17,000, the agreed price of that village, to the mortgagees Kunwar Sen and Bansidhar.

It should be noted that the sums agreed to be left with the vendees for payment to the mortgagees were just sufficient to discharge the incumbrance in favour of Kunwar Sen and Bansidhar.

Raja Balwant Singh did not execute the sale deeds as agreed by him in favour of Mahtab Singh and Raghuraj Singh. On the contrary he sold the two villages to Bishunchand and Dayashankar on August 5, 1921 for Rs.104,000, out of which Rs.75,625 was left with the vendee for payment to the mortgagees Kunwar Sen and Bansidhar. These vendees also agreed to accept Rs.14,100 as compensation for loss of the usufruct in consequence of the lessee's possession for six years. They paid Rs.5,000 as earnest money, and a sum of Rs.9,275 before the sub-registrar at the time of the registration of the deed.

Mahtab Singh brought a suit for specific performance against Balwant Singh and his vendees Bishunchand and Dayashankar in terms of the agreement of sale already referred to. Raghuraj Singh did not bring any action and acquiesced in the breach of agreement to sell village Jamaluddinpur. The court of first instance decreed the suit of Mahtab Singh on May 11, 1922, and directed execution of a sale deed by Raja Balwant Singh as agreed. On the failure of Raja Balwant Singh to execute the sale deed in pursuance of the decree passed in the suit for specific performance the court had the sale deed executed and completed on November 22, 1922. Formal delivery of possession was given on January 23, 1923. This, however, did not imply dispossession of any one, as according to the agreement of sale the lessee was to continue in possession for six years. The estate of Raja Balwant Singh was taken under the superintendence of the Court of Wards shortly afterwards in the same year. In the meantime Bishunchand and Dayashankar preferred an appeal to this Court from the decree passed in favour of Mahtab Singh in the suit for specific performance. Their appeal was dismissed on April 27, 1926.

It was not till June 29, 1926, that Mahtab Singh offered to pay Rs.58,625 out of the consideration of the sale to the mortgagees Kunwar Sen and Bansidhar. His deposit under S. 83 of the Transfer of Property Act was not accepted by the mortgagees in full satisfaction of the charge, existing on the two villages. They, however, agreed to accept the same in part satisfaction of the mortgage money due to them on the date of deposit. Mahtab Singh agreed to the deposit made by him being accepted in part satisfaction of the incumbrance. No payment seems to have been made by Bishunchand and Dayashankar out of the consideration for sale of village Jamaluddinpur. It should be mentioned that Rs.58,625 was believed to be due to the mortgagees in respect of the proportionate charge on village Nejabatpur on July 26, 1921. By June 29, 1926, when Mahtab Singh actually deposited that sum, that portion of the charge had considerably increased. On November 17, 1926, the Court of Wards paid Rs.52,752-2-9 in full satisfaction of what remained due to the mortgagees Kunwar Sen and Bansidhar in respect of their mortgage. The major part of this amount represented the incumbrance on village Jamaluddinpur. It is not disputed that it included a sum of Rs.19,352 which was the interest on Rs.58,625 accruing between the date of the sale deed in favour of Mahtab (i.e., November 22, 1922) and the date of deposit by him.

The Court of Wards representing the estate of Raja Balwant Singh instituted the suit which has given rise to this appeal for recovery of Rs.19, 352 aforesaid, together with interest on that sum from the date of deposit by Mahtab Singh to the date of suit. Other reliefs were also claimed, but it is not necessary to mention them for the purposes of this appeal. The lower court decreed the plaintiff's claim for Rs.19,352, but as regards interest on that sum the defendant has been found liable to pay at the rate of 6% from September 18, 1926, when the plaintiff demanded payment of Rs.19,352, up to the date of suit. The defendant Mahtab Singh has appealed to this Court.

The plaintiff's claim for Rs.19,352 proceeds on the ground that the defendant became liable to pay Rs.58,625 to the mortgagees Kunwar Sen and Bansidhar on November 22, 1922, when they obtained execution of the sale deed in pursuance of the decree passed in his suit for specific performance. If such payment had been made on that date, interest would have ceased to run on that sum, and the plaintiff would have not been required to pay interest on Rs.58,625 between November 22, 1922, and November 17, 1926, when the plaintiff actually paid a large sum of money in full satisfaction of the mortgagees' claim; in other words, it was the direct result of the defendant's default in paying Rs.58,625 on November 22, 1922, that the plaintiff had to pay an extra sum of Rs.19,352. It is contended on behalf of the defendant-appellant that the plaintiff is not entitled to recover that sum, as the vendees of village Jamaluddinpur did not pay the portion of the mortgage money charged on it and that even if the defendant had paid Rs.58,625, village Nejabatpur in which alone he was interested could not have been freed from incumbrance—both villages being subject to a common charge. The argument is that Mahtab Singh was not bound to pay till the vendor or the vendee of Jamaluddinpur was ready and willing to discharge the rest of the incumbrance on the two villages. Reliance is placed on *Muhammad Siddiq Khan* v. *Muhammad Nasirullah Khan*[1], the facts of which were different from those before us. In that case there was an agreement between the vendor and the vendee for part of the purchase money being retained by

[1] I. L. R. 21 All. 223

the latter not as a deposit but as security for the vendor paying the entire incumbrance existing on the landed property. Their Lordships held that the vendee was entitled to retain it until the vendor provided the rest of the money necessary for the purpose of discharging the entire incumbrance. An understanding to this effect was established by evidence produced by the vendee. In the case before us there was no plea taken by the defendant that according to the agreement embodied in the sale deed or otherwise arrived at between the parties, payment of Rs.58,625 by Mahtab Singh was made conditional on the remaining incumbrance being discharged by the vendor or the other vendee. The sale deed has not been produced by either party and there is no other evidence that the parties agreed to a condition precedent of the kind referred to above. In the absence of a plea of that kind and an issue the plaintiff could not meet the case set up in the argument subsequently put forward by the defendant-appellant. Under S. 55(5) of the Transfer of Property Act the buyer is bound to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or to such person as he directs. It follows that it was the duty of the defendant-appellant to pay Rs.58,625 to the mortgagees Kunwar Sen and Bansidhar in terms of the agreement of sale. Not having made the payment on November 22, 1922, the amount of Rs.58,625 swelled to a considerably larger sum by November 17, 1926, which the Court of Wards had to pay. We are satisfied that the plaintiff-respondent is entitled to the sum of Rs.19,352 which, as already stated, represents the accumulated interest on the sum of Rs.58,625 between the aforesaid dates. The learned counsel for the appellant also referred to *Badri Das* v. *Jivan Lal*[2]. The facts of that case are wholly different from those of the present case and, in our opinion, it has no application.

Another contention which has been put forward on behalf of the appellant is that he was not liable to pay Rs.58,625 before the controversy regarding the vendor's title was finally set at rest by the judgment of this Court in appeal from the decree passed in the suit for specific performance. There was no dispute about the vendor's title. The only question was whether Bishunchand and Dayashankar, to whom Raja Balwant Singh sold the property in disregard of the agreement previously entered into, had acquired a good title. On the execution of the sale deed in his favour the appellant became liable to pay the price forthwith, and the fact that an appeal was preferred to this Court could not suspend his liability. If he had deferred the execution of the trial court's decree pending the appeal to this Court different considerations might have applied. He insisted on the immediate execution of the sale deed and must accept his liability arising from it.

As regards the further sum of Rs.1,250-14-0 allowed by the lower court as interest on Rs.19,352, it is complained that it amounts to compound interest. We do not think that this is so. The Court of Wards having paid Rs.19,352 on November 17, 1926, in consequence of the default of the appellant, was entitled to recover the sum forthwith. Formal demand was made on September 18, 1926. If the defendant had complied with their demand the sum could have been suitably invested by the plaintiff. We are of opinion that the lower court was justified in awarding reasonable interest from the date of demand as compensation for non-payment of Rs.19,352 as to which the defendant's liability on the date of demand has been established. It is not compound interest but represents compensation for the plaintiff being kept out of the use of Rs.19,352 which should have been paid at any rate, on September 18, 1926, when the same was demanded.

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[2] 10 A. L. J. 480

Reference has been made to the conduct of Raja Balwant Singh in first agreeing to sell the village Nejabatpur to the defendant and subsequently selling it to Bishunchand and Dayashankar, which led to a contentious litigation in two courts. It is said that the defendant's claim, eventually found to be just, was keenly contested at the instance of Raja Balwant Singh. These circumstances are relied on in defence, and at any rate in mitigation of the damages claimed by the plaintiff. This grievance may be well founded. It was open to the defendant to have joined a claim for damages with his claim for specific performance, and the circumstances above mentioned might have entitled him to substantial damages in addition to the decree for specific performance. They have, however, no bearing on the controversy in the present case.

Lastly, the plaintiff's suit is said to be barred by limitation. The suit was instituted within one year after payment by the Court of Wards on November 17, 1926. It is suggested that Articles 65 and 111 are applicable. We do not think any of these articles can apply to the suit as framed by the plaintiff-respondent. The lower court has applied Art. 116 which provides a period of six years for a suit for compensation for the breach of a contract in writing registered. If this article applies the plaintiff's suit was in time but in our opinion the plaintiff's cause of action is not merely the breach of the contract embodied in the registered deed of sale but the fact that he was obliged to pay what the defendant should have paid early enough to prevent further accumulation of interest. It seems to us that the plaintiff could not have instituted a suit for recovery of the sums claimed by him before paying off the mortgagees Kunwar Sen and Bansidhar. This they did on November 17, 1926, which should be considered as the date of their cause of action. We have examined the terms of numerous articles which were referred to in the course of argument, and do not think that any of them applies in terms to the present case. Art. 120 is, therefore, the only article which should be held to be applicable. In that view limitation is to be reckoned from the date of payment by the plaintiff, and the suit having been brought within one year of that date is not barred.

We have discussed all the questions raised at the hearing of the appeal, and find ourselves in agreement with the lower court.

This appeal is accordingly dismissed with costs.

Appeal dismissed

CIVIL

1931

Nov. 6

MUKERJI, J.
BENNET, J.

ABDUL RAB (*Plaintiff*)

versus

AKBAR HUSAIN AND ANOTHER (*Defendants*)*

Pre-emption Act (XI of 1922), Sec. 5—Wajib-ul-arz—Language of—"No particular rule based on custom, but there is one according to custom of country and Mohammedan Law"—Whether Sec. 5 (a) complied with.

Where the extract from the *wajib-ul-arz* prepared before the commencement of the Pre-emption Act (XI of 1922) ran as follows:—"Custom of Pre-emption. There is no particular rule of (based on) custom in this village, but there is one according to the custom of the country and the Mohammedan Law", ***held***, that this statement in the *wajib-ul-arz* contains a declaration that there is a custom of pre-emption, though the entry proceeds to limit its significance by saying that pre-emption can be had only according to the custom of the country and the Mohammedan Law, and Sec. 5 (*a*) of the Pre-emption Act has been complied with. *Shyam Lal* v. *Dwarka Prasad*, 25 A. L. J. 109 *relied on.*

SECOND APPEAL from a decree of BABU PREO NATH GHOSE, Subordinate Judge of Pilibhit, reversing a decree of BABU BABU RAM VERMA, Munsif.

Iqbal Ahmad and *B. Malik* for the appellant.

U. S. Bajpai for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is a pre-emption appeal and raises only one question of law, because the other questions involved in the suit have not been decided by the lower appellate court. The plaintiff who is the appellant before us, based his suit on Section 5 of the Agra Pre-emption Act, and in order to comply with the requirements of that section produced an extract from the *wajib-ul-arz* containing an entry as regards pre-emption.

The court of first instance decreed the claim on condition of payment of Rs.1,900. There was an appeal and there was a cross-objection. The defendant's appeal succeeded on the ground that the entry in the *wajib-ul-arz* read with Section 5 of the Agra Pre-emption Act did not allow the plaintiff to maintain the suit. Section 5 of the Agra Pre-emption Act lays down that

> a right of pre-emption shall be deemed to exist only in mahals or villages in respect of which any *wajib-ul-arz* prepared prior to the commencement of this Act records a custom, contract or declaration—
>
> (*a*) recognizing, conferring or declaring a right of pre-emption, expressly or by necessary implication, whatever its extent and in whatever form it may be expressed, etc.

The extract from the *wajib-ul-arz* that has been produced runs as follows:—

> Dastur darbab haq shafa—shafa ka koi khas dastur nahin hai—Bamaujib rewaj mulk sharake hai.

Translated this would mean

"Custom of Pre-emption."

"There is no particular rule of (based on) custom in this village, but there is one, according to the custom of the country and the Mohammedan law."

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*S. A. 1034 of 1929

In our opinion this statement in the *wajib-ul-arz* contains a declaration that there is a custom of pre-emption, though the entry proceeds to limit its significance by saying that pre-emption can be had only according to the custom of pre-emption which obtained in the country and under the terms of the Mohammedan Law. This being our reading of the entry in the *wajib-ul-arz,* we are of opinion that Clause (*a*) of Section 5 of the Agra Pre-emption Act has been complied with, and it must be held and we do hold that the plaintiff has a right of pre-emption. This view of ours is in accordance with the view taken in *Shyam Lal* v. *Dwarka Prasad*[1] and *Rameshar Prasad Lal* v. *Ghisiawan Prasad*[2].

As the other questions involved in the appeal before the lower appellate court have not been decided, we allow the appeal, set aside the decree of the court below and send back the appeal to the learned District Judge for decision according to law. Costs here and hitherto will abide the result.

Appeal allowed

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[1] 25 A. L. J. 109

[2] 27 A. L. J. (1929) 665

CIVIL
1932
April 8
BOYS, J.
YOUNG, J.

MAJHLI DULAIYA (*Judgment-debtor*)
versus
MUNNA LAL (*Decree-holder*)*

Bundelkhand Land Alienation Act, Secs. 16 and 11—Decree-holder prevented from putting property of judgment-debtor to sale—Whether decree can be executed by giving a lease which the deceased debtor could have given under Sec. 11.

Where a decree-holder is prevented, by reason of Sec. 16 of the Bundelkhand Land Alienation Act, from putting the property of the judgment-debtor to sale, the decree can be executed by the giving of a lease which it would have been open to the judgment-debtor himself to give under Sec. 11, of the Act. *Sardarni Datar Kuar* v. *Ram Rattan,* 1 Lah. 192 *relied on.*

A creditor who has got a decree against the assets of a Hindu who died sonless leaving a widow, can attach and sell the estate in execution of the decree though that would have the effect of depriving the Hindu widow of future profits. *Rani Kanno Dei* v. *B. J. Lacy,* 19 All. 235 *referred to.*

EXECUTION SECOND APPEAL from a decree of H. J. COLLISTER ESQ., District Judge of Jhansi, confirming a decree of M. M. SETH ESQ., Subordinate Judge.

S. N. Chaube for the appellant.

K. N. Laghate for the respondent.

The judgment of the Court was delivered by

Boys, J.

BOYS, J.—The respondent obtained a simple money decree against the assets of a deceased Hindu to whom the Bundelkhand land Alienation Act was applicable. But by reason of Section 16 of the Act, the decree-holder was unable to put the property to sale. He has been given in lieu thereof a lease which does not exceed the form of lease which it would have been open to the deceased himself to give under Section 11 of the Act. The appellant here has contended that this in effect amounts to attaching the profits to which the Hindu widow would be entitled. He has relied upon a decision of two Judges of this Court in *Rani Kanno Dei* v. *B. J. Lacy*[1]. This case has been considered by the Madras High Court, but we do not consider it necessary to pursue that further, as we are of opinion that it does not support the appellant's case but on the other hand defeats it. All that was held in that case was that a creditor who had got a decree against the assets of a deceased Hindu, could not apply for a receiver to be put in charge of the rents of the widow's estate. Nothing more was really held than that he could not proceed against the profits which had already accrued to the widow, whether they had actually come into her pocket or whether they had not, and there was a further suggestion underlying one single phrase in the judgment that future profits could not be affected. It is contended on the strength of this ruling that the profits to which a Hindu widow is entitled under all circumstances are inviolable. Counsel went to the extent of suggesting that when a Hindu died sonless leaving a widow, his assets could not be attached at all. This position eventually had to be abandoned. The very case quoted is direct authority, if indeed authority was necessary, that the property could be sold, though of course that would have the effect of depriving the Hindu widow of future profits.

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*E. S. A. 1359 of 1930

Apart then from the Bundelkhand Land Alienation Act, there cannot be the least doubt that the estate could have been sold after attachment in execution of the simple money decree as being the assets of the deceased judgment-debtor. In the present case, the actual sale is prohibited by Section 16 of the Bundelkhand Land Alienation Act. That is only because the owner himself could not have sold, and therefore the Court is barred from doing that which the owner could not himself have done. There is no reason whatever, why a decree should not be executed by the Court doing anything which the deceased debtor could himself have done. He could give a lease in accordance with the terms of Section 11 of the Bundelkhand Land Alienation Act, and there is therefore no reason why the decree should not be executed by the giving of such a lease. That is all that has been done in this case. If authority were needed in support of this, reference may be made to *Sardarni Datar Kaur* v. *Ram Rattan*[2]—the decision of a Full Bench. We are satisfied, therefore, that there is no force in this appeal and it is dismissed with costs.

Appeal dismissed

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[1] 19 All. 235 (1897)

[2] 1 Lah 192

CIVIL

1931

Nov. 13

MUKERJI, J.
NIAMAT-ULLAH, J.

MANNU LAL AND ANOTHER (*Defendants*)
versus
LACHHMAN DAS AND ANOTHER (*Plaintiffs*)*

Will—Construction of—Testatrix gave to P (Executor under the Will) the right to spend the entire income of her estate—For maintaining himself and his family—Whether income of estate given to P—Succession Act (XXXIX of 1925), Sec. 172.

Where the testatrix expressly said in her will that she was maintaining one *P* and she wanted to maintain him in future, and she authorised him to deal with her property by appointing him the executor and gave him the right to spend the entire income of her estate for maintaining himself and his family, on this condition that if *P* turned out to be a man of dissolute habits, her property was to be utilized in raising money and in constructing a temple, *held,* (1) that the testatrix intended to give and did give the income of her estate to *P,* and as a matter of law the estate belonged to *P* (Sec. 172 of Succession Act of 1925); (2) that the prohibition against alienation being inconsistent with the interest actually given, was bad in law. *Ashutosh Dutt* v. *Doorga Churn Chatterjee,* I. L. R. 5 Cal. 438 *applied.*

SECOND APPEAL from a decree of BABU RAJ BEHARI LAL, Additional District Judge of Cawnpore, reversing a decree of BABU RAJA RAM, First Subordinate Judge.

K. N. Katju and *S. N. Seth* for the appellants.

U. S. Bajpai and *Hari Ram Jha* for the respondents.

The following judgments were delivered:—

Mukerji, J.

MUKERJI, J.—The question involved in this appeal is: what was the intention of Musammat Budhia, towards Phundu as regards her property, as expressed by her in her will?

It appears that on the death of Mst. Budhia, Phundu took possession of her property which consisted of two houses and some movables and mortgaged one of these to the plaintiff No. 2. Phundu died without any heir. The defendant No. 1 obtained Letters of Administration to the estate of Mst. Budhia, and by the permission of the District Judge, who granted the Letters of Administration, sold the property, mortgaged by Phundu, to the defendant No. 2. The plaintiff No. 1 is a transferee from the plaintiff No. 2 and has joined with the original mortgagee in the suit.

The court of first instance dismissed the suit holding that Phundu got nothing under the will, but the lower appellate court decreed the suit holding that Phundu was the legatee under the will and was entitled to make the mortgage.

It is common ground that the defendant No. 1 is not an heir to Mst. Bhudia. It is also the case that no one has so far claimed any interest in Bhudia's property as her heir-at-law.

We have been furnished with a translation of the will, and we have also examined the original will which is in Urdu. Briefly what Bhudia said was as follows:—

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*S. A. 1183 of 1928

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Mukerji, J.

> Budhia's mother-in-law had brought up one Gauri. Gauri was married and had a son Phundu. Gauri became immoral of character and was turned out of the house by Mst. Gyani. Phundu's mother died leaving Phundu a child of one year. Budhia brought up this child Phundu who was eleven years of age at the date of the execution of the will.

Having said all this, Budhia expressed herself as follows:—

> I am maintaining him (Phundu) and also intend to maintain him in future. I have also in mind the future management of my property. Therefore, in health (of) body and mind I put down the following provisions which should be carried out after my death by the said Phundu who is appointed executor herewith:—
>
> 1. Of all my property the said Phundu shall be the executor.
> 2. The said executor will not have any right to sell the property.
> 3. Whatever may be the income of the property, the executor will have the right to spend the same for his own maintenance and for the maintenance of all the members of the family (Ahlekhandan) but will have no further right.
> 4. The said executor will have no right to commit any act which will in any way encumber or cause loss to the property.

Having said so, Mst. Bhudia further expressed her idea that, if Phundu also turned out to be of immoral character, her caste men and certain other persons (including some Brahmans) would be entitled to take the property out of Phundu's hands and to sell one of the properties and build a temple in the other.

The question then is: did Mst. Budhia intend to give and did she give Phundu the right to appropriate the income of her estate and whether, she having in no way limited the duration during which this appropriation is to take place, it followed from the provisions of Section 172 of the Indian Succession Act that the corpus of the estate should be taken as having been bequeathed to Phundu?

I have already mentioned that neither in the will nor in any of the pleadings nor in the evidence so far as it can be gathered from the two judgments, was there any suggestion that Bhudia left any relation whom she wanted to benefit, if her idea to benefit Phundu failed. We have seen that she clearly set forth in her will that, if Phundu turned out to be a man of dissolute character, her property was to be utilized in raising money and in constructing a temple. Budhia expressly says in the will that she was maintaining Phundu and she wanted to maintain him in future. She authorised him to deal with her property by appointing him the executor and gave him the liberty to spend the entire income of her estate for maintaining himself and his family. It has been conceded in argument that the maintenance of the family or *khandan* could mean only the maintenance of the family which would come into existence if he married and reared up a family. We have to consider, now, what was in the mind of the testatrix. Did she give to Phundu unreservedly the income of her estate? For, if she did so without indicating any limitation of duration, it would follow as a matter of law that the estate would belong to the legatee (Section 172 Indian Succession Act 1925).

It has been contended that Bhudia gave to Phundu authority to maintain himself and his family and nothing more and, therefore, it cannot be said that the "interest or produce" of the estate had been bequeathed to Phundu within the meaning of Section 172 of the Indian Succession Act. In my opinion, this is taking rather a narrow view of the whole situation. Phundu was the executor of the estate and was *prima facie* the person fully authorised to deal with the income. The fact that he was prohibited from transferring the property did not debar him from spending the entire income of the property. It is true that Phundu was told that he was to spend the money on the maintenance of himself and his family, but there is no limitation as to the portion of the income that was to be utilized for the purpose. Undoubtedly it was the idea that the whole income might be spent, at the discretion of Phundu, if he thought that the money was needed for his own support and the support of his family. The income from the property was not very large. The property consisted of two houses and a few movable properties. In my opinion, the court below was right in holding that Bhudia intended to give and did give the income of her estate to Phundu on this condition and this condition alone that he was to be of good character.

It is nobody's suggestion that Phundu was of immoral character and forfeited the bequest. If he did not forfeit it, he was the owner of the property and was not divested of it under the only condition under which he could be divested. The mortgage made by him must be taken, therefore, to be valid. The prohibition against alienation is bad in law.

The case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[1] and the remarks to be found at page 444 made by their Lordships of the Privy Council, in my opinion bear out the plaintiffs' contention as regards the construction of the will.

The only other point urged on behalf of the appellant is that the lower appellate court was not right in holding that any consideration had been paid to Phundu. This is a decision on a point of fact. Besides, the admission of Phundu in the deed which is relevant against the defendants under Section 19 of the Indian Evidence Act, and the evidence on the record would be good enough, in the circumstances of the case, to prove the payment of the consideration.

I would dismiss the appeal with costs.

Niamatullah, J.

NIAMATULLAH, J.—On the construction of the will in question, I was very doubtful as to the correctness of the view taken by the lower appellate court, but I find that in *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[2] their Lordships of the Privy Council have construed an exactly similar clause as conferring an absolute title on the devisee. There a Hindu lady left to her sons lands belonging to her to support the daily worship of an idol and to defray the expenses of certain other religious ceremonies with a provision that, in the event of there being a surplus after those usages had been satisfied out of the revenue of the said land, such surplus should be applied to the support of the family. It was held by their Lordships of the Privy Council that the last provision amounted to a bequest of the surplus to the members of the family for their own use and benefit and that each of the sons of the testatrix took a share in the property. After considering the terms of the will, which, as I have said, are similar to those contained in the will before me, "Their Lordships, not without some doubt and hesitation, came to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further declares 'this property of mine will not be liable for debts of any person, none will be able to transfer it, none will have the rights of gift and sale.' But these directions, being inconsistent with the interest given, were wholly beyond her powers and must be rejected as having no operation." In this view, I must hold that the decree passed by the lower appellate court is correct, and agree with my learned brother in dismissing the appeal with costs.

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[1] I. L. R. 5 Cal. 438

[2] I. L. R. 5 Cal. 438

By the Court—The appeal is dismissed with costs.

Appeal dismissed

Civil
1932
April 4
Pullan, J.
Niamatullah, J

JOTI PRASAD and another (*Plaintiffs*)
versus
HAR PRASAD (*Defendant*)*

Tenancy Act (Local Act II of 1901), Sec. 31(2)—Unauthorised transfer by occupancy tenant—Suit by zamindar—To eject transferee—Tenant not impleaded—Whether maintainable in civil court.

Where the plaintiffs sued for ejectment of defendant on the allegation that the heirs of an occupancy tenant of the land of which the plaintiffs were the owners, had transferred it to defendant, though they had no right to do so, and the heirs of the occupancy tenant were not impleaded, *held*, that the question of jurisdiction must, in the first instance, be decided on the statement of facts to be found in the plaint which merely sought the ejectment of an alleged trespasser, and the suit was cognizable by the civil court; and Sec. 31(2) of the Tenancy Act of 1901 did not apply as the plaintiffs had not sued for the ejectment of both the tenant and the transferee.

The word '*maurusi*' means heritable and is not the recognised equivalent of occupancy, which is more appropriately translated as '*dakhilkari*'.

First Appeal from a decree of S. M. Mir Esq., Subordinate Judge of Moradabad.

P. L. Banerji and *S. N. Seth* for the appellants.

K. N. Katju, Vishwa Mittra and *Banke Behari* for the respondent.

The judgment of the Court was delivered by

Niamatullah, J

Niamatullah, J.—This appeal arises out of a suit brought by the plaintiff-appellants for a declaration that the sale deed, executed by the legal representatives of one Mr. John Lemaistre in favour of the defendant-respondent on July 25, 1925 is null and void as against the plaintiffs, who are the proprietors of the land to which the aforesaid sale deed relates and for recovery of possession with mesne profits and perpetual injunction restraining the defendant from cutting down trees standing on the land.

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*F. A. 269 of 1928

CIVIL

1932

JOTI PRASAD
v.
HAR PRASAD

Niamat-ullah, J.

The land in dispute consists of Nos. 2781 and 2783|1, measuring 5 bighas 10 biswas and 1 bigha 15 biswas, respectively, situate in patti Jasso in the town of Bijnor. It is not disputed that the plaintiff-appellants are the owners of the plots in dispute which are mixed up with plots Nos. 2783|2 and 2782|3, belonging to certain proprietors, who are not parties to this case, as also with Nos. 2782 and 2784, which belonged to Mr. John Lemaistre himself. There is a 'kothi' on a portion of the land to which all these 'khasra' numbers refer. Parties are not agreed as regards the exact situation of the 'kothi'. In the view of the case we are inclined to take, it is not necessary to locate it with reference to the exact khasra number.

The plaintiffs' case, as stated in their plaint, is that Mr. John Lemaistre was an occupancy tenant of the land claimed by them and that his successors-in-title transferred it to the defendant by the sale deed of July 25, 1925, though as occupancy tenants they had no right to do so. Accordingly it is alleged that the defendant is a trespasser. It should be noted that the heirs of Mr. Lemaistre, who, if the plaintiffs' allegations are true, should now be considered to be occupancy tenants, have not been made parties to the case.

The suit was resisted on a variety of grounds, including the plea that the civil court had no jurisdiction to entertain a suit on the allegations to be found in the plaint. It is pleaded that the land in suit had been leased to Mr. Lemaistre sometime before 1849 by the then proprietors thereof in perpetuity and for building purposes, that the successors-in-interest of John Lemaistre had a transferable right and that by the sale dated July 25, 1925 the defendant stepped into the shoes of his transferors. A number of other pleas were also raised and have been decided by the lower court. It is, however, not necessary to mention them in detail for the purposes of the present appeal.

The learned Subordinate Judge dismissed the plaintiffs' suit, holding against the plaintiffs on the main question raised by their plaint.

We are clearly of opinion that on the allegations contained in the plaint, the suit was rightly instituted in the civil court. The question of jurisdiction must, in the first instance, be decided on the statement of facts to be found in the plaint. The plaintiffs have not impleaded the tenants themselves, who, according to them, had no right to transfer. If this is so, transfer of their tenancy land was void and conferred no right on the transferee (defendant), who is accordingly a trespasser. A suit for ejectment of a trespasser lies in the civil court. Reference has been made to Section 31(2) of the Agra Tenancy Act (II of 1901), which was in force when the suit was instituted and provided that when a tenant has made any transfer, the landholder may sue for the cancellation of the sale, or for the ejectment of the tenant and the sub-lessee or other transferee, or for both. Section 167, read with Schedule IV, Group B, No. 18, makes a suit of the character contemplated by Section 31(2) cognizable exclusively by a revenue court. That section, however, applies to a suit (*a*) for the cancellation of the transfer, or (*b*) for the ejectment of the tenant together with the transferee, or (*c*) for both the reliefs (*a*) and (*b*). The plaintiffs have not sued for the ejectment of both the tenant

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1932
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v.
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Niamat-ullah, J.

and the transferee. In case (*b*) above it is only if the object of the suit is to terminate the tenancy and to eject the tenant and his transferee that Section 31 (2) can apply. The ejectment of the transferee, assuming he is only a trespasser, will not necessarily imply extinguishment of the right of the tenant. In this view, the present suit, so far as it is for ejectment of the defendant, is cognizable by a civil court. Whether on facts found the civil court can grant the relief of ejectment is another matter. The initial jurisdiction is determined by the allegations made in the plaint which merely seeks the ejectment of an alleged trespasser. It is not necessary to decide the further question whether the relief of declaration, claimed by the plaintiff in respect of the sale deed of July 25, 1925, can be granted by the civil court.

As regards the exact nature of Mr. John Lemaistre's right in the land in dispute, there is a good deal of obscurity. The land was acquired by him, according to the defendant, before 1849 and, according to the plaintiffs, after 1871. No written grant has been produced by either party. It is not suggested by any of them that the original entry of Mr. Lemaistre on the land in dispute was otherwise than under an oral arrangement. The terms of the tenancy must, therefore, be gathered from the conduct of the parties and the apparent use which has been made of the land ever since the grant. We have been taken through the khasras prepared at the settlement of 1871, a partition in 1879 and at the settlement of 1893-94. The land in dispute has always been shown as in possession of Mr. Lemaistre along with Nos. 2782 and 2784, which belonged to him in proprietary right. All the plots, including proprietary and tenancy lands, were occupied by him either as site of his 'kothi' or its compound. In most years the land in dispute was shown as culturable waste, and occasionally vegetables were grown. Lemon trees are also shown in some years against part of the land in dispute. The land now in dispute was shown as 'maurusi' tenancy in the column of remarks of the khasra prepared in 1871. Reliance is placed by the plaintiffs on that expression to establish their case that Mr. Lemaistre was an occupancy tenant. The word 'maurusi' means heritable and is not the recognized equivalent of occupancy, which is more appropriately translated as 'dakhilkari'. Mr. John Lemaistre was the head clerk in the district of Bijnor. The District Gazetteer shows that he was one of the European residents of that station at the time of mutiny in 1857. It is in the highest degree improbable that he acquired this land as an agricultural tenant and became an occupancy tenant by twelve years' cultivation, as is alleged by the plaintiffs. It is far more probable that the then proprietors let the land in dispute to him to form part of the compound of his 'kothi'.

It appears that in 1897 the then proprietors obtained an order of enhancement of rent from the settlement officer on the allegation that the land in dispute formed part of an agricultural holding. Subsequently an application for review was made, and it was admitted on behalf of the proprietors before the settlement officer "that the land in question was given to the ancestor of the present owner to form compound of a bungalow in the station of Bijnor, which it still does". The plaintiff-appellants have not adduced any evidence to rebut or explain away the admis-

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1932
JOTI PRASAD v. HAR PRASAD
Niamat-ullah, J.

sion referred to in the order of the settlement officer, and we hold on a consideration of the entire evidence that the plaintiff-appellants have failed to establish that the land in dispute was held by Mr. John Lemaistre as an agricultural tenant.

No less than three commissioners were appointed by the lower court to ascertain whether the 'kothi' or any part of it stood on the land in dispute. They arrived at different conclusions. In our opinion, it is wholly unnecessary to determine that question. If the land in dispute, or any part of it, is covered by the 'kothi', the presumption will be that it was let for building purposes, and there can be no doubt that the lessee of land let for building purposes has a right of transfer. If, on the other hand, no part of the land in dispute forms site of the 'kothi' and is merely appurtenant to it as part of its compound and was let as such, the lessee should be deemed to possess a right of transfer of the nature described in S. 108 (*j*), Transfer of Property Act (No. IV of 1882) which merely enacts preexisting law. It was not argued before us, though the question was put to the learned advocate for the plaintiff-appellants, that the law before 1882 was in this respect different from that contained in the Transfer of Property Act (IV of 1882). Unless the land in dispute was held by Mr. Lemaistre as an agricultural tenant, in which case different considerations may apply, he must be deemed to be a lessee subject to the general law governing landlord and tenant, and not that applicable to agricultural holdings. In that view, the heirs of Mr. John Lemaistre had every right to "transfer absolutely or by way of mortgage or sub-lease the whole or any part of their interest in the property and any transferee of such interest or part may again transfer it (Section 108 (*j*)). "The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease". (*Ibid*).

It is not necessary to determine for the purpose of this case whether Mr. John Lemaistre had rights in perpetuity, nor is it necessary to ascertain other terms of the grant under which he held. It is enough for the purpose of this case to find that he and his successor-in-interest did not hold as tenants, having no right of transfer. The plaintiffs' suit was rightly dismissed, and on our findings this appeal must also fail. It is accordingly dismissed with costs.

Appeal dismissed

CRIMINAL
1931
Dec. 7
BENNET, J.

KING-EMPEROR
versus
SIKHDAR*

Arms Act, Sec. 19 (f)—Unlicensed gun in the house—Presumption against all adult male members that it was in their possession and control—One or all the members liable to prosecution.

The finding of an unlicensed gun in the house would raise a presumption against all the adult male members that it was in their possession and control, and they might one and all be tried on that charge. It would be for these persons to show that they were not in possession of the gun in

*Cr. Ref. 658 of 1931

question. It is open to the police to prosecute one or all of the adult male members for an offence of this nature.

Q.-E. v. *Sangam Lal*, I. L. R. 15 All. 129 *explained.*

CRIMINAL

1931

KING-EMPEROR *v.* SIKHDAR

CRIMINAL REFERENCE made by BABU GANGA PRASAD VERMA, Sessions Judge of Fatehpur.

M. Waliullah (Assistant Government Advocate) for the Crown.

The opposite party was not represented.

The following judgment was delivered by

Bennet, J.

BENNET, J.—This is a reference by the learned Sessions Judge of Fatehpur asking that the conviction of one Sikhdar for illegal possession of a gun without a license under Sec. 19 (*f*) of the Arms Act should be set aside. The facts found by the learned Sessions Judge are that the gun in question was found in the house of this accused, but the recommendation is made on the ground that not only the accused lives in this house but some other members of the joint family of which the accused is a member, and that the accused is not the managing member. The joint family in question consists of the father of the accused, who appeared as a witness and denied that there was a gun in the house, and he is an old man aged 60, and he stated that he cannot see distinctly. The magistrate is apparently right in his conclusion that the father would have anything to do personally with this gun. Of the two brothers of the accused one Purna is said to live in another village called Nathkhera. Another brother Jethwa apparently lives in the house with the accused and Jethwa is said to be older than the accused. The learned Sessions Judge referred to a ruling of this Court of the year 1893, *Q.-E.* v. *Sangam Lal*[1] in which it was laid down at page 131 that

> where it is sought to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the fact before we can in an Act of this kind arrive at such a conclusion.

In the head-note this ruling is made to say that there must be good evidence that such arms are in the *exclusive* possession and control of the particular member of the joint family. It is to be noted that the word "exclusive" is *not* in the body of the ruling, and there is no justification whatsoever for its appearance in the head-note. In Sec. 19 (*f*) of the Indian Arms Act the words used are not exclusive possession but merely "has in his possession or under his control any arms". If the doctrine of exclusive possession held by the Sessions Judge on the strength of the language of the head-note in *Q.-E.* v. *Sangam Lal* were correct, then it would be impossible to convict two Hindu brothers who were found in possession of a gun in their house, although the evidence might establish that they were actually arrested by the police when they were both holding the gun in question. Such a result would obviously make nonsense of Sec. 19 (*f*) of the Arms Act. I do not consider that a Hindu is in any better position in this country than a Mohammedan or an Indian Christian and in no country in the world is it laid down that the criminal law should be interpreted by the canons of civil law. The evidence here shows that the accused is one of the persons who live in that house and the accused is one of the adult male members of the family. The finding of an unlicensed gun in the house would to my mind raise a presumption against all the adult male members that it was in their possession and control, and they might one and all be tried on that charge. Under these circumstances I consider it would be for these persons to show that they were not in possession of the gun in question. It is open to the police to prosecute one or all of the adult male members for an offence of this nature, and in the present case the police selected Sikhdar for prosecution for the apparent reason that they had information that Sikhdar had been taking part in a dacoity, and they searched the house where he lived in that connection. I consider that the conviction of Sikhdar on the evidence was correct, and I refuse this reference. Let the papers be returned.

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[1] I. L. R. 15 All. 129

Reference refused

CIVIL
1932
March 18
PULLAN, J
NIAMAT-ULLAH, J.

AZIZ FATMA (*Defendant*)
versus
MUKUND LAL AND OTHERS (*Plaintiffs*)*

Transfer of Property Act, Sec. 52 and Tenancy Act (III of 1926), Sec. 19—Lease for 20 years in favour of defendant during pendency of mortgage suit—Civil suit by purchaser in execution of mortgage decree—Relief—That lease was void and defendant be ejected—Status of defendant—Whether suit for ejectment maintainable in civil court.

The plaintiffs purchased certain property at a sale in execution of a mortgage decree. Prior to this the same property was purchased by one *H* in execution of a simple money decree, who executed a lease for 20 years in favour of the defendant during the pendency of the mortgage suit. On a suit by the plaintiffs in the civil court for a declaration that the lease was void and for the ejectment of the defendant, *held,* (1) that at the time the lease was granted, *H* was the landlord and was authorised to admit the defendant to the occupation of the land, and the position of the defendant was that of a tenant, and when the suit was brought, the possession of the defendant was, under Sec. 19 of the Tenancy Act of 1926, that of a statutory tenant, and he could be ejected only under the provisions of that Act; (2) that the lease could be challenged under the terms of Sec. 52 T. P. Act, and the civil court could grant a declaration that the lease was void as against the plaintiffs.

SECOND APPEAL from a decree of ALI AUSAT ESQ., District Judge of Aligarh, reversing a decree of MAULVI SERAJUDDIN, Munsif of Koil.

A. M. Khwaja for the appellant.

K. N. Katju and *R. C. Ghatak* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—The 'zamindari' shares of two brothers were put to sale in execution of a simple money decree and purchased by one Haji Muhammad Saleh Khan on April 20, 1925. At the time when that sale took place, another person, a mortgagee, had also brought a suit in respect of this property. The mortgagee had obtained a final decree on April 3,

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*S. A. 568 of 1930

1925, and he in his turn put the property to sale. The former purchaser, Haji Muhammad Saleh Khan, had received a notice of the impending sale at the instance of the mortgagee on September 2, 1925, and on September 8, 1925 Saleh Khan executed a lease of certain plots in favour of one Muhammad Ishaq for 20 years at, what has been held by the learned District Judge to be, a favourable rate of rent. On July 28, 1926 the property was sold again in execution of the mortgagee's decree and was purchased by the present plaintiffs, who filed this suit for a declaration that the lease in favour of Muhammad Ishaq was fictitious and void, for possession of the plots covered by the lease and for a sum of Rs.750 a year by way of damages.

In this second appeal we have to determine the position of the lessee as against the present plaintiffs. We must accept the findings of the District Judge, first, that these plots were let at a low rate of rent and that the land could fetch Rs.700 a year whereas the lease is only for Rs.344 a year, and, secondly, that the lessor executed the lease in order to cause loss to the plaintiffs and to favour unduly the lessee. The lease was executed *pendente lite*, and a lease executed for 20 years in these circumstances must be taken to be a transfer of property within the meaning of Section 52 of the Transfer of Property Act. The lease was prejudicial to the interests of the present owners of the land and should not be held to be binding upon them. But when we have said this, we have said all that can be said in favour of the present plaintiffs. Whatever may have been the motive which influenced Haji Muhammad Saleh Khan in granting this lease, he was clearly the person authorized to admit the defendant to the occupation of the land. He was at the time the landlord, and it was his duty to arrange for the cultivation of the land. It is not the fault of a lessee that he received favourable terms from the lessor, and whatever may be the rights conveyed by the lease and however much the landlord may now be entitled to challenge the terms of that lease, the position of the lessee is that of a tenant. He is not a trespasser and, as a tenant, he has the rights of a tenant which have been given to him by the Agra Tenancy Act, and he can be ejected only under the provisions of that Act. The new Agra Tenancy Act came into force in September 1926, and when this suit was brought, the possession of the lessee, Mohd. Ishaq, was, under Section 19 of Act III of 1926, that of a statutory tenant. Any proceedings against him by way of ejectment could be taken only in the Revenue Court. The defendant, in his written statement, does not claim to hold to the terms of the lease, as he accepts his position as a statutory tenant. We have already pointed out that the lease was one which can be challenged by the plaintiffs under the terms of Section 52 of the Transfer of Property Act, and we accordingly think it proper to uphold that portion of the decree of the court below which granted the first relief sought by the plaintiffs, namely, a declaration that the lease is void as against the present plaintiffs, but we can go no further than this. We cannot give a decree for profits, and we cannot order the ejectment of the defendant. These questions must be determined by the Revenue Court.

We, therefore, allow this appeal in part and modify the decree of the court below in the manner specified above. The defendant has succeeded in holding this land for a period of seven years altogether and for a period of five years against the wish of the 'zamindar'. In the circumstances of the case we think it proper to order that the parties shall bear their own costs.

Appeal allowed in part

CIVIL
1931
Dec. 23
MEARS, C. J.
SEN, J.

RAGHUNATH PRASAD AND ANOTHER
versus
JWALA PRASAD AND OTHERS*

Tenancy Act (III of 1926), Secs. 15 and 14(5)—Usufructuary mortgage of sir in terms of Sec. 14(5)—Stipulation—In the event of mortgagor being declared exproprietary tenant, he would be liable to pay rent determined—But mortgagee to retain possession of property—Whether this amounted to waiver of exproprietary rights.

Where a specific area of *sir* was transferred by a usufructuary mortgage in terms of Sec. 14(5) of the Tenancy Act of 1926, and there was a stipulation in the mortgage bond that in the event of the mortgagor being declared an exproprietary tenant he would be liable to pay the rent determined but the mortgagee should retain full possession and enjoyment of the mortgaged property, that is the grove, *held*, that the stipulation amounted to a waiver of his exproprietary rights, since the mortgagor expressly consented that the mortgagee should retain possession of the mortgaged property which would form the subject of the exproprietary rights, and the mortgagee could not be deprived of the benefit of this stipulation.

APPEAL under Section 10 of the Letters Patent from a judgment of the HON'BLE MR. JUSTICE KING.

The following is the judgment of

King, J.

KING, J.—This appeal arises out of a suit for damages for fruit misappropriated by the defendant from a grove and for a permanent injunction restraining the defendant from interfering with the plaintiffs' possession of the trees of the grove.

On September 15, 1927 the defendant executed a usufructuary mortgage of certain plots of land, which have been held to be grove land, in favour of the plaintiffs. The property was described as being resumed muafi and it was recorded as sir land. On January 20, 1928 the zamindar brought a suit for the determination of the rent of the mortgagor on the ground that by reason of the transfer of his proprietary rights under the usufructuary mortgage he had become an exproprietary tenant and his rent should be fixed. Accordingly the revenue court fixed Rs. 10-10-0 as the rent of the defendant as an exproprietary tenant.

Subsequently a dispute arose between the parties or their lessees, for possession and enjoyment of the produce of the grove, and the plaintiffs instituted the present suit.

The principal defence was that as the mortgagor had become an exproprietary tenant of the land in suit, the trees which formed part of the exproprietary holding could lawfully be retained by the mortgagor notwithstanding the terms of the mortgage deed. The jurisdiction of the civil court was also challenged as it was stated that the relation of landlord and tenant exists between the parties.

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*L. P. A. 32 of 1931

Both the courts below have decreed the plaintiff's claim and the defendant comes to this Court in second appeal.

It is clear that under the terms of the mortgage deed itself the mortgagee, namely, the plaintiff, is entitled to the usufruct of the grove. It was contemplated in the mortgage deed itself that by reason of the transfer the mortgagor would become an exproprietary tenant, and it was expressly provided that in such an event if rent were fixed upon the holding of the defendant as an exproprietary tenant then he would be liable to pay that rent, but the mortgagee was to be entitled to the full use and enjoyment of the grove, to appropriate the produce and to plant new trees.

The question is whether the mortgagor is bound by the terms of his own agreement, or whether this agreement is void as contrary to the provisions of the Agra Tenancy Act.

The appellant has relied upon a ruling of *Mst. Hafizan* v. *Chakko Lal,* A. I. R. (1927) All. 779 in which it was held that groves situate on exproprietary holdings partake of the nature of the holding on which they stand, and as such cannot be attached and sold in execution of a decree. This was the decision of a single judge, but it followed a Full Bench decision in *Jugul* v. *Deokinandan,* I. L. R. 9 All. 88. These rulings, however, are not strictly applicable to the facts of the present case. The mortgage of the land, with the grove standing thereon, was made by the mortgagor as a proprietor before any question of his being a mere exproprietary tenant arose. The mortgage of the trees, therefore, was perfectly valid, and it is open to question whether the mere fact that the mortgagor subsequently was found by the revenue court to be an exproprietary tenant, in consequence of the transfer, renders the valid mortgage of the trees invalid. It is unnecessary for me to consider that point for reasons which will presently appear. In any case the point decided by the rulings mentioned does not arise, because there is no question whether the defendant as an exproprietary tenant is now able to transfer the grove or whether the grove can be attached and sold in execution of a decree against him.

The finding of the revenue court that the defendant is an exproprietary tenant of the land in suit (which finding is necessarily implied in the determination of rent payable by the defendant as an exproprietary tenant) is, in my opinion, binding upon the civil courts and cannot be challenged.

The decision of this appeal appears to me to turn upon the provisions of the last paragraph of Section 15 of the Agra Tenancy Act of 1926. Section 15 lays down certain rules regarding the relinquishment of exproprietary rights. The last paragraph runs as follows:—

"Notwithstanding anything in this section, where the property transferred by means of a mortgage of the kind specified in Sub-section (5) of Section 14 consists wholly of a specific area of sir, the mortgagor may by simultaneous agreement in writing waive his exproprietary rights, and in that case the mortgaged land shall, if the mortgagor regains within 12 years of the date of the transfer possession thereof on repayment of the mortgage, resume the character of sir."

In my opinion the terms of this provision apply exactly to the facts of the present case. The property was transferred by a usufructuary mortgage which is a mortgage of the kind specified in Sub-section (5) of Section 14. The property consisted wholly of a specific area of sir. The mortgagor, moreover, in the mortgage deed itself expressly agreed in writing that in the event of his being declared an exproprietary tenant he would be liable to pay the rent determined but the mortgagee should retain full possession and enjoyment of the mortgaged property, that is the grove. In my opinion this amounts to a waiver of his exproprietary rights, since he expressly consented that the mortgagee should retain

CIVIL
1931
RAGHUNATH PRASAD
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JWALA PRASAD
King, J.

possession of the mortgaged property which would form the subject of the ex-proprietary rights.

In view of this express provision of the Agra Tenancy Act I think it is not open to the mortgagor to claim that he can disregard the terms of the contract of mortgage, and that he can insist upon retaining possession of the land and grove in exercise of his rights as an exproprietary tenant.

In my opinion the courts below have come to a right decision and I dismiss the appeal with costs.

Panna Lal for the appellants.

Krishna Murari Lal for the respondents.

The judgment of the Court was delivered by

Sen, J

SEN, J.—We are clearly of opinion that the judgment under appeal is correct and ought to be affirmed. Where property is transferred by a usufructuary mortgage in terms of Section 14, Sub-section 5 of the Agra Tenancy Act of 1926 and there is a stipulation in the mortgage bond that the mortgagee is to retain full possession and enjoyment of the mortgaged property including the trees appertaining to an exproprietary holding, the mortgagee cannot be deprived of the benefit of this stipulation. This is perfectly clear from the language of the last paragraph of Section 15 of the Act. We dismiss this appeal with costs.

Appeal dismissed

CIVIL
1932
March 4
MUKERJI, J.
BENNET, J

SURAJ BHAN UGARSEN—IN THE MATTER OF*

Income-tax Act (XI of 1922), Secs. 66(2), 23(4), 30 and 31—Assessment by Income-tax Officer under Sec. 23(4)—Assistant Commissioner considers assessment properly made—No order under Sec. 31—No reference lies to High Court.

Where the Assistant Commissioner of Income-tax considers that the assessment by the Income-tax Officer is *properly* made under Sec. 23(4), no appeal lies to him under Sec. 31 (in accordance with the proviso to Sec. 30) and there is no order under Sec. 31, and no reference therefore lies to the High Court in accordance with the provisions of Sec. 66(2).

Vishwa Mittra for the applicant.

U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—These are two references by the Commissioner of Income tax at the instance of a Hindu joint family of whom the manager is one Surajbhan Ugarsen. In one case the assessment is for the years 1930-1931 and in the other case for the years 1929-1930 under Section 34. In each case there was non-compliance with the orders of the Income tax Officer. In regard to the earlier year the Income tax Officer issued a notice under Section 22(2) read with Section 34 requiring a return of income for the year 1929-1930. The assessee submitted a return of Rs.1,500 as an estimated income from interest and stated that an approximate amount was given because the assessee had kept no accounts previous to April 1, 1929. The Income tax Officer held that this was not a valid return and accordingly he made a best judgment assessment under Section 23(4). An appeal was filed by the assessee and the Assistant Commissioner of Income tax considered the reasons which had led the Income tax Officer to assess under Section 23(4) and he held that those reasons were sufficient and therefore no appeal lay under Section 31 in accordance with the proviso to Section 30. As the Assistant Commissioner of Income tax has considered whether the assessment was properly made under Section 23(4) and has held that no appeal lies therefore there was no order under Section 31. As there was no order under Section 31 no reference lies to this Court in accordance with the provisions of Section 66, Sub-section (2).

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*Mis. 764 of 1931

The case for the assessment in regard to the year 1930-1931 is similar. A notice was issued under Section 22(4) requiring the assessee to submit cash books and ledgers and original bonds and promissory notes and again a notice was issued under the same section requiring him to submit cash books and ledgers in regard to petrol and kerosene oil agency in Dehra Dun, cash books and ledgers in regard to a cloth shop in Dehra Dun and cash books and ledgers for money-lending and grain business at another place. The assessee failed to produce any books in regard to the Dehra Dun business on grounds that they had been previously shown to the Income tax Officer, Dehra Dun and he alleged that he had no account books before the years 1927-1928 and 1928-1929 for this money-lending business. The Income tax Officer held on certain evidence that there must have been account books for the money-lending business for the years not produced and that the reasons for not producing the books in regard to the Dehra Dun business were insufficient. An assessment was therefore made under Section 23, Sub-section (4). An appeal was filed by the assessee. The learned Assistant Commissioner considered the grounds which had led the Income tax Officer to consider that the assessment should be made under Section 23(4) and held that those were good grounds. Accordingly no appeal lay under Section 31. As already stated when no appeal lies under Section 31, no reference lies under Section 66(2).

Our decision, therefore, in both these cases is that no reference lies to this Court and accordingly we refuse these references with costs. We allow the fees to the Government advocate of Rs.150 conditional on his filing a certificate of payment within the period prescribed by the Rules of this Court. The costs of the references will be paid by the assessee.

Reference refused

CIVIL

1932

March 29

MUKERJI, J.
BENNET, J.

DAMBAR LAL (*Judgment-debtor*)
versus
CHAND MAL AND OTHERS (*Decree-holders*)*

Limitation Act, Art. 182, Cl. (5)—Application for execution filed after expiry of prescribed period—Previous application made under Or. 21, R. 11—Not accompanied by affidavit required by Or. 21, R. 66(3)—Rules 11 to 14 complied with—Whether application "in accordance with law" so as to save limitation.

An application for execution of a final decree for sale in a suit on a mortgage was made by the decree-holder, who claimed that limitation was saved under Art. 182(5), Limitation Act, by a previous application under Or. 21, R. 11. On behalf of the judgment-debtor it was alleged that the previous application was not 'in accordance with law' because it was not accompanied by the affidavit required by Or. 21, R. 66(3) and the certificate of the Sub-registrar as regards prior encumbrances. *Held,* (1) that it was not shown that any of the rules 11 to 14 of Or. 21 were not complied with and therefore the application under Rule 11 was an application according to law; (2) that the affidavit and the certificate should be filed at a subsequent stage.

EXECUTION FIRST APPEAL from a decree of MAULVI MUHAMMAD AQIB NOMANI, Subordinate Judge of Agra.

B. Malik for the appellant.

Gopi Nath Kunzru for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is an execution first appeal by a judgment-debtor and the sole point raised is that the application for execution is beyond time. There was a final decree for sale in a suit on a mortgage, the decree being dated October 26, 1925. The present application for execution is dated August 1, 1930. The decree-holder claims that limitation was saved under the Indian Limitation Act, Article 182, Clause (5) by an application under Order XXI, Rule 11 dated November 26, 1927. The sole question is whether that application was "an application in accordance with law" as is necessary under the Limitation Act Article quoted. On behalf of the appellant it is alleged that the application was not in accordance with law because it was not accompanied by the affidavit required by Order XXI, Rule 66(3) and the certificate of the sub-registrar as regards prior encumbrances. We consider that that certificate and affidavit should be filed at a subsequent stage from the application for execution under Order XXI, Rule 11. When the application for execution was filed the court should have dealt with it under Order XXI, Rule 17 which lays down that the court is to ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with. It is not shown that any of these Rules 11 to 14 were not complied with and therefore in our opinion the application under Rule 11 was an application according to law. We therefore consider that limitation was saved by this application and we dismiss this appeal with costs.

Appeal dismissed

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*E. F. A. 173 of 1931

CRIMINAL
1932
April 28
KING, J
THOM, J.

HAR PRASAD
versus
KING-EMPEROR*

Municipalities Act (Local Act II of 1916), Secs. 307, 318 and 321(1)—Prosecution under Sec. 307—Accused's failure to comply with notices ordering him to remove certain construction—Remedy under Sec. 318 not availed of—Whether trying magistrate precluded from questioning legality or validity of notices.

The accused was prosecuted under Sec. 307 of the Municipalities Act of 1916 for failure to comply with two notices issued by the Municipal Board under Secs. 186 and 211 ordering him to remove a certain construction which was encroaching upon a public drain, and it was proved that the notices had been served and not complied with. The accused maintained that he had not made any encroachment on the public drain and therefore the Municipal Board had no jurisdiction to issue the notices. *Held,* that Sec. 318 gave to the accused a remedy by way of appeal to the District Magistrate to challenge the legality or validity of the notices under Secs. 186 and 211 of the Act and as he failed to avail himself of that remedy, the criminal court was, under Sec. 321, precluded from questioning the legality or validity of the notices.

There is nothing in the language of Sec. 307 of the Municipalities Act of 1916 which indicates that it is the duty of the court to satisfy itself that the notice was "lawfully" issued by the Municipal Board. *King-Emperor* v. *Piare Lal,* 12 A. L. J. 254 *referred to*. *Mannu* v. *Emperor,* 18 A. L. J. 187 *relied on.*

CRIMINAL REFERENCE made by the Sessions Judge of Mainpuri.

The applicant was not represented.

M. Waliullah (Assistant Government Advocate) for the Crown.

Krishna Murari Lal for the Municipal Board.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a reference by the learned Sessions Judge of Mainpuri recommending that a conviction and sentence passed by a Magistrate under Section 307 of the U. P. Municipalities Act, 1916, be set aside.

The facts are that there was a certain plot No. 2357 situated within the limits of the Mainpuri Municipality. In this plot there is a *nallah* through which the drainage of that locality passes. The accused Har Prasad *alias* Lallu is alleged to have started making a certain construction which encroached upon the *nallah,* partly blocking it up and interfering with the drainage. The Municipal Board issued a notice to him under Section 186 of the Municipalities Act, which was served upon him on October 30, 1928, requiring him to stop immediately the construction which he was making without permission. The accused did not comply with this notice which admittedly was served upon him.

On June 21, 1929 a second notice was served upon him by the Municipal Board under Section 211 ordering him to remove the construction, which was encroaching upon the public drain, within one month. The accused neglected to comply with this notice also. The Municipal Board thereupon instituted the prosecution under Section 307 for failure to comply with the two notices. The case was tried summarily. It was proved and admitted that the accused had been served with the two notices issued by the Municipal Board. It was also proved that he had not complied with the notices. The accused maintained that he had not made any encroachment on the public drain and therefore the Municipal Board had no jurisdiction to issue the notices. This was his only ground of defence. The trial court held that, as the accused was entitled under the Municipalities Act to appeal to the District Magistrate under Section 318, if he had any objection to complying with the notices served upon him, and as he had failed to avail himself of that remedy, the criminal court was precluded under Section 321 from considering the question whether the notices were valid or invalid. The result was that the accused was fined Rs.15 for each offence.

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*Cr. Ref. 810 of 1931

The learned Sessions Judge was of opinion that the trial court was not precluded from going into the question whether the notices were legal and valid and held that the Magistrate should have taken evidence to show that the construction made by the applicant was an illegal construction to which the provisions of Sections 186 and 211 were applicable. The learned Sessions Judge therefore has made this reference recommending that the conviction and sentence be set aside and the Magistrate be directed to proceed with the case according to law.

This reference first came before a learned single Judge of this Court who considered that it raised an important question of law and directed that it be laid before a Bench of two Judges.

The Municipal Board has been represented before us by counsel. No one appears on behalf of the accused.

The main question which we have to consider is whether the Magistrate was bound, or authorised, to go into the question whether the notices served by the Municipal Board upon the accused were legal and valid.

Section 318 gave to the accused a remedy by way of appeal to the District Magistrate (or to such officer as the local Government may appoint for such purpose) to challenge the legality or validity of the notices served upon him under Sections 186 and 211 of the Municipalities Act. The accused neglected to avail himself of the remedy prescribed by statute. It appears to us that, in these circumstances, the Magistrate was perfectly right in holding that, under the provisions of Section 321, he was precluded from questioning the legality or validity of the notices. Subsection (1) of Section 321 runs as follows:—

> No order or direction referred to in Section 318 shall be questioned in any other manner or by any other authority than is provided therein.

The language seems to us to be perfectly clear. Section 318 expressly lays down that

> Any person aggrieved by any order or direction made by a Board under the powers conferred upon it by Sections 186 or 211 may, within thirty days from the date of such direction or order, appeal to the District Magistrate.

Section 321 clearly shows that this is the only method by which the person served with a notice can challenge the validity of that notice and, if he fails to do so, no other authority such as a criminal court can question the validity of the notice.

The learned Sessions Judge referred to a ruling of this Court, *King-Emperor* v. *Piare Lal*[1]. In that case it was held that no one can be convicted of disobedience of a written notice of a Municipal Board for demolition of certain construction unless the court is satisfied that, what he had disobeyed, is a notice lawfully issued by the Board under the powers conferred upon it by the Municipalities Act. The court relied upon the language of Section 147 of the U. P. Municipalities Act of 1900 (Act I of 1900). That section provides a penalty for any person who disobeys any lawful direction given by the Board by public notice lawfully issued by it under the powers so conferred, etc. In view of the language of that Section it was held that it was incumbent upon the trial court to satisfy itself that the notice had, in fact, been lawfully issued by the Board under the powers conferred upon it by the Act. That decision clearly proceeded on the language of Section 147 of the old Municipal Act. The Legislature has introduced important changes in the language of Section 307 of the Municipalities Act of 1916, which corresponds to Section 147 of the old Act. Under Section 307 it is laid down that:

> If a notice has been given under the provisions of this Act . . to a person requiring him to execute a work, or do or refrain from doing anything within a time specified in the notice, and if such a person fails to comply with such a notice, then the said person shall be liable, on conviction

It will be noticed that in the present Section 307, the word "lawfully" has been omitted. There is nothing in the language of Section 307 which indicates that it is the duty of the court to satisfy itself that the notice was "lawfully" issued by the Municipal Board; probably this change of language was intentional, in order that it should be consistent with the provisions of Section 321 which prohibits any authority, other than the appellate authority specified in Section 318, from questioning the validity of the notice. The view which we take of the present law is supported by a decision of this Court in the case of *Mannu* v. *Emperor*[2].

In our opinion, the view taken by the trial court was perfectly right and the learned Sessions Judge has not appreciated the effect of the amendment of the statute.

We accordingly reject the reference and maintain the conviction and sentence. Let the record be returned.

Reference rejected

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[1] 12 A. L. J. 254

[2] 18 A. L. J. 187

Civil

1930

July 18

Sulaiman, J.
Banerji, J.

HIRAMBHO NATH BANERJI (*Judgment-debtor*)
versus
SAROJNI DEVI (*Auction-purchaser*)*

Civil Procedure Code, Or. 41, R. 5 and Sec. 151—Appeal from an order confirming sale under Or. 21, R. 92—Application by auction-purchaser for delivery of possession under Or. 21, R. 95—Judgment-debtor applies for stay—Whether High Court has power to order stay.

The judgment-debtor appealed to the High Court from an order confirming the sale of immovable property under Or. 21, R. 92. During the pendency of the appeal the auction-purchaser applied to the court below for delivery of possession under Or. 21, R. 95. The judgment-debtor therefore applied to the High Court for stay of proceedings relating to the delivery of possession. *Held,* (1) that the application for delivery of possession was 'a proceeding under the order' confirming the sale, and the appellate court had therefore power to order stay under Or. 41, R. 5; (2) that assuming that Or. 41, R. 5 did not apply, the appellate court had power under Sec. 151 C. P. C. to stay proceedings in a subordinate court from which an appeal was pending.

ORDER on application of Hirambho Nath Banerji, judgment-debtor.

P. L. Banerji, H. C. Mukerji and *R. C. Ghatak* for the applicant.

S. N. Seth, H. P. Sen and *J. C. Mukerji* for the opposite party.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an application for stay of execution in a First Appeal from order confirming an auction sale. In execution of a simple money decree the house property belonging to the applicant was put up for sale and purchased by a third party. An application was filed for setting aside the sale but it was dismissed and the sale was confirmed. Thereupon the sale certificate was duly granted and then the auction purchaser applied to the court below for delivery of possession under O. 21, R. 95. In the meantime the judgment-debtor has appealed from the order confirming the sale and has impleaded both the auction purchaser and the decree-holder.

A preliminary objection is taken to the hearing of this application on the ground that this Court has no jurisdiction to grant any stay. It is contended that O. 41, R. 5 is not applicable to this case because the application for delivery of possession is not a proceeding under the order confirming the sale but is a separate proceeding. It is also contended that when O. 21, R. 95 casts a duty upon the court below to deliver possession and gives it no discretion, this Court will have no inherent jurisdiction to order the stay and, in any case, we should not exercise that jurisdiction.

It seems to us that the expression "proceedings under a decree or order" in Order 41, R. 5 (1) is very wide and would include proceedings taken on the basis of a decree or order. It has to be conceded that the proceeding relating to the delivery of possession to an auction purchaser is not a proceeding in execution because the decree has been satisfied and the decree-holder has received his money. This was the view expressed by Banerji,

*Application in F. A. F. O. 90 of 1930

J. in *Bhagwati* v. *Banwari Lal*[1] in which Aikman and Griffin, JJ. concurred. The proceeding in reality is one between the judgment-debtor and his representative the auction purchaser." See also *Mohsin Raza* v. *Haidar Baksh*[2].

It does not however follow that the proceeding is not one under the order confirming the sale. Once the sale has been confirmed the court is bound to grant the sale certificate and O. 21, R. 94 does not even require a previous formal application to that effect. The effect of the grant of the sale certificate which is a ministerial act is to entitle the auction purchaser to apply for delivery of possession under R. 95. Such application therefore is an application on the basis of the order confirming the sale and is consequent upon it. We are therefore inclined to hold that it can be treated as "a proceeding under the order" confirming the sale. There seems to be no reason to limit the meaning of that expression to proceedings which are expressly directed by the order itself.

Assuming that O. 41, R. 5 does not apply to such a case, we have no doubt that the appellate court has inherent jurisdiction under Section 151 C. P. C. to make such order as may be necessary for the ends of justice. This power includes one for stay of proceedings in a subordinate court from which an appeal is pending (see 52 I. C. 185 and the cases referred to therein). It is quite clear that the order confirming the sale has not yet become final so far as the appellate court is concerned, and if the order of the court below is set aside the proceedings relating to the delivery of possession will become infructuous. We therefore think that we have power to interfere if a fit case is made out.

In the present case one of the two houses in suit in a single enclosure has been sold and purchased by a stranger. The other portion of the enclosure is still being occupied by the judgment-debtor. He offers to deposit the full sale price in the court below by August 15 at the latest. We think that having regard to the facts mentioned in the affidavit this is a fit case in which there should be a stay of proceedings. We therefore direct that the proceedings relating to the delivery of possession should be stayed on condition that the applicant deposits Rs.15,850 on or before August 15, 1930. If the amount is not deposited within that time, the stay order will automatically stand discharged. The time shall not be extended in any event. If the amount is so deposited, the auction purchaser would be at liberty to take the money out and in case of the dismissal of the appeal would have to redeposit it before taking delivery of possession. We make no order as to the costs of the application.

Application allowed

[1] I. L. R. 31 All. 82=6 A. L. J. 71

[2] 1928 A. I. R. All. 368

CIVIL

1932

Jan. 8

PULLAN, J.
NIAMAT-
ULLAH, J.

RAM SAHAI (*Plaintiff*)
versus
DEBI DIN (*Defendant*)*

Bundelkhand Alienation of Land Act (II of 1903), Secs. 16 (as amended by Act VII of 1929), 9 and 6—Mortgagor and mortgagee—Members of agricultural tribe—Suit for sale on mortgage instituted in 1924—No decree for sale could be passed in view of Sec. 16—Sec. 9 inapplicable—Order of Subordinate Judge consigning the case to the record room—Effect of—Whether amending Act revived proceedings.

The mortgagee, who was a member of an agricultural tribe within the meaning of the Bundelkhand Land Alienation Act (II of 1903), sued for enforcement of his mortgage executed by another member of an agricultural tribe but as a claim to a simple money decree was time-barred, he prayed for a decree under Or. 34, R. 4 C. P. C. for satisfaction of the mortgage money by sale of the mortgaged property. The Subordinate Judge, being of opinion that no decree for sale or for foreclosure could be passed, made a reference to the Collector with a view to the latter substituting a mortgage in the form prescribed by Sec. 6 in place of the mortgage then in suit. On the Collector's refusal to take action under Sec. 9, the Subordinate Judge referred the matter to the High Court under Or. 46, R. 1 C. P. C. and after the High Court's decision "that the law as it stood, left the mortgagee without a remedy" (*Ram Sahai Singh* v. *Debi Din*, 24 A. L. J. 945), the Subordinate Judge on June 10, 1927 ordered the case to be consigned to the record room. After the Bundelkhand Land Alienation Act had been amended in 1929, the mortgagee, who was protected by the newly added proviso to Sec. 16, applied for a decree for sale under Or. 34, R. 4 C. P. C. *Held*, that the order of the Subordinate Judge dated June 10, 1927 operated as a final adjudication of the rights of the parties and was a decree determining the suit for sale; and the amending Act could not have retrospective effect so far as to revive proceedings in a suit which had terminated before it was passed.

Govind Rao v. *Kamta Prasad*, I. L. R. 36 All. 376 *referred to.*

Strictly speaking there is no provision in the Act requiring the Collector to 'return' the reference. If the Collector cannot take action under Sec. 9, the proceedings before him terminate.

CIVIL REVISION from an order of J. N. MUSHRAN ESQ., Subordinate Judge of Banda.

S. N. Seth for the applicant.

A. Sanyal for the opposite party.

The judgment of the Court was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This is an application for revision of an order dated July 25, 1930 passed by the Subordinate Judge of Banda. The applicant, who is a member of an agricultural tribe within the meaning of the Bundelkhand Land Alienation Act, was a mortgagee under a deed of simple mortgage dated January 24, 1913 executed by Mst. Raj Rani, who is now represented by Debi Din the opposite party, who was also a member of such tribe. The land hypothecated by the aforesaid deed is 'land' within the meaning of that Act. The circumstances which have led to the revision are so inter-related to the provisions of the Bundelkhand Land Alienation Act II of 1903 that it is necessary to make a reference at the outset to Sections 6, 9 and 16 of the aforesaid Act. Section 6 provides that a member of an agricultural tribe can make a mortgage in one of the prescribed forms and not in others. Generally speaking the object of the Section is to minimise the chances of foreclosure, if not altogether to prevent it. Section 16 declares that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court. Section 9 provides, *inter alia,* that if a suit is instituted in any civil court on a mortgage not in the prescribed form made by a member of an agricultural tribe the court should refer the matter to the Collector who can modify the mortgage so as to make it conform to the provisions of Section 6. Broadly speaking, the mortgages permitted by Section 6 enable the mortgagee to remain in possession for a period not exceeding 20 years during which usufruct is to satisfy the mortgage money and at least interest which is, in no case, to run over and above the usufruct. After the expiry of the period the mortgagor is entitled to redeem on payment of the sum, if any, due on the mortgage.

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*Civ. Rev. 17 of 1931

To advert to the facts of this particular case, the mortgage of January 24, 1913 was in the form of a simple mortgage, the only remedy of the mortgagee being to obtain a simple money decree or a decree for sale of the mortgaged property. The mortgagee instituted a suit for enforcement of that mortgage in 1924, when a claim to simple money decree was barred by limitation. Accordingly he prayed for a decree under Order XXXIV, Rule 4 of the Code of Civil Procedure for satisfaction of the mortgage money by sale of the mortgaged property. The suit was contested. The Subordinate Judge was of opinion that no decree for sale could be passed in view of Section 16 of the Bundelkhand Land Alienation Act as that Section contained a clear provision against sale of 'land' belonging to a member of the agricultural tribe. No decree for foreclosure could be passed having regard to the terms of the mortgage deed. He however considered that Section 9 of the Bundelkhand Land Alienation Act was applicable, and accordingly on October 9, 1925 he made a reference to the Collector with a view to the latter substituting a mortgage in the form prescribed by Section 6 in place of the mortgage then in suit. The Collector, however, ruled that S. 9 was not applicable as both the mortgagor and the mortgagee were members of an agricultural tribe, the section being confined to cases in which the mortgage is made by a member of an agricultural tribe in favour of a person who is not a member of such tribe. The result of this view, which was subsequently upheld by this Court, was that a mortgagee who is a member of an agricultural tribe is in a worse position than a mortgagee who is not. The Collector refused to take action under Section 9 and returned the reference. Strictly speaking there is no provision in the Act requiring the Collector to 'return' the reference. If the Collector cannot take action under Section 9, the proceedings before him terminate. The Subordinate Judge, on receipt of the Collector's reply, made a reference to this Court under Order XLVI, Rule 1 of the Code of Civil Procedure asking for a decision of the question as to what was the proper remedy for the mortgagee in view of the Collector refusing to take action under Section 9. The matter was considered by a Full Bench in *Ram Sahai Singh* v. *Debi Din*[1]. The majority of the Judges composing the Full Bench held that Section 9 of the Bundelkhand Land Alienation Act, as it then was, did not apply to a simple mortgage between members of the same agricultural tribe. The learned Judges pointed out that there was a hiatus in the Act which worked injustice in a class of cases of which the one before them was an instance. They felt constrained to hold that the law as it stood left the mortgagee without a remedy. After this Court's decision on the reference, the Subordinate Judge passed an order, on June 10, 1927, in the following words:—

> No steps can be taken now. The reference has been decided against the decree-holder. It is accordingly ordered that the case be consigned to the record room.

The view expressed by the learned Judges was taken notice of by the Legislature and the Bundelkhand Land Alienation Act was amended by Act VII of 1929 which has added a proviso to Section 16 under which 'land' belonging to a member of an agricultural tribe can be sold in execution of a decree passed on foot of a simple mortgage made by him in favour of a member of the same tribe or to a member of an agricultural tribe residing in the district in which the land is situated. The amending Act came into force on September 14, 1929. The applicant is protected by the newly added proviso. The application which has given rise to this revision was made by him shortly afterwards praying for a decree for sale under Order XXXIV, Rule 4 of the Code of Civil Procedure being passed. The learned Subordinate Judge has held that the amending Act has no retrospective effect and that no decree for sale can be passed. The applicant questions the correctness of this view.

There is no doubt that this is a hard case, but the law as it stood when the suit was instituted and when it was "consigned to the record room" has so materially affected his position that the amendment since made in the law cannot help him. The order of the Subordinate Judge dated October 9, 1925, referring the case to the Collector under Section 9 is tantamount to an adjudication that no decree for sale could be passed (foreclosure being out of the question) and that the only relief which could be granted to the mortgagee was a reference to the Collector who, it was believed, could substitute a mortgage in the form prescribed by Section 6 for the mortgage then in suit.

Ordinarily a suit for sale of the mortgaged property terminates either in dismissal or in a decree under Order XXXIV, Rule 4 C. P. C. In cases in which the mortgagor is a member of an agricultural tribe and the Bundelkhand Land Alienation Act applied, a third course is possible, namely, a reference to the Collector who can take action under Section 9. In such a case the final order of the civil court is a reference to the Collector and no further proceedings can take place before the court which, *ex hypothesi,* cannot pass a decree for foreclosure or sale. In this case, however, the Subordinate Judge reopened the proceedings after the Collector's refusal to take action under Section 9 Bundelkhand Land Alienation Act

[1] 24 A. L. J. 945

and pursued the matter further by making a reference to this Court and it was not till June 10, 1927, after the decision of this Court, that he passed an order "consigning the case to the record room." It is contended by the learned advocate for the applicant that the suit not having been dismissed and no formal decree having been drawn up declaring the dismissal of the suit, it should be deemed to have been pending when the amending Act VII of 1929 was passed and also when an application was made for a decree under Order XXXIV, Rule 4 being passed. The argument is that neither the order dated October 9, 1925 nor that of June 10, 1927 can be considered to be a decree as defined in Section 2 of the Code of Civil Procedure and that therefore the suit never terminated. *Govind Rao* v. *Kamta Prasad*[2] is relied on as an authority for the proposition, that a reference under Section 9 of the Bundelkhand Land Alienation Act to the Collector does not terminate the suit. In that case the Collector refused to take proceedings on a reference being made to him under Section 9 on the ground that the mortgagor was not a member of an agricultural tribe. On such refusal the Subordinate Judge passed a foreclosure decree. In appeal to this Court it was held that the mortgagor not being a member of an agricultural tribe, the foreclosure decree passed after the refusal of the Collector to take action under Section 9 was a good decree. The only question which was raised before the court was whether the mortgagor in that case was a member of an agricultural tribe. On a consideration of the circumstances of the case it was held that he was not. The question whether the proceedings in a suit terminate on a reference being made to the Collector under Section 9 of the Bundelkhand Land Alienation Act was not raised and decided. It was assumed by the parties and by all the courts including this Court that the proceedings do not terminate. The case is therefore no authority for the proposition that on a reference being made by a civil court under Section 9, the suit must remain pending. It is not necessary to decide this question as in view of the subsequent order passed by the Subordinate Judge, on June 10, 1927, it is purely academic. If the Subordinate Judge did not intend by his order of October 9, 1925 to decide the case once and for all he must be deemed to have done so by his order of June 10, 1927. After an expression of opinion by a Full Bench of this Court, the Subordinate Judge clearly ruled that no relief could be given to the mortgagee and that the case "should be consigned to the record room." The suit was in effect dismissed. Refusal to grant any relief to a plaintiff can have no other meaning. Decree is defined in Section 2 of the Code of Civil Procedure as "The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." There can be no doubt that the adjudication in the case was that the mortgagee (the applicant) was not entitled to any relief in the view of the law taken by this Court. So far as the Subordinate Judge was concerned that was a final adjudication of the mortgagee's right to obtain relief on foot of the mortgage deed then in suit. The mere fact that a formal decree was not drawn up will not prevent the court's

[2] I. L. R. 36 All. 376

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final order operating as such adjudication. For these reasons we hold that the order dated June 10, 1927 operates as a final adjudication of the rights of the parties and is a decree determining the suit for sale.

The amending Act VII of 1929 now entitles a mortgagee who is a member of an agricultural tribe, claiming under a simple mortgage made by another member of an agricultural tribe to have the 'land' belonging to the mortgagor and mortgaged to him sold in execution of a decree passed on foot of his mortgage. It is not necessary to decide for the purposes of this case whether it has no retrospective effect as regards deeds executed before but sought to be enforced after the amending Act was passed. It is, however, perfectly clear that it cannot have retrospective effect so far as to revive proceedings in suits which had terminated before it was passed.

In this view of the case this application for revision must fail and is dismissed with costs.

Application dismissed

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1932
March 14
LORD BLANESBURGH
LORD TOMLIN
SIR GEORGE LOWNDES

PRIVY COUNCIL

THE COMMISSIONER OF INCOME TAX, BENGAL

versus

SHAW, WALLACE AND COMPANY*

Income-Tax Act (XI of 1922), Secs. 6(iv), 2(4), 10, 6(vi) and 12—"Income, profits and gains"—Meaning of—Sum received by agent from his principal as compensation for cessation of agency—Whether taxable—Sec. 4(3) (vii)—"Receipts arising from business"—Meaning of.

The object of the Indian Income-tax Act is to tax "income" which connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is loosely spoken of as "capital".

A sum received by an agent from his principal as compensation for the compulsory cessation of his agency cannot be regarded as profit or gain from carrying on the business or as income from "other sources" as mentioned in Sec. 6(*vi*) of the Income-tax Act and therefore such a sum is not taxable under the Act.

The expression "receipts arising from business" in Sec. 4(3) (*vii*) must mean receipts arising from the carrying on of business. *In re Turner Morrison and Co.*, I. L. R. 56 Cal. 211 *doubted.*

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal.

A. M. Dunne, K.C. and *R. P. Hills* for the appellant.

A. M. Latter, K.C. and *Cyril King* for the respondents.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—This is an appeal from a judgment of the High Court at Calcutta delivered on a reference made to it under Section 66 of the Indian Income Tax Act, XI of 1922. The reference was out of an assessment to income tax upon the respondents for the year 1929-30, in respect of an item of Rs.9,83,361, part of a larger sum of Rs.15,25,000 received by them in 1928 as compensation for the termination of certain agencies.

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*P. C. A. 108 of 1931

The respondents carry on business in Calcutta as merchants and agents of various companies, and have branch offices in different parts of India. For a number of years prior to 1928 they acted as distributing agents in India of the Burma Oil Company and the Anglo-Persian Oil Company, but had no formal agreement with either company. In or about the year 1927 the two companies combined and decided to make other arrangements for the distribution of their products. The respondents' agency of the Burma Company was accordingly terminated on December 31, 1927, and that of the Anglo-Persian Company on June 30 following. Some time in the early part of 1928 the Burma Company paid to the respondents a sum of Rs.12,00,000 "as full compensation for cessation of the agency," and in August of the same year the Anglo-Persian Company paid them another sum of Rs.3,25,000 as "compensation for the loss of your office as agents to the Company." The quotations are from letters by which the payments were recorded, and are accepted on both sides as correctly expressing the nature of the transactions.

The income tax officer, in computing the assessable income of the respondents for the relevant year, took these two receipts into account as profits or gains of their business in the year ending December 31, 1928, but allowed certain deductions therefrom in respect of compensation paid by the respondents to various employees, leaving a balance of Rs.9,83,361 which he included in the total income of the respondents found assessable for the year 1929-30.

The respondents objected to the assessment, and appealed to the Assistant Commissioner, who confirmed the assessment. Thereafter, on the requisition of the respondents, the Commissioner drew up a statement of the case, and referred the questions of law therein set out to the High Court with his own opinion thereon, which was against the contentions of the respondents.

The questions so formulated were as follows:—

> (*a*) Was not the sum of Rs.9,83,361 which had been included in the total income of the assessees for purposes of assessment for 1929-30, in the nature of a capital receipt and therefore not income, profits or gains within the meaning of the Income Tax Act?
>
> (*b*) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed under either of the Sections 10 and 12 of the Act, inasmuch as (1) it was not the profits, or gains of any business carried on by the assessees within the meaning of Section 10 of the Act, nor (2) income, profits or gains from other sources within the meaning of Section 12 of the Act?
>
> (*c*) In the alternative, was not the payment of Rs.9,83,361 an *ex gratia* payment in the nature of a present from the oil companies in question and was it not therefore exempt under Section (4) 3 (*vii*) of the Act?

The reference was heard by the Chief Justice sitting with Ghose and

Buckland, JJ. The judgment of the High Court was delivered by the Chief Justice, his colleagues concurring.

The learned Judges appear to have returned a formal answer only to question (*a*) which the Chief Justice stated to be "the real question in the case." He thought that if the respondents could not escape by reason of the contention raised by this question they must fail. The other questions, he thought, fell within a recent decision of the Court in the case of *In re Turner Morrison & Co.*[1]; he had nothing to add to what was then said on these points.

Their Lordships agree that the real matter for decision falls under (*a*), but they think that this question is not happily worded, as it seems to suggest that it was only if the sum there referred to was "in the nature of a capital receipt" that it would be exempt from assessment, whereas the more correct proposition would seem to be that it was only if it was in the nature of an income receipt that it would fall to be assessed to the tax. The question was, however, re-stated by the learned Chief Justice in more precise terms, viz., "whether these sums are income profits or gains within the meaning of the Act at all," and for the reasons stated in his judgment he came to the conclusion that they were not. Their Lordships think that his conclusion was right though they arrive at this result by a slightly different road.

In one part of his judgment the Chief Justice seems to hold that the "compensation for loss of these agencies is a receipt in respect of a capital asset in the nature of goodwill," but it has been objected with some force that there is nothing upon which this finding can be based. There was, so far as the facts disclose, no transfer of the goodwill of the respondents, and no agreement by them not to compete with the new selling agency of the companies.

In another part of the judgment the payment seems to be regarded as in the nature of compensation in lieu of notice. But here again their Lordships think that there are no facts to support such a conclusion, and they doubt if Section 206 of the Indian Contract Act upon which reliance is placed has any application.

Again their Lordships would discard altogether the case-law which has been so painfully evolved in the construction of the English Income Tax Statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not *in pari materia;* it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations.

The object of the Indian Act is to tax "income," a term which it does not define. It is expanded, no doubt, into "income profits and gains," but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return

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[1] I. L. R. 56 Cal. 211

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Sir George Lowndes

"coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital." But capital, though possibly the source in the case if income from securities, is in most cases hardly more than an element in the process of production.

The sources from which the taxable income under the Act are to be derived are enumerated in Section 6, which runs as follows:—

> Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—
>
> (*i*) Salaries.
> (*ii*) Interest on securities.
> (*iii*) Property.
> (*iv*) Business.
> (*v*) Professional earnings.
> (*vi*) Other sources.

The claim of the taxing authorities is that the sum in question is chargeable under head (*iv*) business. By Section 2(4) business "includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade commerce or manufacture." The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under Section 10 the tax is to be payable by an assessee under the head business "in respect of the profits or gains of any business *carried on by him*." Again, their Lordships think, the same central idea: the words italicised, are an essential constituent of that which is to produce the taxable income: it is to be the profit earned by a process of production. And this is borne out by the provision for allowances which follows. They include rent paid for the premises where the business is carried on; the cost of current repairs in respect of such premises; interest on money borrowed for carrying on the business, etc.

Some reliance has been placed in argument upon Section 4(3) (*v*) which appears to suggest that the word "income" in this Act may have a wider significance than would ordinarily be attributed to it. The subsection says that the Act "shall not apply to the following classes of *income*," and in the category that follows, Clause (*v*) runs:—

> Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund.

Their Lordships do not think that any of these sums, apart from their exemption, could be regarded in any scheme of taxation as income, and they think that the clause must be due to the over anxiety of the draftsman to make this clear beyond possibility of doubt. They cannot construe it as enlarging the word "income" so as to include receipts of any kind which are not specially exempted. They do not think that the clause is of any assistance to the appellant.

Following the line of reasoning above indicated, the sums which the appellant seeks to charge can, in their Lordships' opinion, only be taxable if they are the produce, or the result, of carrying on the agencies of the oil companies in the year in which they were received by the respondents. But when once it is admitted that they were sums received, not for carrying on this business, but as some sort of *solatium* for its compulsory cessation, the answer seems fairly plain.

If the business had been sold—even if that somewhat indeterminate asset known as the "goodwill" had been assigned to the employing companies, as the High Court seems to have thought it had—it is conceded that the price paid would not have been taxable. But why? Plainly because it could not be regarded as profit or gain from carrying on the business, and their Lordships think that the same reasoning must apply when the sum received is in the nature of a *solatium* for cessation.

It is contended for the appellant that the "business" of the respondents did in fact go on throughout the year, and this is no doubt true in a sense. They had other independent commercial interests which they continued to pursue, and the profits of which have been taxed in the ordinary course without objection on their part. But it is clear that the sum in question in this appeal had no connection with the continuance of the respondents' other business. The profits earned by them in 1928 were the fruit of a different tree, the crop of a different field.

For the reasons given their Lordships are of opinion that question (*a*) was rightly answered by the High Court in favour of the assessee. No objection has been taken to the form of the answer or to its sufficiency, and it would seem unnecessary therefore to deal with the other two questions. Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (*vi*) "other sources" and the corresponding provisions of Section 12.

With regard to the claim to exemption under Section 4(3)(*vii*), their Lordships think that the decision in the case of *In re Turner Morrison & Co.* to which reference has been made above, may need re-consideration in the light of this judgment. In their Lordships' view the expression "receipts arising from business" in that clause must mean receipts arising from the carrying on of business.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed

Solicitor, India Office—Solicitor for the appellant.

Linklaters and Pamis—Solicitors for the respondents.

ABDUL HALIM KHAN

versus

SAADAT ALI KHAN AND OTHERS*

CIVIL

1932

March 10

LORD BLANESBURGH

LORD TOMLIN

SIR GEORGE LOWNDES

Oudh Estates Act (I of 1869), Sec. 29—Widow of Mohammedan taluqdar—Power to adopt—Forfeited upon remarriage—Hindu Law—Adoption—Widow—Power to adopt—Whether exercisable after remarriage.

The widow of a Mohammedan taluqdar has, under the terms of Sec. 29 of the Oudh Estates Act (I of 1869), no power to adopt a son after her re-marriage.

A Hindu widow cannot, after re-marriage, make a valid adoption to her former husband.

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

B. Dube, K.C. for the appellant.

A. M. Dunne, K.C., M. A. Jinnah and *S. Hyam* for the respondents.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—The appellant in this case is the claimant to a large and valuable taluqdari estate in Oudh, known as Taluqa Nanpara, the succession to which is governed by Act I of 1869. The 1st respondent was at the date of the suit in possession of the estate, and unless the appellant is able to show a better title in himself, it is admitted that he cannot succeed.

The last full owner was Raja Muhammad Siddiq Khan, who died without issue on December 30, 1907. He left four widows surviving him, and by his will gave successive authorities to each of them to adpot a son. The 1st respondent is in possession as the adopted son of the second widow, Rani Saltanat. The appellant claims to oust him as the adopted son of the fourth widow, Rani Champa, on the ground that his (the appellant's) adoption was the only valid one. The other respondents are in possession of parts of the estate under a compromise with the 1st respondent.

The main question in the suit was whether the adoption of the appellant, the factum of which is admitted, was valid, and the first line of defence was that Rani Champa had been re-married to one Sher Mahomed Khan before the adoption of the appellant, and that for this reason his adoption was invalid.

The question of the re-marriage was contested at great length in the Oudh Court, as is testified by the bulky record now before the Board. The appellant, in addition to denying the re-marriage in fact, asserted that, previous to the date on which it was alleged to have taken place, Sher Mahomed Khan had been married to the sister of Rani Champa, and this was put forward as making the story of the latter's re-marriage impossible it being admittedly contrary to the Mohammedan law for a man to be the husband of two sisters.

The trial Judge and the Court of Appeal have concurrently held that the re-marriage of Rani Champa with Sher Mahomed Khan, on a date prior to the adoption of the appellant, is established by the evidence. They are also agreed that the alleged previous marriage with the Rani's sister, the burden of proving which was clearly upon the appellant, is not established. These findings must, in accordance with the recognized practice of the Board, be held conclusive as to the fact of the re-marriage.

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*P. C. A. 60 of 1931

It only remains to consider an alternative contention of the appellant that the re-marriage did not invalidate the adoption. This again has been negatived by both the Indian Courts, mainly on the strength of Clause 10 of Raja Muhammad Siddiq Khan's will. The official translation of this clause, which was before the trial judge, was in the following terms:—

> If any of the Ranis contract a second marriage after me she shall not be entitled to be profited by any of the paras of this will.

The learned Judge held that the power of adoption was on the same footing as a power of appointment and therefore "a benefit or privilege" conferred on the widow which she would, under the terms of this clause, forfeit upon re-marriage. He also thought that under Section 29 of the Oudh Estates Act (I of 1869), by which a conditional power of adoption is given to the widow of a Mohammedan taluqdar, the power could only be exercised by her if she were still his widow at the time of making the adoption.

In the Court of Appeal the translation of Clause 10 of the will was amended by the learned Judges, and this has now come up to the Board under the official seal of the Court. The amended translation runs as follows:—

> If any of the Ranis contract a second marriage after me she shall not be entitled to avail herself of any of the provisions of this will.

The learned Judges thought that on this reading of the clause it was clear that Rani Champa "on her re-marriage with Sher Mahomed Khan forfeited her power of adoption, and consequently the plaintiff's adoption made by her on July 25, 1914, is invalid."

Their Lordships, while not disagreeing with the reasoning of either of the Indian Courts on this question, think that the same result is to be arrived at in another way.

The parties being Mohammedans, there is no power to adopt under their personal law, and it is only conferred by Section 29 of the Act, and must be confined strictly within the limits there laid down. The section is as follows:—

> Every Mohammedan taluqdar, grantee, heir or legatee, and every widow of a Mohammedan taluqdar or grantee, heir or legatee, with the consent in writing of her deceased husband, shall, for the purposes of this Act, have power to adopt a son whenever, if he or she were a Hindu, he or she might adopt a son.

The power is thus exercisable by the widow of the taluqdar only under such circumstances that if she were a Hindu she would be entitled to adopt. It can, their Lordships think, hardly be doubted that a Hindu widow could not, after re-marriage, make a valid adoption to her former husband. Indeed, this is conceded by Mr. Dube, who has presented the appellant's case with ability and restraint. Their Lordships think that it necessarily follows that the widow of a Mohammedan taluqdar has, under

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the terms of the section, no power to adopt a son after her re-marriage, and that therefore the adoption of the appellant was invalid and conferred upon him no right to the Nanpara estate.

For these reasons their Lordships think that this appeal fails and that the appellant's suit was rightly dismissed by the trial Judge, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Appeal dismissed

Hy. S. L. Polak and Co.—Solicitors for the appellant.
Barrow, Rogers and Nevill—Solicitors for the respondents.

HIGH COURT

PARAS RAM CHAUBEY AND ANOTHER (*Defendants*)
versus
SHEO DHAN PANDEY AND ANOTHER (*Plaintiffs*)*

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Jan. 11
Pullan, J.
Niamatullah, J.

Mortgage—Possessory mortgage—Simple mortgage—Covenant—Mortgagor could not redeem first mortgage without payment of sum due under second mortgage—Suit for redemption of possessory mortgage—At a time when suit on second mortgage barred by limitation.

Besides the possessory mortgage of 1868, the mortgagor had executed in 1874 another bond in favour of the same mortgagee and the sum advanced under the bond was charged on the same property as was in possession of the mortgagee under the deed of 1868, and there was a clear stipulation that the mortgagor should not redeem the mortgage of 1868 without payment of the principal and interest due under the bond of 1874. The present suit was brought to redeem the possessory mortgage at a time when if the defendant had to sue on the bond of 1874 it would have been barred by limitation. *Held*, that limitation can be pleaded as against a plaintiff's claim but no defence can be barred by any Article of the first Schedule of the Limitation Act, and the mortgagor was not entitled to redeem the possessory mortgage without payment of the sum due under the second bond. *Aditya Prashad* v. *Ram Ratan Lal*, 57 I. C. 173; *Ram Kishore Ahir* v. *Ram Nandan Ram*, 25 A. L. J. 1086 *relied on.*

Second Appeal from a decree of Babu Krishna Das, Subordinate Judge of Ghazipur, confirming a decree of S. Ejaz Husain, Munsif of Ballia.

U. S. Bajpai and *J. P. Bhargava* for the appellants.
K. Verma and *A. P. Pandey* for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

Niamatullah, J.—This is a defendants' appeal and arises out of a suit for redemption. Both the courts below have decreed it, but on payment of a much smaller amount than that claimed by the defendant-appellants who are the legal representatives of the original mortgagee Ramyad Chaube. The plaintiffs are the transferees of the original mortgagor Brij Raj Dube. The principal question in controversy between the parties relates to a deed of further charge for Rs.100 carrying interest at

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*S. A. 1504 of 1928

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Niamat-ullah, J.

one-eighth per cent. It is alleged to have been executed by the mortgagor on September 22, 1874. The possessory mortgage sought to be redeemed was executed much earlier, on August 4, 1868. The defendant-appellants claim a sum of Rs.1,358-0-9 alleged to be due under the bond of 1874. Both the lower courts have disallowed this sum and decreed redemption on payment of Rs.213. It is not now in dispute that under the mortgage of 1868 the defendant-appellants were in possession of two plots, one of which was allowed to be redeemed on payment of Rs.86. The lower courts have therefore allowed redemption of the remaining plot No. 1358 on payment of the remaining sum of Rs.213 out of Rs.299 the original consideration of the usufructuary mortgage.

As regards the bond of 1874, the trial court held that the mortgagee's remedy for recovery of the sum due thereunder is barred by limitation, and that therefore no payment can be claimed as a condition precedent to the redemption of the usufructuary mortgage. The lower appellate court has disallowed the defendant-appellants' claim on the additional ground that it has not been shown that the bond of 1874 relates to the same property which had been mortgaged in 1868.

The case relied on by the lower appellate court and which might have influenced the trial court is *Kesar Kunwar* v. *Kashi Ram*[1], in which the opinion was expressed that a mortgagee cannot insist on payment of the sum due under a tacking bond unless his suit on the basis thereof is in time when the mortgagor's suit for redemption of the possessory mortgage is brought. In later rulings of this Court, e.g., *Ram Kishore Ahir* v. *Ram Nandan Ram*[2] this view was not approved and it was pointed out that limitation can be pleaded as against a plaintiff's claim and that no defence can be barred by any article of the first schedule of the Indian Limitation Act. We are clearly of opinion that this is so. The defendant-appellants are certainly entitled to have the sum due under the bond of 1874, if they are otherwise entitled regardless of the question whether their suit on foot of that bond, if now brought, would be barred by limitation.

The next question is whether the bond of 1874 creates a charge on the property sought to be redeemed. The lower appellate court has thrown some doubt on that aspect of the case. The plaintiff-respondents were not aware of the particulars of the mortgage of 1868. They stated in the plaint certain conjectural particulars as regards the date of the mortgage, the property in possession of the mortgagee and the amount advanced thereunder. It was not till the defendant-appellants filed their second written statement and a *phatbandi* which is in reality part of an award made by certain arbitrators in a dispute relating to the partition of the family property of the defendant-appellants and their co-parceners that the plaintiffs ascertained the correct particulars of the mortgage of 1868. Accordingly they amended their plaint and made allegations in accordance with the entries in the aforesaid *phatbandi* and such entries have been accepted by both the courts below in decreeing their suit for redemption. Now, the *phatbandi* also mentions the fact that besides the mortgage of 1868 the mortgagor had executed, on September 22, 1874, another bond for Rs.100 in favour of the same mortgagee and that the sum advanced

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[1] 37 All. 634=13 A. L. J. 889

[2] 25 A. L. J. 1086

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under the bond was charged on the same property as was in possession of the mortgagee under the deed of 1868. It is not disputed before us that the *phatbandi* is admissible in evidence for proving the fact that the sum advanced under the bond of 1874 is charged on the property which had been mortgaged in 1868, but it is contended that the entry in the *phatbandi* is not conclusive and it is possible that it refers to some other bond executed between the same parties on the same date for the same sum. It has never been suggested in this litigation that there was any other bond with identical description. The necessity of extrinsic evidence to establish the property hypothecated under the bond of 1874, arose from the fact that it did not specifically mention the property which had been mortgaged under the deed of 1868, which has not been produced. The lower appellate court has referred to a discrepancy in the name of the village according to the recitals contained in the bond of 1874. There is an obscure reference to a village Jauhi in which the property hypothecated under the bond of 1874 is recited to be situated. This may be a correct recital and it does appear that certain properties to which the possessory mortgage did not relate were hypothecated by the bond of 1874. Besides the security afforded by such property it contains a stipulation to the effect that the possessory mortgage should not be redeemed by the mortgagor without payment of the sum due under the bond of 1874. The difficulty arises from the fact that the bond of 1874 does not give any particulars of the 'possessory mortgage'. This ambiguity is cleared up by the *phatbandi* to which reference has already been made. We are satisfied that there is no difficulty as regards the identity of the usufructuary mortgage referred to in the bond of 1874 or as regards the property mortgaged thereunder.

On the construction of the bond of 1874 ther is no doubt that it creates a further charge on the property mortgaged by the deed of 1868. There is a clear stipulation to the effect that the mortgagor should not redeem the mortgage of 1868 without payment of the principal and interest due under the bond of 1874. The case of *Aditya Prasad* v. *Ram Ratan Lal*[3] is fully applicable, and we are bound to hold, that the plaintiff-respondents are not entitled to redeem plot No. 1257 in possession of the defendant-appellants under the mortgage of 1868 without payment of the principal and interest due under the subsequent bond of 1874. Accordingly, we allow this appeal, set aside the decree passed by the courts below and substitute therefor a decree in favour of the plaintiff-respondents for redemption of plot No. 1257 on payment of Rs.213 plus principal and interest due under the bond of September 22, 1874. The period for redemption is fixed at six months. The usual redemption decree shall be prepared.

Appeal allowed

[3] 57 I. C 173

CIVIL

1932

Jan. 29

MEARS, C. J.
SEN, J.

GOBARDHAN DAS AND ANOTHER (*Plaintiffs*)
versus
AFZAL HUSAIN AND (AFTER HIS DEATH) IQBAL HUSAIN AND OTHERS (*Defendants*)*

Transfer of Property Act, Secs. 55(2) and 55(1)(g)—Vendees—Property passes out of their possession—Suit for damages—Claim not founded upon covenant of indemnity in sale-deed—Whether vendees entitled to an implied warranty of title under Sec. 55(2).

Defendant purchased certain property. Part of the sale consideration was left with him for payment of the pre-existing mortgage. As the money was not paid, the vendors brought a suit for recovery of the unpaid purchase money against the defendant, and the present plaintiffs, who had purchased the property from the defendant, were also made parties to this suit; and a decree was passed against defendant personally and against the property in the hands of the plaintiffs. In execution of the decree, the property was sold. Thereupon the plaintiffs instituted the present suit for damages against the defendant, and the claim was not founded upon the covenant of indemnity contained in the sale-deed. ***Held,*** (1) that the cause of action for the present suit accrued on the date of plaintiffs' dispossession consequent upon the sale of the property, and they were entitled to damages by reason of a breach of an implied warranty of title under Sec. 55(2) T. P. Act; (2) that the former suit did not operate as *res judicata.*

SECOND APPEAL from a decree of J. C. MALIK ESQ., Additional Subordinate Judge of Fatehpur at Cawnpore, confirming a decree of BABU KISHORI LAL, Munsif of Fatehpur.

R. C. Ghatak for the appellants.

Zafar Mehdi and *Hyder Mehdi* for the respondents.

The judgment of the Court was delivered by

Sen, J.

SEN, J.—This is an appeal by the plaintiffs and is directed against the appellate decision of Mr. J. C. Malik, dated March 20, 1929, confirming the decision of the Munsif, Mr. Kishori Lal, dated June 19, 1928.

Chaudhri Afzal Husain owned zamindari shares in three villages, namely, Pindri, Moiya and Karmun. He sold these shares to Thakur Prasad and Baij Nath under a sale-deed dated August 14, 1919 for Rs.1,772. The sale-deed contained the usual indemnity clause which provided that if the vendees lost possession over the property sold in whole or in part the vendor would be liable to make good the loss together with interest at 1 per cent per annum. Baij Nath sold his share to Gobardhan Das plaintiff No. 1. Gobardhan Das was brother of Thakur Prasad. Thakur Prasad is dead. Bhagwat Das, plaintiff No. 2, is his son.

Chaudhri Afzal Husain had purchased the shares in Pindri and Moiya from Ikram Husain and Ghazanfar Husain under a sale-deed dated February 25, 1919. On the date of the execution of the sale-deed, Ikram and Ghazanfar were indebted to one Cheda Lal for a mortgage debt. They left Rs.700 of the purchase money with Chaudhri Afzal Husain for payment to Cheda Lal. Afzal Husain did not pay the money. Ikram Husain and Ghazanfar Husain, therefore, brought a suit (No. 224 of 1922, of the court of the Munsif of Fatehpur) for recovery of the unpaid purchase money against Afzal Husain and also against Gobardhan and Thakur Prasad. Afzal Husain pleaded that he was no longer liable for the amount because he had parted with the property. Gobardhan and Thakur Prasad pleaded that they were *bona fide* purchasers for value and had no notice that the property was subject to an encumbrance in favour of Cheda Lal. Presumably they took shelter under Section 40, Paragraph 2 of the Transfer of Property Act. Their contention was overruled by the trial court and a decree was passed on January 31, 1923 against Chaudhri Afzal Husain personally and against the property in the hands of Gobardhan Das and Thakur Prasad. In execution of this decree, the properties in Pindri and Moiya were sold on August 22, 1927. This led to the institution of the present suit by Gobardhan Das and Bhagwat Das for recovery of Rs.992 principal and Rs.69-4-0 interest from Chaudhri Afzal Husain for damages consequent upon the loss of the property purchased by them under the sale-deed dated August 14, 1919. This suit was instituted on March 22, 1928.

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*S. A. 918 of 1929

Various pleas were raised in defence, but the chief contention was that the decision in suit No. 224 of 1922 operated as *res judicata* inasmuch as it had been held therein that the predecessors-in-title of the plaintiffs had made the purchase of zamindari shares in mauza Pindri and Moiya with the knowledge that the property at the date of the purchase was subject to an encumbrance of Rs.700 in favour of Cheda Lal.

This plea found favour with the trial court which dismissed the suit. It held that the former decision operated as *res judicata*. It also held that the plaintiffs had agreed to purchase the properties as they were at the time of the sale and that they had before them the title deeds relating to the properties, a perusal of which was bound to disclose the pre-existing encumbrance. The lower appellate court has confirmed the decree.

It has been argued that the decision in the former suit does not operate as *res judicata* and that in view of Section 55 (1) (*g*) and Section 55 (2) of the Transfer of Property Act it was the statutory duty of Afzal Husain to discharge whatever encumbrance existed upon the property on the date of the sale.

We are of opinion that the courts below have erred in holding that the claim is barred by the rule of *res judicata*. In the former suit Afzal Husain had pleaded that he had sold away the property to Gobardhan Das and Thakur Prasad and that the plaintiffs' remedy lay not against him personally but against the purchasers and against the property in their hands. Gobardhan Das and Thakur Prasad pleaded that they were *bona fide* purchasers for value without notice and that the plaintiffs had no remedy either against them or against the property in their hands. No question arose whether Gobardhan Das and Thakur Prasad would be entitled to claim damages from Afzal Husain if the property passed out of their possession. Under the decree dated Jan. 31, 1923, Ikram Husain and Ghazanfar Husain could proceed either against Chaudhri Afzal Husain personally or against the property in the possession of Gobardhan Das and

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Sen, J.

Thakur Prasad. They chose to proceed against the latter and the property was sold on August 22, 1927. No loss accrued to the plaintiffs till the property was actually sold. The cause of action for the present suit accrued on the date of plaintiffs' dispossession consequent upon the sale of the property. The plaintiffs were entitled to relief against the defendant by reason of a partial failure of consideration. They were entitled to rely upon the covenant of indemnity contained in the sale-deed. They did not rely upon the said covenant and the claim was not founded upon a breach of the covenant contained in the sale-deed. They, however, were entitled to an implied warranty of title which has received statutory recognition in Section 55 of the Transfer of Property Act. In the case of a breach of covenant or warranty of title the vendees were entitled to repudiate the sale altogether or to claim compensation for the breach. The cause of action for the suit arose as the result of the breach. The cause of action for the present suit was distinct from the cause of action in suit No. 224 of 1922. The cause of action was consequent upon the execution of the decree in that suit resulting in the deprivation of the property purchased by the plaintiffs. The decision in the former suit could not operate as *res judicata* in another suit in which the cause of action was distinct.

Neither the trial court nor the lower appellate court has gone into the question as to the amount of loss sustained by the plaintiff by reason of the deprivation of the properties. In paragraph 5 of the plaint, the plaintiff stated that the value of the shares in the villages lost to him was Rs.992. The defendants in their written statement disputed the correctness of this proposition. The case cannot be disposed of without a finding on the aforesaid issue. As the courts below have disposed of the case upon a preliminary ground and as we have come to the conclusion that the decision on the preliminary ground is erroneous, we allow the appeal, set aside the decrees of both the courts below and remand the case through the lower appellate court to the trial court for reinstatement under its original number for disposal according to law.

We allow no costs to the plaintiff-appellants because of the negligence with which the plaint was drawn up. Great stress was laid by the learned advocate for the appellants upon the indemnity clause in the sale-deed. The suit was not founded upon a breach of the warranty of title as contained in the sale-deed. The plaintiffs succeed because of the breach of the warranty of title which must be implied under Section 55 of the Transfer of Property Act. We therefore allow no cost to the plaintiffs either of this court or of the courts below.

Appeal allowed
Case remanded

Civil

1932

April 10

King, J.

JAG NARAIN PANDEY AND ANOTHER (*Plaintiffs*)
versus
MATA BADAL AND ANOTHER (*Defendants*)*

Court-fees Act, Sec. 19, Cl. XX—Applicability of—Application under Sec. 13 for refund of court-fees—Not chargeable with court-fees.

No court-fee is chargeable on an application, under Sec. 13 of the Court-fees Act, for refund of court-fees.

STAMP REFERENCE.

A. P. Bagchi for the applicants.

The following judgment was delivered by

King, J.

KING, J.—This is a reference under Section 5 of the Court Fees Act, 1870, and the question raised is whether an application under Section 13 of the Act, for refund of court-fees, is chargeable with a court-fee.

The application in question was made to the High Court which passed the remand order in consequence of which the refund is claimed. Under Schedule II, Art. 1 (*d*) a court-fee of Rs.2 is chargeable upon every application (not otherwise specially provided for) when presented to a High Court, unless some ground for exemption is established.

The applicant claims exemption under Section 19, Clause XX. This lays down that no fee is chargeable upon an "application for the payment of money due by Government to the applicant." *Prima facie* this clause is applicable to the facts of this case. The court-fee was credited to Government. If the court-fee is refundable under Section 13 (which is mandatory and not discretionary in its terms) then I think it must be held that the money claimed is due by Government to the applicant, and an application for the payment of such money is covered by Section 19 (XX).

It is admitted that the practice of this Court before 1927 was to charge no court-fee on applications for the refund of court-fees. The Taxing Officer relies upon a Local Government Notification No. C|276|X-530-1927 for holding that the previous practice was wrong. That notification modified the court-fee prescribed in Schedule II, Art. 1 (*d*) in respect of applications to the High Court for payment of deposits. Instead of a final fee of Rs.2 being payable on every such application, the notification laid down a graduated scale of fees, starting with 2 annas, according to the amount of the deposit. This notification does no doubt show that court-fees are chargeable on applications for payment of deposits made by parties to civil suits. It has also been expressly held in *Haridasi Debi* v. *Gopeshwar Pyne*[1] that an application for the refund of a deposit, for costs of the preparation of a paper book of a Privy Council appeal, is chargeable with a court-fee. In my opinion neither the notification nor the ruling are in point. The repayment of a deposit is very different from the refund of a court-fee. The money paid for a court-fee is paid to Government outright. If the money is refundable under Section 13, the money is due by Government. The incidents of deposits made by parties in civil suits

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*Stamp Ref. in S. A. 823 of 1929

[1] 27 C. W. N. 646

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King, J.

are quite different. I think it is only through a misunderstanding that the notification has been taken to mean that court-fees are chargeable on applications for the refund of court-fees and the previous practice has accordingly been changed. The language of Section 13 supports the view that no court-fees are chargeable on applications for refund under that Section. It is laid down that "the full amount of fee" is to be paid. In the present case the applicant claims a refund of Rs.3-12-0. If he has to pay a fee of Rs.2 in order to claim Rs.3-12-0, I do not think he can properly be said to recover "the full amount of fee". If the sum claimed is less than Rs.2, as it might be, it seems absurd to require the applicant to pay a further court-fee exceeding the amount claimed. If the Act required such applications to be charged with court-fees, I think Government would certainly have introduced a graduated scale of fees (as it has done in the case of deposits) in order to avoid the absurdity of charging Rs.2 on an application for the refund of sums less than Rs.2.

In my opinion Section 19, Clause XX covers the case and no fee is chargeable on the application.

Reference answered

CIVIL

1932

May 3

KENDALL, J.

HARNARAIN SAHI (*Judgment-debtor*)
versus
GOVIND RAI (*Decree-holder*)*

Civil Procedure Code, Or. 41, R. 6(2)—Interpretation of—Decree—Appeal—Order for sale of immovable property in execution—Whether execution court obliged to stay sale in every case.

Or. 41, R. 6(2) is not to be interpreted to mean that in *every* case where an order has been made for the sale of immovable property in execution of a decree from which an appeal is pending, the executing court is obliged to stay the sale on the application of the judgment-debtor.

APPLICATION for stay of execution proceedings.

M. Waliullah for the applicant.

Shambhu Prasad (for *Shiva Prasad Sinha*) for the opposite party.

The following judgment was delivered by

Kendall, J.

KENDALL, J.—This is an application under Order XLI, Rule 5 of the Code of Civil Procedure for stay of execution proceedings. It is made on the ground that the judgment-debtor entered into a compromise with the decree-holder to the effect that the latter should execute his decree against the villages of Singha and Mahesra, which were said to be free from encumbrance; and that if any encumbrance were discovered on these villages the decree-holder should proceed against the villages of Pakaryar and Sorha. The decree-holder has however proceeded against these two latter villages on the allegation that village Singha had an encumbrance on it. On the question of whether there is an encumbrance on this village the two lower courts have decided that there is, but a second appeal is pending.

The applicant states in paragraph 12 that he will suffer an irreparable injury and may have to pay substantial compensation if the villages of Sorha and Pakaryar are sold. This is explained by the allegation that he has entered into a deed of partition with his wife and son by which they become the owners of these two villages. Apart from this there is nothing to show why he should suffer any more substantial loss by the sale of these two particular villages than of the others which he is willing to offer for sale. If he really has transferred the villages of Sorha and Pakaryar to his wife and son, he may have to pay compensation to them under some private arrangement, but will himself be compensated by escaping from the liability that would attach to his own villages. Moreover, if the villages have been transferred it is difficult to see on what principle the judgment-debtor can come into court and object to their sale. The proper remedy would be for the transferees to make an objection under Order XXI, Rule 58 C. P. C.

In short, after hearing counsel on both sides I am not satisfied that there is sufficient reason for the stay of the sale under Rule 5 of Order XLI.

The suggestion was made that the sale could be stayed under Clause (2) of Rule 6 of Order XLI. As the interpretation of this rule has on some occasions given some difficulty I have considered the matter somewhat carefully. Clause (2) of Rule 6 reads as follows:—

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*Application in E. S. A. 182 of 1932

> Where an order has been made for the sale of *immovable property* in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the court which made the order, *be stayed* on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.

and Rule 8 of the same Order provides:—

> The powers conferred by Rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

as is the case here.

If this Rule is to be interpreted to mean that in every case where an order has been made for the sale of immovable property in execution of a decree from which an appeal is pending, the executing court is obliged to stay the sale on the application of the judgment-debtor, then the present application might succeed on the ground that the High Court will have jurisdiction to pass an order that ought to have been but has not been passed by the executing court.

Rules 5 to 8 of Order XLI are the rules covering stay of proceedings and of execution, and the marginal notes to Rule 5 show that that is the rule that is applied to stay of proceedings and of execution, while the marginal notes to Rule 6 show that that is the rule that is applied to security. Clause (1) of Rule 6 shows that where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken (from the decree-holder executing the decree) for restitution. Clause (2) shows that where an order has been made for the sale of immovable property in execution of a decree for which an appeal is pending, the sale shall be stayed on the application of the judgment-debtor to the court which ordered the sale 'on such terms as to giving security or otherwise as the court thinks fit.' The attention of the Legislature seems in both these clauses to have been directed to the manner in which security should be demanded, and as the rule immediately follows Rule 5, which prescribes the manner in which execution proceedings may be stayed, the whole of Rule 6 must, I think, be held to be complementary to Rule 5, providing in fact an explanation of the word 'security' which has been used in Clause (*c*) of Sub-rule (3) of Rule 5. I am not, therefore, of opinion that Clause (2) of Rule 6 was intended to impose on the court which ordered the sale an obligation to stay the sale merely because the property which is to be sold is immovable property.

The result is that the present application fails and is dismissed with costs.

Application dismissed

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1932

Jan. 12

MEARS, C. J.
SEN, J

SRI RAM SINGH AND OTHERS (*Defendants*)
versus
BALDEO PRASAD AND OTHERS (*Plaintiffs*)*

Civil Procedure Code, Sec. 11—Rule of Res judicata—*As between co-defendants—Criterion—Evidence Act, Sec. 115—Estoppel—Conditions to be fulfilled—Tenancy Act (II of 1901), Sec. 22—Occupancy holding—Succession.*

The plaintiffs, who were the heirs of the mortgagor under the personal law, instituted the present suit for redemption of a usufructuary mortgage of an occupancy holding. The mortgagees contested the suit on the ground that the plaintiffs were not the heirs to the mortgagor under the Tenancy Law in force at the time the inheritance opened (Sec. 9 of Act XII of 1881). Prior to this the zamindar had instituted a suit in the revenue court against the present plaintiffs and defendants for possession of the occupancy holding on the allegation that on the death of the tenant (mortgagor) without leaving any heirs, the holding lapsed to her as zamindar. The present plaintiffs did not contest the suit. The present defendants however contested the suit on the ground that the tenant had died leaving the present plaintiffs as heirs. This plea found favour with the revenue court which dismissed the suit for ejectment. The plaintiffs contended that the decision of the revenue court operated as *res judicata*, and it was not now open to the mortgagees to take the plea that the plaintiffs were not the heirs to the mortgagor. *Held*, (1) that there was no conflict of interest between the present plaintiffs and defendants, who were arrayed as defendants in the revenue court, and the revenue court decision did not operate as *res judicata. Munni Bibi* v. *Tirloki Nath*, 1931 A. L. J. 453; (2) that whether or not the plaintiffs were the legal heirs of the tenant (mortgagor) was as much within their knowledge as that of the defendants, and the attitude of the defendants in the revenue suit did not in any way mislead the plaintiffs or induce them to alter their position, and Sec. 115 Evidence Act did not apply. *Ram Saran Singh* v. *Munshi Syed Amin Ali*, 13 Moore's I. A. 551 *applied.*

An occupancy tenure is the creation of statute, and where a special rule of succession has been laid down in the statute, it is the statute which regulates the devolution of inheritance and not the personal law of the tenant (Sec. 9 of Act XII of 1881 and Sec. 22 of Act II of 1901). *Bhura* v. *Shahabuddin*, I. L. R. 30 All. 128.

LETTERS PATENT APPEAL from a judgment of the HON'BLE MR. JUSTICE DALAL.

N. P. Asthana and *B. N. Sahai* for the appellants.

K. N. Katju and *R. C. Ghatak* for the respondents.

The judgment of the Court was delivered by

SEN, J.—This is an appeal by some of the defendants in a suit for redemption of a mortgage and is directed against a judgment of this Court under Section 10 of the Letters Patent. *Sen, J.*

One Parmanand Lal possessed an occupancy holding in Mouza Bhaipur Kalan, pargana Bhulli, in the district of Mirzapur which consisted of 27 plots comprising an area of 15 bighas and 10 biswas. On June 26, 1885, he executed a usufructuary mortgage of the entire holding in favour of

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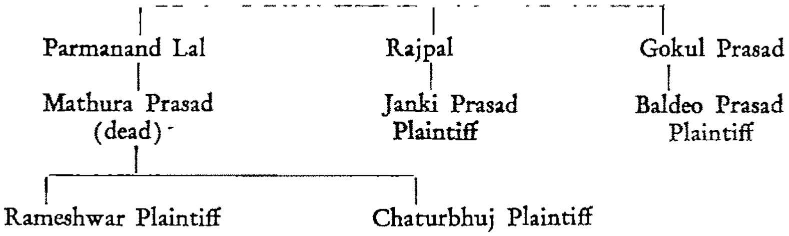
*L. P. A. 6 of 1931

Udit Singh for Rs.175. Later on, Parmanand Lal executed another usufructuary mortgage of the identical plots in favour of one Bhagwan Lal for Rs.475 on January 21, 1901 and left Rs.175 with the mortgagee for payment to Udit Singh under the earlier mortgage. It was stipulated in this document that this mortgage was to remain in force for 59 years. On April 29, 1904, Bhagwan Lal sold his mortgagee rights to Mukutdhari Lal, son of Udit Singh, for Rs.499. Mukutdhari Lal was the father of defendants Nos. 1 to 3 and grandfather of defendants Nos. 4 and 5. On March 11, 1924, the sons of Mukutdhari Lal made a sub-mortgage in favour of defendants Nos. 6 to 9. No effect appears to have been given to this sub-mortgage, and on May 8, 1926, they sold the mortgagee rights under the document, dated April 29, 1904, to defendants Nos. 6 to 14.

On January 10, 1927, the suit which has given rise to this appeal was instituted by Janki Prasad, Baldeo Prasad, Rameshwar Prasad and Chaturbhuj for redeeming the mortgage, dated June 26, 1885 on payment of Rs.175. The plaintiffs claimed to be the heirs of Parmanand Lal. The following genealogical table will elucidate the relationship:—



Plaintiffs alleged that Parmanand Lal died 29 or 30 years before suit, that Rajpal and Gokul Prasad were alive at the time of his death, that the equity of redemption was inherited by his brothers and that it devolved subsequently upon the four plaintiffs. They further alleged that the usufructuary mortgage bond, dated January 21, 1901 was collusive, fictitious and without consideration. They also impugned the deed of assignment, dated April 29, 1904 on the same grounds. In 1922, Rani Surajpal Kuer, zemindar of mouza Bhulli Kalan had instituted a suit in the revenue court against the present plaintiffs and defendants Nos. 1 to 5 for possession of the occupancy holding. This was suit No. 543 of 1922. The Rani alleged that Parmanand Lal had died without leaving any heirs and that the occupancy holding had lapsed to her as the zemindar. The present plaintiffs did not contest the suit. The other defendants, who were the successors-in-interest of Udit Singh, in their written statement dated July 11, 1923 resisted the suit on the ground that Parmanand Lal had not died without leaving any issue, that defendants Nos. 1 to 5 (brother and nephews of Parmanand Lal) were his heirs and that the occupancy holding had not lapsed to the zemindar. These pleas found favour with the revenue court, which dismissed the suit on September 28, 1923.

Since the dismissal of the suit, defendants Nos. 1 to 5 and their transferees have continued to remain in possession of the occupancy holding.

Plaintiffs contended that they were entitled to redeem the mortgage as they were the heirs of Parmanand Lal under the personal law and had an interest in the holding under Section 91(*a*) of the Transfer of Property Act, that the finding in Suit No. 543 of 1922 that Baldeo Prasad and others were the occupancy tenants of the holding by right of succession to Parmanand Lal operated as *res judicata* and that the defendants were estopped under Section 115 of the Indian Evidence Act from disputing the title of the plaintiffs to redeem.

The suit was directed against 14 defendants; defendants Nos. 1 to 5 were the grandsons and great-grandsons of Udit Singh the original mortgagee; defendants Nos. 6 to 14 were the puisne transferees in possession.

The suit was contested by defendants Nos. 6 to 9 and by defendants Nos. 12 to 14. They contended that Rajpal was not the brother of the mortgagor, that Parmanand Lal died 13 or 14 years before suit, that Rajpal and Gokul had predeceased him, that the plaintiffs had no interest in the equity of redemption, that the mortgage of 1901 was a genuine transaction supported by consideration and that the mortgage, dated June 26, 1885 had been superseded by the later mortgage, dated January 21, 1901 and that under the last mentioned mortgage, the property was not redeemable before the expiry of 59 years.

The court of first instance dismissed the suit. It came to the following conclusions:—

(*a*) Parmanand Lal and Rajpal were own brothers;

(*b*) Rajpal died 20 or 21 years ago;

(*c*) Parmanand Lal died in or about 1324 F.;

(*d*) Parmanand Lal had executed the mortgage bond, dated January 21, 1901 but this document and the subsequent document, dated April 29, 1904 were not supported by consideration;

(*e*) On the allegation contained in the plaint that Parmanand Lal died 29 or 30 years ago, Rajpal or the plaintiffs did not inherit the holding, having regard to the provisions of Section 9 of Act XII of 1881 as they did not share in the cultivation of the holding along with Parmanand Lal;

(*f*) The judgment in suit No. 543 of 1922 did not operate as *res judicata;* and

(*g*) The defendants were not estopped under Section 115 of the Indian Evidence Act from denying the title of the plaintiffs to the property in dispute.

The lower appellate court reversed the decision and decreed the suit for redemption. It specifically came to a finding that the mortgage, dated January 21, 1901 was a fictitious document and did not supersede the earlier mortgage dated June 26, 1885. No findings were arrived at as to the time of the death of Parmanand Lal and his brothers or whether the inheritance in the occupancy holding devolved upon the plaintiffs. This is clear from the following extract from the judgment:—

> In my opinion in this case it is not very important to decide when Parmanand Lal died and whether his borthers were alive or not at that time and how the inheritance of Parmanand Lal devolved on his heirs.

The lower appellate court was of opinion that the plaintiffs or, at any rate their father and grandfather were heirs of Parmanand Lal under the Hindu Law and that fact gave them sufficient interest to maintain a suit for redemption of the mortgage. The court also found that the judgment in suit No. 543 of 1922 operated as *res judicata* as against the defendants; and that the defendants having set up the plaintiffs as the heirs of Parmanand Lal in the occupancy holding in their written statement, dated July 11, 1923, were precluded from contesting the plaintiffs' claim to redeem. The grounds upon which the judgment proceeds may be reproduced here:—

> In 1922, Rani Surajpal Kuar, the zemindar of the plots in dispute, sued Kamta Prasad, Jwala Prasad and Sankhta Prasad, sons of Mukutdhari, and also the brother and nephews of Parmanand Lal for ejectment on the allegation that Parmanand Lal had died without leaving any heir, and his brother, nephews and the mortgagees, the sons of Mukutdhari, were not entitled to remain in possession and she was entitled to possession after ejecting the defendants. Kamta Prasad on his own behalf and on behalf of his brothers filed a written statement on July 11, 1923 and in it he clearly stated that after the death of Parmanand Lal defendants 1 to 5 (brothers and nephews of Parmanand Lal) became the lawful heirs of the occupancy holding in dispute and their names were entered in the village papers 13 or 14 years ago, that it could not be said that Parmanand Lal died without any heir; that the plaintiff had admitted the right of inheritance of the defendants and she could not go against her admission. This ejectment suit was decided on September 28, 1923 and the claim was dismissed on the ground that Parmanand Lal had left heirs who were entitled to inherit under the tenancy law and they were rightly recorded as occupancy tenant in the village papers In the present case, the plaintiffs have been recorded as heirs of Parmanand Lal, the occupancy tenant of the holding, their right was recognized by a competent court in a suit for ejectment by the zemindar in which the heirs of the mortgagor and the heirs of the mortgagee both were parties, and as I have stated above, it was on the plea raised by the heirs of the mortgagee themselves. I think this is conclusive and the mortgagee has got no right to open the question and go behind the finding of the revenue court or village record. I, therefore, hold that the plaintiffs have got a right to redeem the holding in dispute.

The judgment of the lower appellate court has been affirmed by a learned Judge of this Court substantially on the grounds indicated above.

The contesting defendants have appealed to this Court and have challenged the correctness of the findings on all the three points.

In our opinion the contentions of the defendants are well founded and ought to be accepted.

The judgment in suit No. 543 of 1922 cannot operate as *res judicata.*

We however do not accept the contention of Mr. Narain Prasad Asthana that the judgment of the revenue court was not that of a court of competent jurisdiction. The defendants were not sued as trespassers but appear to have been sued as non-occupancy tenants. Under Section 34 of the Tenancy Act (Act II of 1901, local), it was within the competence of the landholder to treat a person occupying land without his consent as a non-occupancy tenant and to sue for his ejectment in the revenue court. The landholder could do this under Section 34 coupled with Section 63 of the Act. As pointed out in *Jagardeo Singh* v. *Ali Hammad*[1]

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[1] 16 A. L. J. 249

> a person occupying land without the consent of the landlord is a person who enters in possession without the *express* consent of the landlord and *without any previous arrangement* with him.

The revenue court had therefore jurisdiction to entertain a suit for the ejectment of persons who occupied land without the landlord's consent.

Neither the lower appellate court nor this Court has indicated in its judgment any reasons for holding why the judgment in the former suit should operate as *res judicata* between the co-defendants. Where parties are arrayed on the same side as co-defendants, any adjudication between them does not operate as *res judicata*, unless three conditions are satisfied:—

(1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and (3) the question between the defendants must have been finally decided. This is settled law and the final pronouncement on this point has been made by the Judicial Committee in *re Mst. Munni Bibi* v. *Tirloki Nath*[2]. Their Lordships have cited with approval the following observation of Wigram, V. C. in *Cottingham* v. *Earl of Shrewsbury*[3]:—

> If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and that the co-defendant will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.

In suit No. 543 of 1922, the present plaintiffs did not put forward any defence. There was no conflict of interest between them and the other defendants who were arrayed on the same side with them. There was therefore no question at issue between the two sets of defendants nor any final adjudication of any such question. The decision therefore cannot operate as *res judicata.*

It has strongly been contended on behalf of the plaintiffs that the defendant-appellants, having in the former suit, held out that the plaintiffs were the heirs of Parmanand Lal and as such the occupancy tenants of the holding in dispute, and this defence having succeeded, with the result that they had continued to remain in possession of this property since 1922, they are precluded from disputing the plaintiffs' title to redeem. The plaintiffs take their stand upon Section 115 of the Indian Evidence Act and also upon a rule of estoppel founded upon general principles. Section 115 of the Indian Evidence Act does not exhaust the doctrine of estoppel. We are however of opinion that the defendants are not estopped from questioning the plaintiffs' title either by reason of Section 115 or by recourse to any doctrine founded upon general principles. In order to operate as estoppel under the aforesaid Section, three conditions must be fulfilled:—(1) There must be a representation made by the opposite party with a view to cause belief, (2) the representation should have been believed under circumstances that its falsity could not be ascertained in spite of due diligence and (3) actions arising out of such belief. There can be no estoppel where truth is accessible. Again, there can be no estoppel

[2] 35 Cal. W. N. 661 at 667 and 668

[3] 3 Hare 627 at 638

in the absence of representation or conduct amounting to such. Further, there can be no estoppel where a party is not misled and has not induced to do something detrimental to its interest owing to the action of the other party. The defendant-appellants, when they filed their written statement in the aforesaid case on July 11, 1923, made no representation to the plaintiff-respondents. The plaintiff-respondents did not contest the suit for their ejectment. Whether or not they were the legal heirs of Parmanand Lal was a matter as much within their knowledge and accessible to search or enquiry as it was to the other co-defendants. The written statement filed by the other defendants did not in any way mislead them or induce them to alter their position to their injury or detriment. Section 115 of the Indian Evidence Act is therefore clearly inapplicable to the case. This matter is concluded by the pronouncement of the Privy Council in *re Ram Saran Singh and Munshi Syed Amir Ali* v. *Mst. Ram Pearey*[4]. The facts of this case present many common features. In a former suit, certain co-defendants combined and made a false statement in respect of an alleged mortgage transaction with a view to defeat the plaintiffs' claim. A foreclosure suit was subsequently brought by one of these defendants against the other defendant founded on such alleged mortgage. The defendants contested the suit and denied the mortgage. The plaintiffs pleaded that the defendants were estopped from denying the mortgage which gave the plaintiffs the right of action. It was held by Lord Justice James that "There was nothing whatever to prevent the defendant from showing the real truth of the transaction" and that "it was equally clear that a pleading by two defendants against the suit of another plaintiff never could amount to an estoppel as between them." This ruling was applied by Turner and Oldfield, JJ. in *re Param Singh* v. *Lal Ji Mal*[5].

Lastly, it was contended that the plaintiff-respondents were the heirs of Parmanand Lal under the Hindu Law and were entitled to redeem as being *persons* having an *interest* in *the right to redeem the mortgaged property* under Section 91(*a*) of the Transfer of Property Act (Act IV of 1882). An occupancy tenure is the creation of statute, and where a special rule of succession has been laid down in the statute, it is the statute which regulates the devolution of inheritance and not the personal law of the tenant. The interest referred to in Section 91 can accrue either by succession, conveyance or contract. No right accrued to the plaintiffs by conveyance or by contract. In order to determine whether the right devolved by inheritance, we have got to look into the statute, which was in force at the time when the succession opened. If Parmanand Lal died before 1902, Section 9 of the Act XII of 1881 applied and regulated the inheritance. Under this Act, his brothers and nephews are no heirs to the holding, if they did not share in its cultivation jointly with Parmanand Lal. If Parmanand Lal died after 1902, inheritance would be governed by Section 22 of Act II of 1901 and his brothers would be entitled to succeed to his holding even though they did not share the cultivation with him. In the absence of a finding as to the time of Parmanand Lal's death, it is

[4] 13 Moore's I. A. 551

[5] I. L. R. 1 All. 403

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impossible to determine whether or not the plaintiff-respondents had any title to the property by succession to Parmanand Lal. The appeal has not been tried on the merits. We have however not the slightest doubt in holding that the personal law of the parties was not applicable to the case of succession to an occupancy holding, *Bhura* v. *Shahabuddin*[6]. If therefore the plaintiffs are not the heirs to Parmanand Lal under the Tenancy Law in force at the time when the inheritance opened, they cannot maintain a suit for redemption. They acquired no interest in the holding under their personal law. The 'interest' referred to in Section 91 of the Transfer of Property Act is interest in the property sought to be redeemed.

As the appeal has not been heard and disposed of on the merits and as we are reversing the findings of this Court and of the lower appellate court upon preliminary points, this appeal must go back for trial on the merits. We accordingly allow the appeal, set aside the judgments and decrees of this Court and of the lower appellate court and remand the case to the lower appellate court under Order 41, Rule 23 of the Civil Procedure Code for its reinstatement under its original number and disposal according to law. Costs here and heretofore shall abide the event.

Appeal allowed
Case remanded

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[6] I. L. R. 30 All. 128

NEWAL KISHORE AND ANOTHER (*Defendants*)
versus
SARJU RAM SAHU (*Plaintiff*)*

CIVIL
1932
March 31
MUKERJI, J.
BENNET, J.

Transfer of Property Act, Sec. 55 (2)—Sale-deed—No covenant of indemnity—Vendee had some idea as to defect in vendor's title—Whether vendor liable under Sec. 55 (2).

Where the sale deed does not contain any statement to the effect that the vendor was assuring the vendee that his title subsists, *held,* that unless the vendor's liability as imposed by Sec. 55, Sub-sec. (2) Transfer of Property Act is excluded by express covenant, his liability must be deemed to subsist, notwithstanding the fact that the vendee may have some idea as to the defect in the title of the vendor. *Ram Chander Dutt* v. *Dwarka Nath Bysack,* I. L. R. 16 Cal. 330 and *Muhammad Ibrahim* v. *Nakched Ram,* 7 A. L. J. 752 *relied on.*

FIRST APPEAL from a decree of S. MAITRA ESQ., Additional Subordinate Judge of Basti.

P. L. Banerji, N. Upadhiya, S. N. Verma and *Kartar Narain Agarwala* for the appellants.

K. N. Katju and *Harnandan Prasad* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is an appeal by the two defendants in the suit. The appeal, although filed jointly, has been argued separately on behalf of the two appellants. The reasons will be apparent from the facts of the case which are as follows:—

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*F. A. 267 of 1928

The Raja of Basti owned the property in suit. It was eventually purchased by certain gentlemen known as the Pandes of Narharia in the district of Basti. An 8 annas share in the village of Bhatendwa was sold by the said Pandes to Babu Nawal Kishore, the appellant No. 1, for a sum of Rs.6,000. The entire sum was left with the vendee for payment to certain mortgagees who were in possession. This was on March 10, 1914. The defendant No. 1 sold the property to the plaintiff on August 31, 1915 for a sum of Rs.15,000. Out of this consideration money a sum of Rs.9,000 was paid in cash to the appellant No. 1 and Rs.6,000 was left with the vendee for payment to the mortgagees who were duly paid. After this the sons of the Pandes of Narharia brought a suit against Sarju Ram Sahu, the plaintiff-respondent in this case, and Mr. Nawal Kishore, the appellant No. 1, to recover the entire 8 annas share on the ground that the family of the then plaintiffs and the vendors was a joint one and the vendors had no right to transfer the family property. The suit succeeded to the extent of 7 annas 8 pies share out of the entire 8 annas share sold. Sarju Ram Sahu filed an appeal to the High Court but the appeal was dismissed. Thereupon Sarju Ram filed an application to this Court for leave to appeal to the Privy Council. This was rejected and then he applied to their Lordships of the Judicial Committee for special leave to appeal. This application was also dismissed. Thereupon the plaintiff filed the suit out of which this appeal has arisen.

In the plaint as originally filed the plaintiff stated that the defendants were members of a joint Hindu family and for some reasons best known to him the defendant No. 2, the father of the defendant No. 1, had obtained the sale-deed from the Pandes of Narharia in favour of his son, the defendant No. 1. Later on the plaint was amended and it stood as if both the defendants had made the purchase, the sale-deed being executed in favour of only one of the defendants.

After this amendment of the plaint, the defendants filed their written statements. The defendant No. 1, Mr. Nawal Kishore, said that he was only a *benamidar* and he was not liable on account of any claim for damages and was not liable to refund any part of the purchase-money. The defendant No. 2, the father, said that he was not an executant of the sale-deed and therefore he was not liable. It was admitted by both the defendants that the father and son were members of a joint Hindu family. As regards the damages, the plaintiff stated in the plaint that the costs of the application for leave to appeal made in this Court and the costs of the application to His Majesty in Council for special leave to appeal had been incurred at the instance of Babu Jugal Kishore who had agreed to meet all the expenses if the applications proved unsuccessful.

The learned Subordinate Judge framed several issues and he held that the defendants being members of a joint Hindu family were both liable and that the plaintiffs were entitled to recover a proportionate part of the purchase money paid by him and the costs incurred by him in his litigation with the sons of the Pandes of Narharia. He disallowed the amounts spent by the plaintiff in his applications for leave to appeal in India and in England.

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Mukerji, J.

The defendants have filed this appeal and the plaintiff has filed a cross-objection in respect of the portion of the damages disallowed by the court below.

The appeal on behalf of the appellant No. 2, Babu Jugal Kishore, has been argued by Mr. Upadhia and the appeal of Mr. Nawal Kishore, the appellant No. 1, has been argued by himself.

The argument on behalf of the appellant No. 2 was that the sale-deed did not contain any covenant to indemnify the plaintiff and that, in any case, all the important facts relating to the property had been mentioned in the sale-deed and, therefore, the plaintiff having purchased with his eyes open was not entitled to recover any damages.

The sale deed has been read out to us. We do not find in it any statement of the fact that the Pandes of Narharia had sons who were members of a joint Hindu family with them. This was an important fact which Sarju Ram might have been told for his benefit. But the matter does not really stand on such a narrow ground. It is true that the sale-deed in question does not contain any statement to the effect that the vendor was assuring the vendee that his title subsists. But by application of Section 55, Sub-section (2) there is an implied contract on the part of the vendor that his title subsists.

Some cases have been cited to us on behalf of Babu Jugal Kishore and these are *Kulla Mal* v. *Umra*[1], *Gondu Ramashubbu Iyer* v. *Muthiah Kone*[2] and *Kali Din* v. *Madho*[3]. The first two cases are single Judge judgments and do not really cover the point in question. In the first case the transfer was of an occupancy holding which was not transferable under the law. In the second case what the court considered was Section 55, Sub-section (1), Clause (*a*) and not Section 55, Sub-section (2). In the last-mentioned case the observations of Stuart, J. of this Court do not touch the point in question. On the other hand there are two clearly applicable cases which go entirely against the appellant. These are *Ram Chander Dutt* v. *Dwarka Nath Bysack*[4] and *Muhammad Ibrahim* v. *Nakched Ram*[5]. In both these cases it was held that unless the vendor's liability as imposed by Section 55, Sub-section (2) was excluded by express covenant, his liability would be deemed to subsist, notwithstanding the fact that the vendee may have some idea as to the defect in the title of the vendor. In the Calcutta case it was stated that the vendee was entitled to rely on the assurance of title on the part of the vendor, although he himself may have had some doubt as to it. We are of opinion that the view taken in Calcutta and in this Court quoted above is the correct view. The liability of the vendor clearly exists.

The next point that was urged was that the liability was of the vendor Babu Nawal Kishore, the appellant No. 1, and not of Babu Jugal Kishore. We shall consider this point when we consider the liability of the appellant No. 1 himself. Now we take up the case of appellant No. 1. His case was that he was only a *benamidar* for his father and he was not liable.

Now, what are the facts that we find established? We find that the

[1] 61 I. C. 604

[2] 1925 A. I. R. Mad. 968

[3] 1923 A. I. R. All. 169

[4] I. L. R. 16 Cal. 330

[5] 7 A. L. J. 752

father and son, the appellants, formed a joint Hindu family. We find that the son purchased a property. We find that the father approached the plaintiff (*see* the evidence of the plaintiff) and proposed that he should purchase the property. Babu Jugal Kishore who is a practising pleader was the legal adviser of Sarju Ram in his cases. When the price was ultimately settled at Rs.15,000 both the appellants arrived at Basti and appellant No. 1 executed the sale deed. The sum of Rs.9,000 was handed over to Babu Nawal Kishore as the vendor. This fact, he admits, but he nowhere says that he handed over the money to his father, he himself being a benamidar and, as such, having nothing to do with the money. All these facts stand unrebutted. None of the appellants entered into the witness-box to state that the facts were different from what have been deposed to. On the facts before us we have no hesitation in coming to the conclusion that the purchase was made by the joint family in the name of the junior member of the family; that the sale was on behalf of the family, and that the sale-deed had to be executed by the junior member for the simple reason that the sale-deed executed by the Pandes of Narharia stood in his favour. On these findings there is no question of a benamidar coming on the scene. We hold with the court below that both the defendants are liable.

In the view of the facts that we take it is not necessary to consider what would be the liability, if any, of a man who is a pure benamidar and not a member of a joint family interested in the property and transferring the same as such.

The result is that the appeal fails and we hereby dismiss it with costs.

As regards the cross-objection, we have already mentioned that it is for the costs incurred in the two applications for leave to appeal, and sought to be recovered on the allegation that Babu Jugal Kishore promised to recoup them. It has been conceded before us by the learned counsel on behalf of the plaintiff that he could not base his claim on the ground that he was entitled to damages for loss of property at the instance of the sons of the Pandes of Narharia. We find it difficult to decree the claim for no less than Rs.1,800 and odd on the mere statement of the munib of the plaintiff that he approached B. Jugal Kishore and got an assurance from him that he would recoup the costs if the applications proved unsuccessful. There is a contradiction on this point between the palintiff and his *munib*. The plaintiff said that when his *munib* returned after a visit to the defendants, he (the *munib*) told him (the plaintiff) that both the father and son had agreed to recoup the plaintiff his costs. The *munib* says that it was Babu Jugal Kishore alone who gave the assurance. It would certainly have been wise on the part of the plaintiff to obtain some assurance in writing from Babu Jugal Kishore that he was going to repay the costs of the applications for leave to appeal if the applications were to prove unsuccessful.

For the foregoing reasons, we hold that the cross-objection cannot succeed and we dismiss it also with costs.

Appeal dismissed

RAGHUNATH DAS (*Plaintiff*)
versus
GANESH DAS AND OTHERS (*Defendants*)*

CIVIL
1932
Jan. 19
PULLAN, J.
NIAMATULLAH, J.

Civil Procedure Code, Sec. 11—Appeal—Abatement—Whether decision of trial court operates as res judicata—*Custom—Ancient—How to be proved—Whether proof of instances essential—Whether prevailing practice in* maths *of the same order relevant.*

Where an appeal is not decided on the merits but abates, so that the appeal becomes infructuous and the decision of the trial court becomes conclusive, the latter will operate as *res judicata* as regards questions decided by it, in a subsequent suit between the same parties, assuming that other conditions of the rule exist.

Evidence afforded by instances is more satisfactory than evidence afforded by tradition but an ancient custom can be established by evidence of persons who heard it mentioned by persons deceased who had special means of knowledge.

While it is true that questions relating to succession to the office of a *mahant* have to be decided on proof of custom applicable to each particular *math,* the prevailing practice in a large number of 'maths' of the same order (that installation by *mahants* belonging to the same order is considered necessary) cannot be ignored.

Where the plaintiff alleged that the 'math' in question had existed for several centuries, and this fact was admitted in the written statement without any qualification or reservation, *held,* that the District Judge was not justified in holding contrary to the case of both parties that the 'math' in question was of recent growth.

SECOND APPEAL from a decree of T. N. MULLA ESQ., District Judge of Gorakhpur, reversing a decree of BABU HARI HAR PRASAD, Additional Subordinate Judge.

K. N. Katju, P. L. Banerji and *N. Upadhiya* for the appellant.

Iqbal Ahmad and *Sankar Saran* for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This appeal has arisen out of a suit brought by the plaintiff-appellant for a declaration of his right as 'mahanth' of the Kabirpanthi Math, situate in 'muhalla' Ghasi Katra, city Gorakhpur, in succession to the preceding 'mahanth' Malhu Das. Ganesh Das, the 1st defendant, is a rival claimant to the 'gaddi', while the other defendants were transferees of certain properties alleged to belong to the 'math' but wrongfully transferred by Mahanth Malhu Das.

The plaintiff-appellant, who claims to be the disciple of Khelawan Das, a disciple of Malhu Das and who is described in the proceedings as 'grand chela' of Malhu Das, has been engaged in litigation for about 15 years. He had instituted, with the permission of the District Judge, Gorakhpur, a suit under the Religious and Charitable Endowment Act against Mahanth Malhu Das (1) for removal of Malhu Das from the office of 'mahanth', (2) for certain alienations made by him in favour of the present defendants Nos. 2 to 6 being declared invalid, and (3) for appointment of himself as a 'mahanth' in succession to Malhu Das. The first two reliefs were granted. As regards the 3rd, it was held that the Court had no power to appoint the plaintiff as 'mahanth'. Accordingly it was refused. Three appeals were filed from the decision of the Subordinate Judge: one by the plaintiff, a 2nd by the transferees and the 3rd by Malhu Das. During the pendency of the appeals Malhu Das died on December 12, 1921. Ganesh Das, present defendant No. 1, claimed to be his 'chela' and entitled to have his name brought on the record in place of Malhu Das. He was opposed by the plaintiff, who denied that Ganesh Das was the 'chela' of Malhu Das. Accordingly, an issue was remitted to the court of first instance for a finding on this question. Eventually, it was held that Ganesh Das was not the 'chela' of Malhu Das. Two out of the three appeals already mentioned ended without the questions arising therein being decided on the merits. Malhu Das's appeal was declared to have abated, as no one entitled to claim as his legal representative had applied within limitation for substitution of his name in place of Malhu Das, Ganesh Das's application having been dismissed. The plaintiff's appeal was virtually withdrawn, as it was dismissed on his statement that he had been installed as a 'mahanth' by other 'mahanths' and the gentry of the town after the decree of the trial court removing Malhu Das from the office of 'mahanth'. The only appeal which was heard and decided by this Court was that of the transferees. As against them, the judgment of the first court was upheld. In the meantime, Ganesh Das succeeded in obtaining mutation of names after the death of Malhu Das. The present suit was instituted on August 2, 1923 against Ganesh Das and the transferees, who had been unsuccessful before the Subordinate Judge and this Court, for declaration of his right as 'mahanth' and for recovery of the properties in possession of the unsuccessful transferees, namely, defendants Nos. 2 to 6. The plaintiff relied on a custom obtaining in all Kabirpanthi Maths and also in the math in question, under which, on the death or removal of a 'mahanth', a successor is installed by other 'mahanths' of Kabirpanth Maths and the gentry of the neighbourhood, such successor being either the disciple or disciple of the disciple of the preceding 'mahanth'. The plaintiff alleged that he had been installed after Malhu Das's removal under the decree passed by the court of first instance in the suit under the Religious and Charitable Endowment Act. The Subordinate Judge, before whom the suit had been instituted, dismissed it on the preliminary ground that the plaintiff failed to establish that he had been installed as alleged by him. On appeal, the Additional District Judge set aside the decree of the court of first instance, holding that the plaintiff had established his installation, as alleged by him. Accordingly, the suit was remanded under O. 41, R. 23, C. P. C., for a decision on all the questions arising in the case, specially the issue relating to the custom, on which the trial court had expressed no opinion. On December 15, 1924, the Additional Subordinate Judge decreed the plaintiff's suit in full. Ganesh Das, defendant No. 1, preferred an appeal. The transferee-defendants, except Manohar Sahu who filed a separate appeal, acquiesced in the decision of the trial court. Both the appeals were heard by the learned District Judge of Gorakhpur, who allowed them by

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*S. A. 596 of 1928

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his judgment of March 19, 1928 and dismissed the plaintiff's suit. The plaintiff has filed two appeals in this Court. The present appeal is against the decree of the lower appellate court passed in the appeal preferred by Ganesh Das, while second appeal No. 597 of 1928 is from the decree passed by him in the appeal preferred by the transferee. In so far as the learned District Judge found that Ganesh Das was not the 'chela' of Malhu Das, a cross-objection has been filed by Ganesh Das impugning that finding. We may say at once that no arguments have been addressed to us in support of the cross-objection, directed as it is against a finding of fact. It must, therefore, fail and the finding of the learned District Judge that Ganesh Das, defendant No. 1 was not the 'chela' of Mahanth Malhu Das is accepted by us in discussing the merits of the case so far as they relate to the plaintiff's appeal.

The learned District Judge has held that the plaintiff was installed as 'mahanth' by the "mahanths of his sect and neighbouring *raises*" during the lifetime of Malhu Das after the latter's removal in pursuance of the decree passed in the suit brought by the plaintiff under the Religious and Charitable Endowment Act. He felt bound to arrive at that finding in view of the order of remand passed by the Additional District Judge in appeal from the first decree of the trial court dismissing the suit. We think that the learned District Judge was right in taking that view of the aforesaid order of remand, which was one under O. 41, R. 23, and could have been appealed from but as it was not challenged by an appeal, it became conclusive. No attempt was made on behalf of any of the respondents to impugn the correctness of the view taken by the learned District Judge on this aspect of the case. We must, therefore, take it that the plaintiff-appellant was accepted by the 'mahanths' of Kabirpanthi Maths and the gentry of the neighbourhood as the rightful successor of Malhu Das after the latter's removal.

Though the appellant starts with important findings in his favour, namely, that defendant No. 1, the rival claimant to the 'gaddi', has no *locus standi* and that he had been installed by the 'mahanths' of Kabirpanthi Maths and the gentry of the neighbourhood, yet he is confronted with a definite finding by the learned District Judge that he failed to establish that he was the grand chela of Malhu Das and further that he failed to establish the custom pleaded by him. If all the findings of the learned District Judge were to stand, a most anomalous state of things will exist, at least, for sometime, as regards the management of the 'math' and its properties. His findings, however, must be accepted, being those of fact, unless they can be displaced on any legitimate ground.

It was contended before the learned District Judge, as has been done before us, that the finding arrived at by the trial court and by the High Court on appeal in the suit under the Religious and Charitable Endowment Act to the effect that the plaintiff-appellant was the 'grand chela' of Malhu Das operates as *res judicata* on the same question arising in the present litigation. The learned District Judge held that it did not, as, to quote his own words,

> an appeal having been filed by Malhu Das and having been admitted in the

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> appellate court, the matters decided by the lower court ceased to be *res judicata* and were left open between the parties for final decision of the appellate court. It can hardly be denied that there was no final decision by the High Court as against Malhu Das, because his appeal had abated.

We do not think that the ground on which the view of the learned District Judge proceeds is sustainable. It is true when the decision of the trial court is appealed from, all questions decided by it again become *sub judice,* and its decision cannot operate as *res judicata* pending the appeal. It is also true that the decision of the appellate court on such questions supersedes the decision of the 1st court, so that for the purpose of *res judicata* the decision of the appellate court, unless it adopts that of the 1st court, is to be considered; but where the appeal is not decided on the merits but abates, so that the appeal becomes infructuous and the decision of the trial court becomes conclusive, the latter will operate as *res judicata* as regards questions decided by it, in a subsequent suit between the same parties, assuming, of course, that other conditions of the rule exist. We have been taken by the learned advocate for the appellant through the judgment of the trial court in the suit under the Religious and Charitable Endowment Act and that of the court of appeal, and find that the question of the plaintiff being the 'grand chela' of Malhu Das was directly and substantially in issue in that case, the fact having been alleged by the plaintiff and denied by the opposite party. Both the courts definitely found that the plaintiff was the 'grand chela' of Malhu Das. The question was material in so far as the plaintiff had no right to take proceedings under the Religious and Charitable Endowment Act, unless he established that he had such an interest in the 'math' as entitled him to sue. Referring to the plaintiff's right to sue, the learned Judges of this Court, who heard the appeal, observed as follows:—

> What the plaintiff has proved is that he is a celibate ascetic belonging to the same fraternity as Mahant Malhu Das. He has proved, further, that he has been personally associated in a peculiar manner with that body or group of ascetics who resided on the premises in the city of Gorakhpur referred to in this case as the Math of Ghasi Katra, that he took part in the worship performed on these premises and benefited by the charities dispensed there in favour of Sadhus or ascetics appertaining to this sect. These facts alone would appear sufficient under the provisions of Sec. 15 of the Religious Endowment Act No. XX of 1863 to give B. Raghunath Das a right to maintain the suit. We think it right to add, however, that we see no reason to doubt the evidence by which the plaintiff sought to prove an even closer association with this establishment by showing that he was himself the disciple of B. Khelawan Das, who was a disciple of Mahant Malhu Das.

It was contended before us that it was not necessary for the purposes of that case that the court should go so far as to pronounce the opinion of the plaintiff being the 'grand chela' of Malhu Das, as a lesser association with the 'math' was sufficient to entitle the plaintiff to sue and the court found that the plaintiff was a celibate ascetic belonging to the same fraternity as Mahanth Malhu Das. It must be observed that the plaintiff cannot belong to the same fraternity as Mahanth Malhu Das unless he is a 'grand chela' of Malhu Das, as alleged by him. It is not suggested by the defendants that the plaintiff could belong to the same fraternity as Mahanth Malhu Das for any reasons other than those alleged by the plaintiff himself. The plaintiff could be a "celibate ascetic" only if he had been initiated by Khelawan Das as his 'chela'. The two characters of the plaintiff are so inseparable that the finding arrived at in the previous case, accepted as a whole, must imply that the plaintiff was the 'grand chela' of Malhu Das. We are of opinion that the question whether the plaintiff was the 'grand chela' of Malhu Das was directly and substantially in issue in the previous case and was heard and finally decided in that case, and the decision thereon operates as *res judicata* on the same question arising in the present litigation.

It is argued by the learned advocate for the respondents that Ganesh Das cannot be deemed to be claiming under Malhu Das and that any decision obtaining against the latter cannot operate as *res judicata* against the former. We do not think this contention is well-founded. Malhu Das was a party in the earlier suit and represented the 'math'. Ganesh Das claims now to be representing the 'math', being, according to himself, its 'mahanth'. We are satisfied that the present suit is between the same parties or those claiming under the parties to the previous suit, as required by Section 11, C. P. C.

Apart from what the lower appellate court held on the question of *res judicata,* it should have regarded the judgment in the previous case as possessing some evidential value on the question whether the plaintiff was the 'grand chela' of Malhu Das. Again, the lower appellate court having accepted as a fact that the plaintiff-appellant had been installed by the 'mahanths' of other Kabirpanthi Maths and the gentry of the neighbourhood, should have treated it as a circumstance possessed of some evidential value on the question whether the plaintiff was the 'grand chela' of Malhu Das. The learned District Judge, however, approached this question as if there was nothing but the oral evidence of a few witnesses bearing on that question. We are clearly of opinion that the two pieces of evidence referred to above, should not have been ignored by the learned District Judge and that his finding, though one of fact, is vitiated in consequence of such evidence being ignored. We have been taken through the evidence of several witnesses examined on behalf of the plaintiff and of the three witnesses examined on behalf of the defendants, and think that the finding of the trial court, which is in favour of the plaintiff, should be accepted. Taking the oral evidence with all the probabilities of the case, the recognition of the plaintiff as the 'grand chela' of Malhu Das in the judgment of the trial court and of this Court in the suit under the Religious and Charitable Endowment Act and by a number of Kabirpanthi Maths and the gentry of the neighbourhood as the rightful successor of Malhu Das, we are driven to the conclusion that the plaintiff's case on this point is true. The learned District Judge has not referred to the evidence of the defendants' witnesses probably considering it as quite worthless. In any case we take it to be so. For these reasons, we hold that, apart from any previous judgment operating as *res judicata,* the plaintiff is proved by the evidence adduced in this case that he was the 'grand chela' of Malhu Das, as alleged by him.

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As already stated, the learned District Judge has found against the plaintiff on the question of custom set up by him. Referring to a passage in the judgment of the 1st court in the suit under the Religious and Charitable Endowment Act and one or two other documents, the learned Judge held "that the office of the math is not a very ancient institution", and "that the office of the mahanth has been so far hereditary." He went on to hold "that the math in dispute was established definitely as a math only in the time of Paltan Das", that is, the immediate predecessor of Malhu Das. Now, this finding is contrary to what is admitted by both parties in pleadings. It is alleged in paragraph 1 of the plaint that the 'math' in question had existed for several centuries. Ganesh Das admitted this fact in the 1st paragraph of his written statement without any qualification or reservation. The learned District Judge was not justified in holding contrary to the case of both parties that the 'math' in question is of recent growth and no custom such as is alleged by the plaintiff could come into existence. The learned Judge lays stress on the fact that no instance has been cited in which a 'mahanth' was removed and another appointed. It is true that evidence afforded by instances is more satisfactory than evidence afforded by tradition but it is beyond question that an ancient custom can be established by evidence of persons who heard it mentioned by persons deceased who had special means of knowledge. The witnesses examined by the plaintiff, who, it should be noted, have not been disbelieved by the learned District Judge, so far as they speak of the custom, state it to be the same as alleged by the plaintiff. The only custom which the defendants have alleged in the written statement relates to the case of a 'mahanth' who dies leaving several chelas. They do not allege any custom where a 'mahanth' dies without leaving a chela. The witnesses examined on behalf of the defendants, do not, likewise, throw any light on the question. While we agree that questions relating to succession to the office of a 'mahanth' have to be decided on proof of custom applicable to each particular 'math',[*] we cannot ignore the prevailing practice in a large number of 'maths' of the same order that installation by 'mahanths' belonging to the same order is considered necessary. Considering the evidence as a whole, we are of opinion that the finding arrived at by the lower appellate court cannot be supported, vitiated as it is by reasons some of which have been mentioned, and that the finding of the trial court, which is based on the evidence produced by the plaintiff, should be allowed to prevail. We have considered the evidence as to custom for ourselves, and find ourselves in agreement with the trial court. We may note that in interfering with the finding of the lower appellate court on the question of custom we have not departed from the principle laid down in the recent Full Bench case of this Court in the *Municipal Board, Benares* v. *Kandhiya Lal*[1] cited at the bar.

The result is that the appeal is allowed. The decree of the lower appellate court is set aside and that of the court of first instance is restored. The cross-objection preferred by defendant No. 1 is dismissed with costs.

Appeal allowed

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[*] *Ram Prakash Das* v. *Anand Das*, 14 A. L. J. 621

[1] 1931 A. L. J. 757

HALIMA BEGAM (*Plaintiff*)
versus
MOHIT ULLAH KHAN AND ANOTHER (*Defendants*)*

CIVIL
1932
March 8
BANERJI, J.
KING, J.

Land Revenue Act (III of 1901), Sec. 233 (k)—Joint co-sharers in a unit formed by partition—Civil suit raising a question of title between them—Whether barred.

There is no authority for the proposition that Sec. 233 (*k*), Land Revenue Act, bars a civil suit raising a question of title between joint co-sharers in a unit formed by partition, because such questions might have been raised in the partition proceedings. Supposing *A, B* and *C* are recorded co-sharers in a *mahal*, their respective shares being recorded as 8 annas, 5 annas and 3 annas. Supposing *A* applies for separation of his share into a separate *mahal. B* and *C* do not wish for any partition *inter se* and prefer to remain joint in one *mahal*, and the revenue court therefore would only be concerned in dividing the original mahal into two shares of equal value. If after partition *C* claims as against *B* a declaration that his share in the new mahal which has been allotted to them jointly is not 3|5ths but ½, then his suit would not be barred, because the question of title, though it might have been raised under Sec. 111 during the partition proceedings, would not have affected the partition. *Muhammad Sadiq* v. *Laute Ram*, I. L. R. 23 All. 291 *explained; Lal Bihari* v. *Parkali Kunwar*, I. L. R. 42 All. 309 *relied on.*

FIRST APPEAL from a decree of P. C. MOGHA ESQ., Subordinate Judge of Aligarh.

S. K. Dar and *T. A. K. Sherwani* for the appellant.

P. L. Banerji, M. Waliullah and *M. A. Aziz* for the respondents.

This appeal arose out of a suit for possession of zamindari shares in certain villages. The portion of the judgment dealing with the applicability of Sec. 233 (*k*), Land Revenue Act, is reproduced below.

King, J.

KING, J.—The main question is whether the trial court was right in holding that the plaintiff's claim for a larger share in village Hamirpur was barred either by S. 233 (*k*) of the Land Revenue Act or by the rule of *res judicata?*

In 1906, two co-sharers of village Hamirpur made an application to the revenue court for separation of their shares by partition. It must be presumed that notice was given to all the other recorded co-sharers including the present plaintiff Mst. Halima Begam. We find from the khewat of the village for the year 1315 Fasli that the result of the partition was to divide the mahal into four pattis. One of the pattis was allotted to the two brothers Mohit Ullah Khan and Azmat Ullah Khan and to their sister Mst. Halima Begam jointly, the two brothers being recorded as owning 14 shares and Halima Begam's being recorded as owning one share in this patti. Presumably the members of this family must have applied for having their shares formed into a separate patti. The imperfect partition of the mahal and village into four pattis was sanctioned and declared to come into force on July 1, 1908.

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*F. A. 512 of 1927

Now the question is whether the plaintiff can claim in a civil court a share larger than the share allotted to her in the partition.

The question of *res judicata* may be disposed of briefly. The parties to the present suit, or their predecessors-in-title, were arrayed upon the same side in the partition proceedings. If they applied jointly for having their shares formed into a separate patti, as appears probable, then they were in the position of co-plaintiffs. Otherwise they were in the position of co-defendants. No partition was effected between the parties *inter se*. A separate patti was allotted to them jointly, proportionate to the total value of their recorded shares. There was no conflict of interest between them and for the purpose of effecting the partition it was unnecessary to determine the shares of the parties *inter se*. In such circumstances we hold that the plaintiff's claim to a larger share as against her brothers is not barred by the rule of *res judicata*. The extent of the shares of the parties *inter se* was not raised or decided by the revenue court. Although it was open to the plaintiff to have raised the question of title in the partition proceedings, it is difficult to say that she *ought* to have raised such question and in any case it cannot be held that she ought to have raised the question as a ground of defence or attack, since there was no conflict of interest between the parties *inter se*. We hold therefore that the rule of *res judicata* does not bar the present suit.

The next question is whether the plaintiff's claim is barred by S. 233 (*k*).

Section 233 (*k*) prohibits the institution of a civil suit or proceeding in respect to "partition except as provided in Ss. 111 and 112". The present suit was certainly not instituted as provided in S. 111; so the only question is whether it is a "suit with respect to partition." This language is very wide, but ever since the decision of the Full Bench in *Mohammad Sadiq* v. *Laute Ram*[1] it has been understood as referring to a suit which aims at altering the distribution of property effected by the partition. In the absence of authority we should find it difficult to hold that the present suit is of such a nature. There was no division of property between the parties. One patti was allotted to them jointly. It is true that the extent of their respective interests was recorded in accordance with S. 114 but it would be difficult to hold that any alteration of the recorded shares of the parties *inter se* would amount to an alteration in the distribution of property effected by the revenue authorities.

The plaintiff's advocate has cited a number of rulings in which it has been held that where a civil suit does not aim at disturbing the distribution of property effected by the revenue court, so as to alter the total amount of shares in any mahal or patti or to alter the area of any mahal or patti, but merely aims at substituting the plaintiff for the defendant as owner of a share or plot of land in a mahal or patti, then the suit is not barred by S. 233 (*k*). We may refer to *Data Din* v. *Nohra*[2], *Ram Rekha Misra* v. *Lallu Misra*[3] and the Full Bench decision in *Kalka Prasad* v. *Man Mohan Lal*[4]. In all these cases the parties had conflicting interests in the partition proceedings, i.e., they were allotted separate mahals or pattis. Nevertheless,

[1] I. L. R. 23 All. 291

[2] 1930 A. L. J. 1046

[3] I. L. R. 53 All. 568

[4] I. L. R. 38 All. 302

it was held that a civil suit by one party claiming a share in property allotted by partition to the opposite party, was not barred by S. 233 (*k*). In the present case the revenue court made no division of property between the parties and there was no conflict of interest between them. The rulings cited are, therefore, distinguishable upon the facts. Although we hold that S. 233 (*k*) does not bar the present suit, we wish it to be clearly understood that we do not arrive at that conclusion on the strength of these rulings which seem to be hardly reconcilable with the Full Bench decisions in *Muhammad Sadiq* v. *Laute Ram*[5] and *Bijai Misir* v. *Kali Prasad Misir*[6].

Our decision is supported by two other rulings cited by the plaintiff, to which we shall presently refer.

The respondent's learned counsel contends for the proposition that if the plaintiff could have claimed a larger share under S. 111 and failed to do so, then she is debarred from raising the question in the present suit. He relies strongly upon the Full Bench decision in *Muhammad Sadiq* v. *Laute Ram*. This is undoubtedly the most authoritative Full Bench decision on this point as it was passed by five Judges unanimously. The decision turns upon the construction of the corresponding provisions of the North-Western Provinces Land Revenue Act 1873 which laid down that "no civil court shall exercise jurisdiction over any of the following matters", one of the matters mentioned in Clause (F) being, "The distribution of the land or allotment of the revenue of a mahal by partition". The language of S. 233 (*k*) of the present Land Revenue Act is even wider, and we think that any civil suit which would be barred under the Act of 1873 would also be barred under the present Act of 1901. In that case it was held that if a party to a partition desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in Ss. 112 to 115 of the Act. If a question of title affecting the partition which might have been raised under Ss. 112 and 113 of the Act during the partition proceedings, is not so raised and the partition is completed, S. 241 (F) bars the parties to the partition from raising subsequently in a civil court any such question of title. In our opinion the Full Bench decision does not go to the length of laying down the proposition for which the respondent contends. The decision does not refer to every question of title which might be raised by a party to a partition but only to a question of title *affecting the partition*. We consider this qualification very important. In the case before the Full Bench, the question of title which might have been raised did affect the partition, because there was a conflict of interest between the parties to whom separate mahals were being allotted in the partition proceedings. Supposing *A*, *B* and *C* are co-sharers in a mahal, their respective shares being recorded as 8 annas, 5 annas and 3 annas. Supposing *A* applies for separation of his share into a separate mahal. If *B* and *C* do not wish for any partition *inter se* and prefer to remain joint in one mahal, then the revenue court would only be concerned in dividing the original mahal into two shares of equal value. If after the partition *C* claims as against *B* a declaration that his share in the new mahal which has been allotted to them jointly is not 3|5ths but ½, then we understand that his suit would not be barred, on the authority of the Full Bench ruling, because the question of title would not have affected the partition even if it had been raised during the partition proceedings. If, on the other hand, *B* and *C* applied to have their property divided ***inter se***, in accordance with their recorded shares, so that the revenue court formed three mahals proportionate to 8 annas, 5 annas and 3 annas respectively, then if after the confirmation of the partition *C* claims a one anna share in *B's* mahal, such suit would, in accordance with the Full Bench ruling, be barred, because it is a question of title which might have been raised during the partition proceedings and which would have affected the partition. If *C* had raised the question during the partition proceedings and had established his claim, then the revenue court instead of allotting to *B* and *C* unequal mahals proportionate to 5 annas and 3 annas respectively, would have allotted 2 equal mahals proportionate to 4 annas each. Interpreting the Full Bench ruling in this light, we find that it is no authority for the contention that the plaintiff's suit is barred by S. 233 (*k*), because the question of title, though it might have been under S. 111, did not affect the partition.

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[5] I. L. R. 23 All. 291

[6] I. L. R. 39 All. 469

Not a single ruling has been cited in which it has been held that S. 233 (*k*) bars a suit raising a question of title between joint co-sharers in a unit formed by partition, because such questions might have been raised in the partition proceedings. On the other hand, the plaintiff's learned advocate has cited clear authority for the view that a suit in such circumstances is not barred, namely, *Lal Bihari* v. *Parkali Kunwār*[7] which was followed by a single Judge of the Chief Court for Oudh in *Mst. Phuljhari* v. *Har Prasad*[8]. These rulings are directly in point and the former is of special importance, as the two learned Judges who decided that case were parties to the Full Bench decision in *Muhammad Sadiq* v. *Laute Ram*, and must have found that decision distinguishable upon the facts. We agree with them and follow their ruling.

We find therefore that the plaintiff's suit is not barred by S. 233 (*k*).

Appeal allowed

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[7] I. L. R. 42 All. 309=18 A. L. J. 110

[8] I. L. R. 1 Luck. 318

Criminal
1932
April 22
Young, J.

KATWAROO RAI AND OTHERS

versus

KING-EMPEROR*

Criminal Procedure Code, Secs. 426 (1), 107 and 423 (1) (d)—'Convicted person' in Sec. 426 (1)—Meaning of—Appeal from an order under Sec. 107—Whether appellate court empowered to suspend execution of order relating to security.

The words "convicted person", in Sec. 426 (1) of the Criminal Procedure Code, include persons against whom an order has been passed by a criminal court from which there is an appeal allowed.

The applicants, who were bound over under Sec. 107 Cr. P. Code to keep the peace and were ordered to find security, appealed to the sessions court, ***held***, that the words 'convicted person' in Sec. 426 (1) applied to a

*Cr. Rev. 156 of 1932

person against whom an order was made under Sec. 107 and the appellate court was therefore empowered to suspend the order relating to furnishing of security. Even supposing Sec. 426(1) did not apply, the appellate court could pass such order under Sec. 423 (1) (*d*).

CRIMINAL

1932

KATWAROO RAI *v.* KING-EMPEROR

CRIMINAL REVISION from an order of BABU PREO NATH GHOSE, Additional Sessions Judge of Basti.

R. K. Dave for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Young, J.

YOUNG, J.—This is an application in revision against the order of the Additional Sessions Judge of Basti. The applicants were bound over under S. 107 of the Criminal Procedure Code to keep the peace and were ordered to find security. They appealed to the sessions court. An order was passed on their application that security was not to be taken from them until the hearing of the appeal. Against that order the Government Pleader made an application contending that such an order was *ultra vires* and could not be passed by the sessions court and also that no bail could be granted. The learned Sessions Judge came to the conclusion that the objection of the Government Pleader was sound and set aside the order. Against this order of the Additional Sessions Judge the applicants have come here in revision. The learned Additional Sessions Judge relied upon the provisions of S. 426(1) of the Criminal Procedure Code which enacts as follows:

> (1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinment, that he be released on bail or on his own bond.

The learned Additional Sessions Judge held that the words "convicted person" in the section did not apply to a person against whom an order was made under S. 107 and therefore there was no authority in the appellate court to suspend the order relating to furnishing of security. He relied upon a decision of the Patna High Court in A. I. R. 1930 Patna 274 which held that the words "convicted person" in S. 426 applied only to persons convicted of an offence. It is clear that persons against whom an order is passed under S. 107 cannot be said to be convicted of an offence. See A. I. R. 1926 All. 403. But I do not see why such a narrow or restricted meaning should be given to the words "convicted person" in this Section. When S. 406 is looked at, it is found that persons against whom an order has been made under S. 107 and ordered to find security under S. 118, are given the power to appeal against the order. The whole of this chapter is concerned with appeals. It would be peculiar that the execution of sentence or order could be suspended in the cases of persons charged and convicted of serious offences and yet the appellate courts should be powerless to suspend an order under Section 107. It is impossible, in my opinion, to think that the legislature could have contemplated this. Further, in S. 426 itself the words "sentence or order" are used.

I see no reason why the words "convicted person" in this section should not include persons against whom an order has been passed by a criminal court from which there is an appeal allowed. The word "convicted" is not in the English language confined to an association with offences. A man may be said to be convicted of vulgarity or moral depravity and the word can also be used where someone has merely been proved to be wrong. While agreeing therefore with the consensus of opinion of this Court and other courts that it cannot be said that a person against whom an order has been passed under S. 107 has been convicted of an offence, I see no reason why he cannot be said to have been convicted. He has been proved to be a dangerous person and in that sense he certainly has been convicted.

Further, even supposing Sec. 426 did not apply, I consider that S. 423 (1) (*d*) would cover the order originally made in this case suspending the execution of the order relating to security. Section 423 (1) (*d*) reads as follows:

> The appellate court may make any amendment or any consequential or incidental order that may be just or proper.

This is in the very widest terms and in my opinion an order dispensing with securities pending an appeal which possibly may be successful, may be said to be an incidental order that may be just or proper.

The second point raised in this application is whether the appellate court could grant bail in a case where an order has been made under S. 107. Section 498 of the Code of Criminal Procedure enacts:

> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Sessions may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

This again is in the very widest terms. Authority is in my opinion clearly given to an appellate court, to the High Court or Court of Session, in any case to direct that any person be admitted to bail. I find it difficult to construe this section in any other manner.

This application in revision is allowed and the record is sent back to the sessions court in order that the learned Additional Sessions Judge may proceed with the appeal. The original order of the Sessions Court dated February 19, 1932 is restored.

Application allowed

Civil

1932

May 25

MUKERJI, J.
BANERJI, J.
BENNET, J.

TOTA RAM AND OTHERS (*Defendants*)
versus
RAM LAL AND OTHERS (*Plaintiffs*)*

Transfer of Property Act, Secs. 92 and 101 (as amended by Act XX of 1929)—Embody rule of justice, equity and good conscience—Whether have retrospective effect—Three successive mortgages—Third mortgagee pays off first mortgagee with a part of the mortgage money—Suit for sale by second mortgagee—Whether third mortgagee subrogated to the position of the first mortgagee.

Secs. 92 and 101 of the Transfer of Property Act (as amended by Act XX of 1929) have retrospective effect. Supposing, however, that the said sections have no retrospective effect, the rule laid down by the Legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act XX of 1929.

Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first and second mortgages and pays off only the first mortgage, and the second mortgagee brings a suit to enforce his mortgage, *held*, that the third mortgagee is subrogated to the position of the first mortgagee. *Makhan Lal* v. *Naththi*, 21 A. L. J. 382 *overruled*.

[On return of the answer by the Full Bench, the Division Bench directed that the property mortgaged should be sold subject to the prior mortgage as held by the third mortgagee.]

SECOND APPEAL from the decision of the Subordinate Judge of Bulandshahr.

S. B. L. Gaur for the appellants.

Panna Lal for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This case has been referred to a Full Bench for a decision of the following point of law, namely:—

> Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first and second mortgages and pays off only the first mortgage, whether, in a suit by the second mortgagee to enforce his mortgage, it is open to the third mortgagee to insist on his being treated as a first mortgagee whose mortgage must be paid off before the plaintiff brings the mortgaged property to sale?

The facts of the case are stated in the referring judgment and briefly are as follows:—

One Ram Chandra was the owner of a certain property. He mortgaged the same for a sum of Rs.200 to one Paras Ram on October 19, 1915. The next year on October 16, 1916, he made a simple mortgage of the same property in favour of one Ram Lal and one Ganga Sahai, son of Tika Ram. The second mortgage was for a sum of Rs.400 and Ram Lal and Ganga Sahai kept a portion of the mortgage money with themselves to pay off Paras Ram. Ram Lal and Ganga Sahai, however, did not pay off Paras Ram and their suit out of which the present appeal has arisen is for recovery of a sum of Rs.176 principal amount and interest.

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*S. A. 1005 of 1930

Ram Chandra sold the property on a date which is unknown to one Ganga Sahai, son of Shimbhoo, and this Ganga Sahai made a simple mortgage of the property sold to the present appellants, (defendants 3 to 5) Ram Chandra, Tota Ram and Durga, for Rs.2,000 on July 29, 1926. Out of the mortgage consideration of Rs.2,000 a sum of Rs.676-3-0 was left with the mortgagees for payment to Paras Ram, a sum of Rs.730-8-0 was left with the mortgagees to pay the second mortgage held by the plaintiff respondents, Ram Lal and Ganga Sahai, son of Tika Ram, a sum of Rs.557-13-6 was similarly left with the mortgagees to pay off a simple money decree held against the vendor and a sum of Rs.35-7-6 was paid in cash to the vendor. On November 29, 1926, the heirs of Paras Ram were paid by the appellants a sum of Rs.704-12-0 in full satisfaction of the first mortgage, dated October 19, 1915. The second mortgage not having been discharged, Ram Lal and Ganga Sahai, son of Tika Ram, have claimed their money. The appellants were impleaded as the third mortgagees and they pleaded *inter alia* that they had satisfied Paras Ram's mortgage and without paying that amount the plaintiffs were not entitled to get the property in question sold by auction.

We have to consider whether in the circumstances of the case the appellants were subrogated to the position of Paras Ram.

The point raised in this appeal has given rise to conflicting decisions, although it must be said that in this Court the majority of cases has decided that a third mortgagee paying off the first mortgage in the circumstances of the present case is not entitled to be subrogated to the position of the first mortgagee.

The earliest important case on this point is the Full Bench decision in *Muhammad Saddiq* v. *Ghaus Muhammad*[1]. It was a case of a purchaser from the mortgagor paying off the first mortgage, and it was held in the circumstances of the case that it was never the intention of the purchaser to keep the first mortgage alive. It was pointed out that at the date of the sale the intention of the purchaser was to pay off and extinguish the first mortgage and not to keep it alive. Then it was pointed out that, if the date of payment be the crucial date on which the intention to keep alive or extinguish was to be entertained, then the written statement showed that no idea of keeping alive the first mortgage was entertained at the date of payment, because it was not even mentioned by way of defence and the point was raised subsequently as an "afterthought".

This case and the Privy Council case of *Bawan Das* v. *Mahesh Lal*[2] were cases of purchasers whose interest it might be to extinguish the mortgage and to hold the property free from it for their own benefit. Both the cases were decided on the peculiar facts of the case and their Lordships took care to point out the questions of fact which determined their decision.

The principle of merger, which was contained in a codified form in Section 101 of the Transfer of Property Act before its amendment and which is still to be found in the amended section of the same Act, does not lay down that there may be a merger, where the person paying off the

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[1] I. L. R. 33 All. 101

[2] I. L. R. 9 All. 961

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earlier charge was only a charge holder or mortgagee and not a full owner. It is only in the case of a larger interest being acquired that a smaller interest disappears on the principle of merger. This was entirely overlooked in some subsequent cases decided in this Court and a doctrine of agency was evolved. It was said that the money with which the third or any subsequent mortgagee pays the first mortgage is the property of the mortgagor and, as no subrogation is allowed to a mortgagor, the third or subsequent mortgagee in making the payment is acting only as an agent of the mortgagor and he is not entitled to be subrogated to the position of the first mortgagee. Such a case was that of *Makhan Lal* v. *Naththi* (21 A. L. J. page 382). There the learned Judges applied the case of *Muhammad Saddiq* v. *Ghaus Muhammad*[3] without distinguishing the feature of the earlier case that there the person making the payment was a purchaser, from the mortgagor.

This case has been followed by other cases in this Court, but a contrary view has also been taken in this Court—*see,* for example, *Shiam Lal* v. *Basir Uddin*[4] and *Chhote Lal* v. *Bansidhar*[5]. In Madras the case of *Vanmikalinga* v. *Chidambara*[6] and in Calcutta the case of *Jagatdhar* v. *Brown*[7] take the same view as this Court did in the two cases just mentioned.

The doctrine of agency has much to be said against it. To start with there does not appear to be any difference in principle between a case where a purchaser or a third mortgagee advances some money to the vendor or the mortgagor, as the case may be, and then pays off the first mortgage and the case where a purchaser or a third mortgagee professes to take the transfer for a larger sum than in the earlier case and keeps with him the money needed for paying off the earliest mortgage and actually does not hand over the money to the vendor or the mortgagor, but uses the money to pay off the first mortgage. It is conceded that in the first case a subrogation does arise, but it is denied that it arises in the second case. The principle of subrogation has been brought into existence on the ground that the person who has discharged a burden should not lose the money spent on discharging the burden, and a subsequent mortgagee who has contributed nothing to discharge the burden should not have the benefit of the discharge for which he has not contributed. The Privy Council case of *Dinbandhu* v. *Yogmaya*[8] and *Ibrahim Husain* v. *Ambika Prasad*[9] are entirely, in our opinion, inconsistent with the theory of agency propounded in some cases by the High Courts.

The question, however, has become very much simplified and, it may be said, has entirely disappeared from the arena of controversy owing to the amendment of the Transfer of Property Act.

Before its amendment in 1929 the Transfer of Property Act did not even contain the word "subrogation" and the law of subrogation had to be deduced from English cases and from general principles of equity. Section 74 of the Transfer of Property Act which has since been repealed

[3] I. L. R. 33 All. 101
[4] I. L. R. 28 All. 778
[5] 24 A. L. J. 570
[6] I. L. R. 29 Mad. 37
[7] I. L. R. 33 Cal. 1133
[8] I. L. R. 29 Cal. 154
[9] I. L. R. 39 Cal. 527

contained only the rudiments of the law of subrogation and was not of much use. Section 92, as it now stands after amendment of 1929, does not recognize any doctrine of agency. It is couched in the simplest, widest and clearest language possible and the relevant portion runs as follows:—

> Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

Mr. Panna Lal, who has argued the case for the respondent with his usual ability, has not denied that, if the first paragraph of Section 92 applied to the case, the appeal must succeed and the appellants must be treated as the first mortgagees. This is also clear, because the appellants as the third mortgagees are among the persons who are entitled under Section 91 of the Transfer of Property Act to redeem the property; they have redeemed the property subject to the first mortgage and they have thereby, according to the terms of the rule of law, the same rights as the first mortgagee whose mortgage they have redeemed, against the mortgagor and any other mortgagee, the last expression including the plaintiff respondents. The fact, that a part of the so-called mortgage money was left with the third mortgagees, does not in any way destroy the facts that the appellants are the third mortgagees and it is they who have redeemed the first mortgage. It is clear, therefore, that, if Section 92 as amended by Act XX of 1929 applies, the appeal must succeed.

Mr. Panna Lal, however, argued that Section 92 had no application because of the provision contained in Section 63 of Act XX of 1929.

Section 63 deals with two portions of the Amending Act. It first says that certain provisions of the Act (XX of 1929) shall not be deemed in any way to affect the terms or incidence of any transfer of property made or effected before the 1st day of April, 1930 or to affect the validity or invalidity, effect or consequences of anything done or suffered before the aforesaid date and so on. The provisions contained in Sections 92 and 101 of the Transfer of Property Act are dealt with by Sections 47 and 51 and these are not to be found in the first provision of Section 63 of Act XX of 1929. The second portion of the Section 63 of Act XX of 1929 runs as follows:

> And nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the 1st day of April, 1930 in any proceeding pending in a court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

Section 47 of Act XX of 1929 dealing with Section 92 of the Transfer of Property Act and Section 51 of Act XX of 1929 dealing with Section 101 of the Transfer of Property Act fall under this Second Clause of Section 63 of Act XX of 1929. In our opinion, there is nothing in the Second Clause which affects the present case. These sections are to have retrospective effect except in so far as they are not to have that effect according to the rule laid down. Now is there anything in this case which has already been done before the 1st day of April, 1930 in any proceeding pending in a court on that date. Then again, is there any remedy and any such proceeding as is referred to in Act XX of 1929 which is being affected by the new provisions of Sections 92 and 101? We do not find that such is the case. Indeed Mr. Panna Lal has not been able to point out to us what has been done in this case before April 1, 1930 which is being undone by the new rule of law and what is the remedy or proceeding which is being affected by the new provisions of Sections 92 and 101. All that has been done is to lay down a rule of subrogation which was not contained in the unamended Act. The rule was based on general ideas of equity, and it cannot be said that the new Act is going to affect any remedy or any proceeding which was lawful under the old Act. In our opinion, therefore, Sections 92 and 101 of the amended Act have retrospective effect.

Supposing, however, that the said sections have no retrospective effect, we have got this position. This Court itself was divided as to the rule of subrogation in the circumstances of this case and there are conflicting decisions of other High Courts. Opinion is likely to differ as to how far the Privy Council cases in I. L. R. 29 and I. L. R. 39 Calcutta quoted above affect the decisions of the High Courts. In the circumstances, the rule laid down by the Legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act XX of 1929.

The result is that in our opinion the question for our decision must be answered in favour of the appellants, and we must hold and do hold that the appellants are subrogated to the position of the first mortgagee.

We direct that the case be returned to the Bench making the reference with the answer given above.

Reference answered

On return of the answer by the Full Bench, the Division Bench consisting of Mukerji and Bennet, JJ. delivered the following judgment:—

In this appeal a point of law was referred to a Full Bench, and the Full Bench has returned an answer to the question. The answer is to the effect that the appellants are entitled to step into the shoes of Paras Ram, the mortgagee of 1915.

We accordingly allow the appeal and modify the decree of the court below by directing that the property to be sold, shall be sold subject to the charge created in favour of Paras Ram on October 19, 1915. The appellants will have their costs of this appeal and their costs in the courts below.

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Dec. 4
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March 8
LORD THANKERTON
SIR LANCELOT SANDERSON
SIR GEORGE LOWNDES

PRIVY COUNCIL

DULAHIN JADUNATH KUAR (*Defendant*)

versus

BISHESHAR BAKHSH SINGH (*Plaintiff*)*

Oudh Estates Act of 1862, Sec. 19—Applicability of—To wills made after inclusion of talukdar's *name in the prescribed lists made up for approval, but before such approval—Hindu Law—Succession—Male agnate—Same as* Gotraja-sapinda—*Necessity of proving identity of* Gotra.

Sec. 19 of the Oudh Estates Act of 1862 applied to wills made after the passing of the Act by *talukdars* of the statutory class prescribed by Sec. 10, and it applied to a will, at the time of making of which the *talukdar's* name was included in the lists made up under Sec. 8 for the purpose of subsequent approval and publication, so that, if unattested as required by Sec. 50 of the Succession Act, 1865, it was invalid as a will.

In order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, viz., (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males. In the absence of challenge, it might well be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but on his being challenged by defendant, it is for the plaintiff to satisfy the court that he complies with this condition also, before he can succeed in his claim to the succession.

APPEAL from a decision of the Chief Court of Oudh at Lucknow. (For a report of judgment under appeal, *see* A. I. R. [1928] Oudh 307.)

The following judgment was delivered by

Lord Thankerton

LORD THANKERTON—These are three consolidated appeals from two decrees dated December 15, 1927, passed by the Chief Court of Oudh, which varied a decree, dated January 4, 1927, of a single Judge of the same Court sitting as a Court of Original Civil Jurisdiction.

The plaintiff in the suit out of which these appeals have arisen was Raja Bisheshar Bakhsh Singh, and he is appellant in the second of these appeals (No. 103 of 1929). The defendants in the suit were (1) Dulahin Jadunath Kuar (hereinafter referred to as defendant No. 1), who is appellant in the first appeal (No. 102 of 1929), (2) Lal Partap Harihar Bakhsh Singh (hereinafter referred to as defendant No. 2), who is appellant in the third appeal (No. 104 of 1929), and (3) Mahabir Singh. The last-named is not a party to the first two appeals, as, by agreement with the plaintiff, the appeal which he had taken from the decree of the Trial Judge to the Chief Court was dismissed on March 15, 1927.

In the suit the plaintiff claims possession of the Taluka Gangwal, consisting of sixty villages as set out in the schedule attached to the plaint, lying in District Bahraich and District Gonda, as the nearest male agnate according to the rule of lineal primogeniture, of Raja Suraj Pragash Singh, the last male holder, who died in 1899, in terms of Section 22(10) of the

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*P. C. A. 102, 103 and 104 of 1929

Oudh Estates Act, 1869, as amended by the Oudh Estates (Amendment) Act, 1910. In the suit the plaintiff also claimed certain other property, as to which no question arises in these appeals.

Two main questions arise in the present appeals, viz.:—(*a*) Whether the succession is governed by the provisions of the Oudh Estates Act, which arises in the first appeal, and, if so, (*b*) whether the plaintiff is "the nearest male agnate according to the rule of lineal primogeniture" within the meaning of the Act, which arises in the third appeal.

A minor question is raised in the second appeal as to certain villages, which the Chief Court held defendant No. 1 entitled to hold during her life, thereby varying the decree of the Trial Judge.

Raja Sitla Bakhsh Singh was the first *Talukdar* of Gangwal, and his name was entered in Lists I and II, prepared in accordance with the provisions of Section 8 of the Act of 1869. The Act was passed on January 12, 1869, and in terms of Section 9 these lists were approved by the Chief Commissioner of Oudh on July 20, 1869, and published in the "Gazette of India" on July 31, 1869.

On April 3, 1869, Raja Sitla wrote a letter to the Deputy Commissioner of Bahraich, in which he said: "I beg to state that, firstly, I hope to have issues, and they will, after me, succeed me. In case there be no hope of issue, the two legally-wedded Ranis of mine are (*malik*) proprietors (of my estate). After my death, the Rani Saheba have power. Share in the estate shall not be divided." It was not disputed before this Board that, as concurrently found by both Courts below, this document is of a testamentary nature. It was equally undisputed that this document was not attested as required by Section 19, which incorporated Section 50 of the Indian Succession Act, but the application of Section 19 was disputed. If this document was both valid and operative as a will, it was not disputed that its effect was to take the succession outside the operation of the Act, with the consequent failure of the plaintiff's case.

The defendants stand on the defensive and put the plaintiff to proof of his title to claim the estate.

The question of the validity of the will depends on construction of the original Act of 1869, apart from its amendment by the Act of 1910. Both the Courts below have held that the will was invalid on the ground that it was not attested as required by Section 19 of the Act of 1869, the material part of which is as follows:—

> 19. Sections 49, 50, 51, 54, 55, and 57 to 77 (both inclusive), and Sections 82, 83, 85, and 88 to 98 (both inclusive), of the Indian Succession Act (No. X of 1865), shall apply to all wills and codicils made by any *Talukdar* or Grantee, or by his heir or legatee, under the provisions of this Act, for the purpose of bequeathing to any person his estate, or any portion thereof, or any interest therein: Provided that marriage shall not revoke any such will or codicil: Provided also that nothing herein contained shall affect wills made before the passing of this Act

Defendant No. 1, who is appellant in this issue, maintains that the provisions of Section 19 of the Act of 1869 with regard to the attestation of wills made by *talukdars* did not apply to a will made before approval and publication under Section 9 of the lists prepared under Section 8, even though, as in the present case, at the time of his making the will, the *talukdar's* name was included in the lists made up for the purpose of subsequent approval and publication. This contention is based on the definition of *talukdar* in Section 2, which is as follows:—

> *Talukdar* means any person whose name is entered in the first of the lists mentioned in section eight.

The material portion of Section 8 is as follows:—

> 8. Within six months after the passing of this Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India in Council, shall cause to be prepared six lists, namely:—
>
> *First.*—A list of all persons who are to be considered *Talukdars* within the meaning of this Act.

Sections 9 and 10 may also be conveniently cited here:—

> 9. When the lists mentioned in section eight shall have been approved by the Chief Commissioner of Oudh, they shall be published in the 'Gazette of India.' After such publication, the first and second of the said lists shall not, except in the manner provided by section thirty or section thirty-one, as the case may be, be liable to any alteration in respect of the names entered therein. If, at any time after the publication of the said lists, it appears to the Governor-General of India in Council that the name of any person has been wrongly omitted from or wrongly entered in any of the said lists, the said Governor in Council may order the name to be inserted in the proper list, and such name shall be published in the 'Gazette of India' in a supplementary list, and such person shall be treated in all respects as if his name had been from the first inserted in the proper list.
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> 10. No persons shall be considered *Talukdars* or Grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such *Talukdars* or Grantees.

Defendant No. 1 maintained that there could not be a list within the meaning of the definition until at least the approval of the Chief Commissioner had been obtained, that the reference to lists in the definition was imperative and not merely evidentiary, and that the definition applied to Section 19 as fully as to any other section. The plaintiff, on the other hand, maintained that the reference to lists in the definition was merely evidentiary and that the Act applied, as from its passing, to every *talukdar* who came within the terms of Section 3, which, apart from the definition, appears to be declaratory of the rights of an existing class. He further maintained that, even if the definition is imperative, it was repugnant to the context of Section 19 and in particular to the proviso as to wills made before the passing of the Act. The plaintiff did not maintain that the provisions of Section 13 as to registration applied in the present case, as he was unable to say that the legatee was not a person excepted from the operation of the section.

The history of events from the annexation of Oudh in 1856 up to the passing of the Oudh Estates Act in 1869, including the Summary Settlement, the preparation of lists of *talukdars* and the granting of *sanads* to *talukdars* was fully dealt with before their Lordships, and the plaintiff founded on the two orders of the Governor-General incorporated in the first schedule to the Act, but their Lordships are of opinion that the Act only recognised a statutory class of *talukdars* and that this is made clear by the provisions of Section10 that no persons should be considered *talukdars* "within the meaning of this Act" other than the persons named in the original and supplementary lists. Further, their Lordships are of opinion that such lists, in the case of the original lists, did not become operative as lists until they had been approved by the Chief Commissioner, but that they became operative as from the date of such approval, the subsequent publication being merely public notification of the fact.

The plaintiff founded on certain passages in the judgment of this Board, delivered by Mr. Ameer Ali, in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[1]. In that case the original *talukdar,* whose name appeared in lists 1 and 2 prepared under Section 8, had died in 1865, prior to the passing of the Act, and the property in dispute was not part of the *talukdari* estate under the Act, it being undisputed that the *taluka* fell under the provisions of the Act. It was held that, upon the death in 1899 of a subsequent *talukdar,* the succession to his property, not forming part of his *talukdari* estate, was subject to a rebuttable presumption that there was a family custom of descent to a single heir. In referring to the original *talukdar,* Mr. Ameer Ali said (at p. 276):—

> As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on January 22, 1859, a *taluqdari sanad* was granted to him on October 17, 1861, and his name was entered as a *taluqdar* in the first of the lists. He had acquired, as declared by Section 3, 'a permanent, heritable and transferable right' in his estate, and was unquestionably a *taluqdar* within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to 'cause to be prepared' were obviously in course of preparation long before the passing of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact, it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such *taluqdars.*

No argument arose in that case as to whether the deceased *talukdar* became a *talukdar* within the meaning of the Act as soon as it passed or only on approval of the lists, and, in their Lordships' opinion, either view is consistent with the general expressions used in this passage.

As regards Section 19, their Lordships consider that operative effect should be given, if a reasonable construction so permits, to every provision of a statute, and that to apply the definition of *talukdar* to Section 19 so as to limit its operation to wills made after the approval of the lists would have the effect of redeeming the proviso as to wills made before the passing of the Act purposeless; they are therefore of opinion that the definition is to that extent repugnant to the context and is inapplicable. It follows that, in their Lordships' opinion, the provisions of Section 19 applied to wills made after the passing of the Act by *talukdars* of the statutory class prescribed by Section 10, and that it applied to the will here in question, so that, being unattested as required by Section 50 of the Indian Succession Act, 1865, it was invalid as a will.

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[1] [1916] 43 I. A. 269 at 276

It therefore becomes unnecessary to consider whether, on the assumption that it was a valid will, it ever became operative or was abandoned by the legatee, Raja Sitla's widow, as to which a separate argument was raised.

With regard to the plaintiff's pedigree, there are concurrent findings of fact by the Courts below to the effect that the plaintiff has proved his pedigree, and their Lordships see no reason for disturbing these findings, which establish that, in blood relationship, the plaintiff is the nearest male blood relation according to the rule of lineal primogeniture of the last male holder of the *taluk*. But this leaves open the issue in the third appeal, in which defendant No. 2 raises a point of law on the construction of Section 22(10) of the 1869 Act as amended by the Act of 1910.

In the first appeal defendant No. 1 also sought to raise a question as to whether a village called Rajapur Grant was comprised in the *taluka*, though no such point was raised in her case of appeal, but, even if it were not too late to raise the point, their Lordships were not prepared to disturb the concurrent findings of fact by the Courts below that the *taluka* consisted of the sixty villages claimed in the plaint, including the village of Rajapur Grant.

In the second appeal (No. 103 of 1929) the plaintiff takes objection to the variation of the decree of the Trial Judge made by the Chief Court, in that they held that defendant No. 1 was entitled to remain in possession during her life of five villages of which she was in possession under an agreement dated June 29, 1899.

Raja Sitla, the original *talukdar*, died in 1885, leaving surviving him his widow, Rani Sukhraj Kuar, and his half-brother, Narpat Singh. Under a compromise of a suit raised by the latter against the former, Narpat Singh was declared to be the absolute owner of the entire estate of Gangwal, and the Rani was allowed to remain in possession of five villages by way of *guzara*, besides some other property, which is not in issue in these appeals. Narpat remained in possession of the *taluka* of Gangwal until his death in 1892, when he was succeeded by his son, Raja Suraj Prakash Singh, who died in 1899, having been predeceased by his only son, Mahesh Bakhsh. Raja Suraj Prakash Singh was survived by—

(*a*) Rani Sukhraj Kuar, Raja Sitla's widow, who died in 1922;

(*b*) Rani Itraj Kuar, the senior widow of Raja Suraj Prakash Singh, who died in 1925, and on whose death the present dispute arose;

(*c*) Rani Abhiraj Kuar, the junior widow of Raja Suraj Prakash Singh, who died before 1925; and

(*d*) Defendant No. 1, the widow of Mahesh Bakhsh Singh, the predeceasing son of Raja Suraj Prakash Singh.

On June 29, 1899, an agreement was entered into between the two widows of Raja Suraj Prakash Singh and defendant No. 1, the material portion of which is as follows:—

> Whereas Raja Suraj Pragash Singh, Taluqdar of Gangwal, died childless and intestate, while we, i.e., Rani Itraj Kuar, the first widow,

> Rani Abhiraj Kuar, the second widow, Dulhin Saheba, viz., Jadunath Kuar, widow of Bachcha Mahesh Bakhsh Singh, the son of the late Raja and Rani Achal Raj Kuar, the mother of the deceased Raja, are the heirs, and now we, by mutual consultation, have decided that the mutation of Taluqa Gangwal, Districts Bahraich and Gonda, and purchased Pattis Chaisar, etc., be effected in favour of Rani Itraj Kuar and, during her (Itraj Kuar's) life Rani Abhiraj Kuar, Musammat Dulhin Jadunath Kuar, and Rani Achalraj Kuar, the mother of the deceased Raja, having received the following Bhaiyai villages, which have always remained in the possession of the heirs to the estate and also were held for a long time by Raja Narpat Singh during the Shahi rule, should support themselves because this Bhaiyai right now belongs to Rani Abhiraj Kuar and Musammat Dulhin Jadunath Kuar, the heirs to the estate, who, after me, Rani Itraj Kuar, shall gradually become the successors.

As Rani Sukhraj and Rani Abhiraj Kuar died in the lifetime of Rani Itraj Kuar, defendant No. 1 was in possession of the *guzara* villages at the time of Rani Itraj Kuar's death in 1925.

The Chief Court held that the agreement was a reaonable family settlement, made for the purpose of settling controversies as to the mutation of names consequent on the death of Raja Suraj Prakash Singh, and they further said:—

> *Prima facie* a provision for maintenance must be deemed to be intended to enure for the lifetime of the grantee—*Raja Rameshwar Bakhsh Singh* v. *Arjun Singh* (L. R. 18 I. A. 1). In the present case the provision was to cease earlier, but only in the event of the grantee coming into the possession of the estate. We are unable to discover anything in the document to justify the interpretation that it was to cease on the death of Rani Itraj Kuar, and during the lifetime of the grantee, when the succession to the estate is withheld from her on a ground not contemplated by the settlement.

Their Lordships find themselves unable to agree with this construction of the agreement, as, in their opinion, the words "during her (Itraj Kuar's) lifetime" do not qualify the antecedent part of the provision, but qualify the subsequent part of the provision, under which alone defendant No. 1 has any claim to the *guzara* villages. It follows that defendant is not entitled to retain possession of these villages, and it is unnecessary to consider whether the settlement was valid and reasonable.

The third appeal involves a question of construction of the Oudh Estates Act of general importance, which does not appear to their Lordships to have been clearly or adequately placed before either of the lower Courts, and, in view of the importance and difficulty of the question, their Lordships feel that it will be more satisfactory to have this appeal re-heard before a fuller Board.

Until the advice to be humbly tendered by their Lordships to His Majesty in respect of the third appeal is determined, it will not be possible to settle the terms of the order in respect of the first two appeals.

[The third appeal was accordingly re-heard before a fuller Board consisting of Lord Tomlin, Lord Thankerton, Lord Salvesen, Sir George Lowndes and Sir Dinshah Mulla.]

A. M. Dunne, K.C. and *J. M. Parikh* for the appellant.

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Upjohn, K.C., L. De'Gruyther K.C. and *W. Wallach* for the respondent.

Subsequently on March 8, 1932 judgment of their Lordships was delivered by

LORD THANKERTON—In accordance with the view expressed in the judgment of this Board dated December 4, 1930, the issue raised in the third appeal has been re-heard before a fuller Board. By that judgment it was decided that the succession to the *Taluka* Gangwal is governed by the Oudh Estates Act, and in particular by Section 22(10), which, as amended in 1910, is as follows:—

> (10) Or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid.

The last *Talukdar* was Raja Suraj Prakash Singh, and the plaintiff's pedigree shows Bhaya Partap Singh as their common ancestor, and in accordance with the previous judgment the plaintiff must be held to have established that, in blood relationship, he is the nearest male blood relation according to the rule of lineal primogeniture of Raja Suraj, the last male holder of the *Taluka*. It is clear from the context that this finding relates to physical blood relationship and does not exclude the possibility—raised by the issue in the third appeal—of the legal right of succession, so far as expressed as blood relationship, having been lost, e.g., by adoption.

The sole question in the third appeal is whether the plaintiff has proved that he is an "agnate" of the propositus within the meaning of Section 22 (10); if so, he is admitted to be the nearest male agnate according to the rule of lineal primogeniture.

In the first place, their Lordships are clearly of opinion that the meaning of "male agnate" for the purposes of the section cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute—in this case the Hindu Law of succession according to the rules of the Mitakshara. The term "agnate" is not a term of art in the English legal system; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males. In their Lordships' opinion, it is a word expressive of relationship, similar to "son" or "brother," to which the rule of construction laid down in *Raghuraj Chandra* v. *Subhadra Kunwar*[2], falls to be applied. The only express prescriptions of the Act relative to "male agnate" are that it denotes only legitimate relatives (Section 2), and that it applies only to *najib-ul-tarfain*, i.e., those of noble birth on both sides (Section 21). Subject to these qualifications, the meaning of "male agnate" falls to be ascertained by the personal law of the individual, to whom the succession is to be established.

Turning to the law of the Mitakshara, their Lordships have no doubt that "male agnate" denote a *gotraja-sapinda*, as to which an authoritative exposition is to be found in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[3]. Sir Robert Phillimore, in delivering the judgment of this Board, says (p. 390):—

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[2] [1928] 55 Ind. App. 139

[3] [1870] 13 Moore Ind. App. 373

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> The *Mitácshará,* in the 5th and 6th sections of the second chapter, recognises two successive classes of heirs: first, 'Gentiles'; next, *Bandhoos;* after them it places certain special persons, and after these last the State, the *ultimus hœres.* Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined. The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindoo Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, the same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the *Mitácshará* is in the strictest conformity to these principles. The Gentiles, or *Gotraja* (from the *Gotra*) are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the *Gotra.* These conditions are all that are stated as necessary to the constitution of the class of Gentiles. As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as *Sapindas* and *Samanodacas;* the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs, then, in this case show a common ancestor, a *Gotra,* a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text.

From this it is clear that, in order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, viz.: (*a*) that he is of the same *gotra,* or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

It is now settled that *sapinda*-ship under the Mitakshara law arises from the community of corporal particles, and is not dependent on the right to participate in the offering of funeral oblations; the latter may be of importance in settling the order of preference of heirs in the same class, but is not relevant in a question of exclusion from a class of heirs. *Lulloobhoy Bappoobhoy* v. *Cassibai*[4], *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*[5]. It may further be noted that the *bandhus,* or cognates, have a technical meaning in the system of the Mitakshara and signify the *bhinna-gotra sapindas,* that is, those not belonging to the same *gotra* or family (*Ramchandra, supra cit.*).

The pedigree of the plaintiff in the present suit shows his community of corporal particles with the propositus through a common ancestor, Bhaya Partab Singh, traced through males, and, to that extent, the pedigree has been held proved, as already stated. He has, therefore, satisfied one of the two requisite conditions, i.e., that he is a *sapinda* of the propositus; but the main issue in the third appeal is whether the plaintiff has proved that he satisfies the other condition, namely, that he is of the same patriarchal stock or *gotra*. In the absence of challenge on this point, it might well be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged by defendant No. 2 on this point, it is for the plaintiff to satisfy the Court that he complies with this condition also, before he can succeed in his claim to the succession.

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[4] [1880] 7 Ind. App. 212

[5] [1914] 41 Ind. App. 290

Defendant No. 2 maintains in this appeal that it is established on the evidence that the *gotra* of the propositus was Vaiyaghra, and the plaintiff's *gotra* being admittedly Atri, they cannot be related as agnates (*gotraja sapinda*) under the Mitakshara law, and that, in any event, the plaintiff has failed to prove that the propositus, like himself, belonged to the Atri *gotra*. The plaintiff maintains that the evidence sufficiently establishes that he was of the same *gotra* as the propositus, but that, if this conclusion is not justified, the case should be remitted for further enquiry on this point, as the issue was not fairly or fully raised in its present form at the trial or in the Courts beow.

It was ultimately agreed by both parties (*a*) that, if in fact the propositus was of the Vaiyaghra *gotra* and the plaintiff was of the Atri *gotra*, this difference of *gotra* necessarily led to the conclusion that the plaintiff is not an agnate, i.e., *gotraja sapinda*, of the propositus, and (*b*) that such difference of *gotra* could only be accounted for by adoption into a different *gotra* of the plaintiff or one of his paternal ancestors since the common ancestor, Bhaya Partab Singh.

In the previous judgment their Lordships expressed the view that this issue had not been clearly or adequately placed before either of the lower Courts, and, after reconsideration before a fuller Board, their Lordships are confirmed in this view.

The question of *gotra* was not raised in the pleadings, written or oral. Defendant No. 2 put the plaintiff to the proof of his pedigree, and his only express contention was that Jugraj Singh, the younger son of Partab Singh, died childless. The only issue that could be held to cover this point was No. 7, which is as follows: "Is the plaintiff the nearest heir under the Act by the rule of lineal primogeniture to Suraj Prakash Singh, or under the custom applicable to the family?"

At the trial, *gotra* was first mentioned during the cross-examination of the plaintiff, when he stated "My *gotra* is Atra *gotra*"; he was not further examined on this point by either side. It is next referred to in cross-examination, for defendant No. 2, of two witnesses for defendant 1 and 3 (D. W. 15 and D. W. 18), and is dealt with by a series of witnesses for defendant No. 2. About halfway through this latter body of witnesses a statement by plaintiff's counsel is recorded to the effect that the plaintiff did not admit that the *gotra* of the Gangwal family was Vaiyaghra, but that the Gangwal family belonged to Atri *gotra*.

It seems reasonably clear from the judgment of the trial Judge that difference of *gotra* was only used before him as affecting the question whether Jugraj Singh had died childless, in other words, as involving a break in the blood relationship of the plaintiff with Jugraj Singh. There appears no trace of an argument that, granted the blood relationship, the difference of *gotra* would still negative the plaintiff's claim to be the nearest agnate.

The learned trial Judge held it proved by the defendants' witnesses that the Gangwal *talukdars* were of the Vaiyaghra *gotra,* though he thought that this conclusion was weakened by the fact that that point was not put to the plaintiff or his witnesses in cross-examination; he also thought it possible that the plaintiff might have stated his *gotra* incorrectly or his ancestors might have forgotten to what *gotra* they belonged and then taken whatever *gotra* was suggested by their *prohits* or priests. On consideration of Sastri's Treatise on Hindu Law and Dr. Gour's Hindu Code, he came, apparently reluctantly, to the conclusion that it is possible that persons descended in the male line from a common ancestor can belong to two different *gotras,* and stated "whatever the explanation of the difference of *gotras* may be, I am not prepared to accept this difference as conclusive proof that the plaintiff and his family are not agnatic relations of the *talukdars* of Gangwal in the manner claimed. Counsel for defendant 2 should have put his case to the plaintiff in cross-examination. Probably he feared that if he did so the plaintiff might be able to explain the apparent difficulty. I think it is impossible to explain away the admissions made by Raja Sitla Bakhsh Singh and his *Mukhtar* to which I have referred above." The admission referred to was made in a suit in 1868 by Sheo Nath, the plaintiff's father, against Raja Sitla, the first *talukdar* of Gangwal claiming that certain villages had been given as *bhayai* to the plaintiff's ancestors; in his answer the Raja stated "The plaintiffs do belong to the defendant's family, but these villages were not given to them as a *bhayai,* i.e., portion. Defendant's ancestors gave Gularia to plaintiff's ancestor in 1244 as *jagir.*" The learned Judge also referred to the conduct of Rani Itraj Kuar in 1900, when Sheo Nath Singh made an application to have the estate taken under the Court of Wards on the ground of mismanagement by Rani Itraj Kuar and the detriment to himself as next reversioner, and the omission of the Rani to suggest that Sheo Nath Singh was in no way related to the *Talukdar's* family and therefore had no *locus standi* to present the application. The learned trial Judge concludes:—

> In my opinion, therefore, the plaintiff has satisfactorily established his agnatic relationship to Raja Suraj Prakash Singh in the manner set forth in his pedigree.

Their Lordships are satisfied that the admissions of Raja Sitla and conduct of Rani Itraj Kuar do not involve any admission as to identity of *gotra* between the two families.

The Chief Court, in their judgment, say:—

> On the question of the plaintiff's relationship with Raja Sitla Bakhsh Singh [? Raja Suraj Prakash Singh] the case put forward and argued before us on behalf of Lal Harihar Partab Bakhsh Singh, the defendant appellant in Appeal No. 19, is that Jugraj Singh, the second son of Partab

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Singh, died issueless, or at least that the plaintiff has failed to prove that he is the descendant of Jugraj Singh. It was not disputed that Jugraj Singh was one of the two sons of Partap Singh. We agree with the trial Court that the plaintiff has succeeded in establishing the fact that he is the descendant of Jugraj Singh according to the line of descent indicated in the pedigree above set forth. The evidence seems to be overwhelming and there is no evidence worth the name in rebuttal.

After dealing with the evidence, including the admissions of Raja Sitla about 1868, the learned Judges state:—

> In agreement with the trial Court, we therefore hold that the plaintiff has succeeded in establishing the fact that he is an agnate of the late Suraj Prakash Singh.

It is obvious that the word "agnate" is loosely used in that finding, for after disposing of a question as to the seniority of the plaintiff's line, which was not in dispute before this Board, the judgment proceeds:—

> Against the broader question of relationship, which we have decided in agreement with the trial Court in favour of the plaintiff, the only argument advanced on behalf of the defendants and particularly Lal Harihar Pratap Bakhsh Singh, defendant No. 2, is that the plaintiff and Raja Suraj Prakash Singh could not be held to be related to each other, in spite of all the evidence to the contrary, on the ground that the two belonged to different *gotras*. On the face of it the argument is highly technical and its pursuit has landed us into the region of Hindu tradition.

After quoting the first part of the passage cited above from the judgment of this Board in *Bhyah Ram Singh's* case[6], the learned Judges state:—

> Technically and *prima facie*, therefore, if the plaintiff and the *talukdar* of Gangwal are descended from a common ancestor, they should have one and the same *gotra*.

Differing from the Trial Judge's view of the evidence as to the *gotra* of the *talukdar* of Gangwal, the learned Judges considered that the matter was not free from doubt, and suggested that there were two meanings of *gotra*, one technical and the other popular. They seek to attribute to the plaintiff's use of the term *gotra* a so-called popular meaning as referring to his being a Sombansi, and they conclude as follows: "On these grounds we are unable to give effect to this argument as sufficient to outweigh the direct and positive evidence as to the relationship of the two families."

As already indicated, their Lordships are of opinion that *gotra* has only one meaning, and they find it difficult to believe that, if the question now raised had been clearly in issue *ab initio*, there would have been any difficulty in producing evidence to identify beyond judicial doubt or speculation the *gotras* of the plaintiff and of Raja Suraj Prakash Singh. Their *gotras* must be well known to relatives who attended the *S'raddh* ceremonies, at which the *gotra* of the three paternal ancestors is recited, and such evidence is conspicuous by its absence. There should be no need to resort to the "region of Hindu tradition."

Their Lordships are therefore of opinion that the case should be remitted to the Chief Court in order that the plaintiff may have the opportunity of establishing the identity of his *gotra* with that of Raja Suraj

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[6] 13 Moore I. A. at 391

Prakash Singh; upon this issue his success or failure in his claim to the *taluka* will now depend.

In accordance with the previous judgment of this Board, dated December 4, 1930, and this judgment, their Lordships will humbly advise His Majesty as follows:—That the decree of the trial Judge dated January 4, 1927, be recalled except in so far as it dismisses the plaintiff's claim in respect of the property mentioned in Schedules B, C, E and F appended thereto, that the decrees of the Chief Court in Civil Appeals Nos. 19 and 24 of 1927 be recalled; that the first appeal (No. 102 of 1929) be dismissed, the appellant (defendant No. 1) to pay the plaintiff's costs of the appeal and of Civil Appeal No. 24 of 1927; that the second appeal (No. 103 of 1929) be allowed, the appellant's costs to be paid by defendant No. 1; that the third appeal (No. 104 of 1929) be allowed without costs, and the case be remitted to the Chief Court as above proposed, the costs of all parties in the trial Court, of the parties in Civil Appeal No. 19 of 1927, and of further procedure to be adjudged by the Chief Court.

Case remitted

[Ed., A. L. J.—This case was recently followed by the Allahabad High Court in F. A. 395 of 1928 decided on June 16, 1932 (*Babu Tulshi Prasad Narain Singh and others defendants-appellants* v. *Maharaja Prabhu Narain Singh*) known as the Narhan case.]

NAGENDRA NATH DEY AND ANOTHER (*Defendants*)
versus
SURESH CHANDRA DEY AND OTHERS (*Plaintiffs*)*

Civil
1932
April 21

Lord Blanesburgh
Lord Tomlin
Lord Russell of Killowen
Sir George Lowndes
Sir Dinshah Mulla

Limitation Act, Art. 182—Construction of—Decree—Appeal—Appeal irregular or incompetent—Whether time runs from date of appellate decree.

Time under Article 182 of the Limitation Act in a case where there has been an appeal runs from the date of the decree of the appellate court. There is no qualification either as to the character of the appeal or as to the parties to it and the appeal would be no less an appeal even though it be irregular or incompetent; nor is it necessary that all the persons affected should be parties to the appeal or it should be one in which the whole decree was imperilled. *Mashiat-un-nissa* v. *Rani*, [1889] 13 All. 1 *overruled.* In construing provisions relating to statutes of limitations equitable considerations are out of place and strict grammatical meaning of the words is the only safe guide.

In a mortgage suit some of the mortgagees were plaintiffs while others were impleaded as defendants. The other defendants were the mortgagors or their representatives. A decree having been passed partly in favour of the plaintiffs and partly in favour of the defendants mortgagees, the plaintiffs appealed against the decree in so far as it related to the defendants mortgagees and to the appeal the defendants representing the mortgagors' interests were not impleaded. *Held,* nevertheless, that time for execution under Article 182 ran from the date of the decree of the appellate court.

Any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary

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*P. C. A. 84 of 1928

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acceptation of the term, and it is no less an appeal because it is irregular or incompetent.

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal.

L. De'Gruyther, K.C. and *Jinnah* for the appellants.

K. V. L. Narasimham and *P. V. Subba Row* for the respondents.

The following judgment was delivered by

SIR DINSHAH MULLA—This appeal raises a question as to the construction of Article 182 of Schedule I of the Indian Limitation Act, 1908.

In a suit brought many years ago for partition of certain properties held jointly by the parties to this appeal and their predecessors, a receiver was appointed with power to raise a loan on the security of a mortgage of the properties. The receiver borrowed Rs.18,000 from some of the co-sharers, and on July 10, 1894, he executed a mortgage of the properties in their favour. Amongst the mortgagees were Nagendra Nath Dey and Pulin Behari Dey, who are the appellants before this Board, and Madan Mohan and his son, who are respondents Nos. 24 and 27 respectively. The position at that date was that some of the co-sharers were mortgagees and all the co-sharers were mortgagors.

In 1907, after the shares of the several co-sharers in the partition suit had been allotted to them and the receiver discharged, Madan Mohan and his son instituted the suit out of which the present appeal arises in the Court of the Subordinate Judge of Hooghly to enforce the mortgage. In this suit Madan Mohan claimed that the appellants (defendants Nos. 11 and 12) had assigned their interest in the mortgage to him. The Subordinate Judge upheld his claim, and after taking accounts between the parties, passed a preliminary mortgage decree declaring *inter alia* the liability of the appellants to pay a sum of Rs.4,467 which they accordingly brought into Court.

On appeal to the High Court at Calcutta a compromise was effected between the parties, and on June 10, 1913, a preliminary decree in supersession of the decree of the Subordinate Judge was passed by the High Court in terms of the compromise.

Under this decree Madan Mohan's claim against the appellants was disregarded, and the appellants were shown as mortgage-creditors for Rs.14,615-15-3. The appellants thereupon applied to the Subordinate Judge for withdrawal of the Rs.4,467. Madan Mohan opposed their application, reasserting his former claim, but his contention was overruled, and the appellants were allowed to withdraw their deposit. Madan Mohan appealed to the High Court, but his appeal was dismissed.

In the preliminary decree as passed by the High Court the co-sharers were ranged into two groups, one of decree-holders consisting of six sets of co-sharers, and the other of judgment-debtors consisting of eight sets of co-sharers. After the date of the decree two out of the eight judgment-debtors paid the amount due from them under the decree. The rest did not pay, and on June 4, 1916, Madan Mohan applied to the Subordinate Judge for a final mortgage decree. In his application he again claimed that the appellants had assigned their interest in the mortgage to him, and prayed that an order should be made to that effect. On June 24, 1920, the Subordinate Judge delivered his judgment, disallowing Madan Mohan's claim, and a final decree was passed for the sale of the mortgaged properties that had come to the share of the remaining six judgment-debtors. The decree was drawn up on August 2, 1920, but properly dated as of June 24. It contained a declaration, in conformity with the judgment, that the appellants were entitled to payment of the above-mentioned sum of Rs.14,615-15-3 out of the proceeds of the sale of the properties.

On August 27, 1920, Madan Mohan presented an application to the High Court purporting to be an appeal from the "order" of the Subordinate Judge of June 24, 1920, and alleging, what was clearly untrue, that no decree had been drawn up. His objection was only to the decision against him in respect of the assignment, and he joined as parties to the appeal only the other decree-holders and not the judgment-debtors.

The appeal, though irregular in form as not being an appeal against the decree of the Subordinate Judge, and being insufficiently stamped for this purpose, was admitted and heard in due course by Woodroffe and Suhrawardy, JJ. Objection was taken to the form of the appeal; Madan Mohan asked to amend but this was refused. In the result, the appeal was dismissed both on the ground of irregularity and upon the merits, and the dismissal was embodied in a decree of the High Court dated August 24, 1922.

It is upon the effect of this appeal that the decision of the question under Article 182 of the Limitation Act now before the Board depends.

On October 3, 1923, the appellants presented an application to the Subordinate Judge for execution by sale of the mortgaged properties. It was opposed by some of the judgment-debtors, the present respondents Nos. 1 to 4, on the ground that it was barred by Article 182. The material portion of that article is in these terms:—

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by article 183 or by Section 48 of the Code of Civil Procedure, 1908.	Three years	1. The date of the decree or order; or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court.

If the three years are to be calculated, as the respondents contend, from the date of the decree of the Subordinate Judge, viz., June 24, 1920, the application was manifestly out of time; it was within time if the critical date is that of the decree of the High Court of August 24, 1922, and the decision of this question depends on whether Madan Mohan's appeal which was dismissed on the latter date was an appeal within the meaning of the second clause in the third column of the article cited above. The Subor-

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dinate Judge held that it was, and that the application was in time; the judgment-debtor-respondents appealed, and the High Court took the opposite view, and dismissed the application of the appellants.

The dismissal is supported upon three grounds, namely, (1) that Madan Mohan's application of August 27, 1920 (hereinafter for convenience referred to as the 1920 appeal), was by reason of its irregularity not an appeal at all, but merely an abortive attempt to appeal; (2) that an appeal in order to save limitation under Clause 2 of the article must be one to which the persons affected, i.e., in the present case the judgment-debtors, were parties; and (3) that it must also be one in which the whole decree was imperilled.

In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it.

The second and third contentions have been the subject of much difference of opinion in India. In *Mashiat-un-nissa* v. *Rani*[1] three of the Judges in the Full Court took one view, and two the other. In *Gopal Chunder Manna* v. *Gosain Das Kalay*[2] a Calcutta Full Bench followed the Allahabad minority, though drawing a distinction between cases of joint and of several decrees. Subsequently further differences of opinion manifested themselves even in the Calcutta Court; see *Christiana Sens Law* v. *Benarashi Proshad Chowdhury*[3] (upon which the judgment of the High Court in the present case was based); and *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty*[4] and *Dewan Abdul Alim* v. *Abdul Hakam*[5] in both which cases the opposite view seems to have prevailed. In the courts of Madras, Bombay and Patna, the view which was taken by the minority in the Allahabad case, and which favours the present appellants, has ultimately prevailed.

Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: "where there has been an appeal," time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of June 24, 1920, time only ran against the appellants from August 24, 1922, the date of the appellate Court's decree. They are therefore in agreement upon this point with the Subordinate Judge, and they think that the order passed by him on August 4, 1924, was right.

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[1] [1889] 13 All. 1

[2] [1898] 25 Cal. 594

[3] [1914] 19 C. W. N. 287

[4] [1920] 47 Cal. 813

[5] [1926] 53 Cal. 901

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated February 16, 1926, should be set aside, and the order of the Subordinate Judge dated August 4, 1924, restored. The respondents Nos. 1 to 4 must pay the cost of the appellants in the High Court and before this Board.

Appeal allowed

Watkins and Hunter—Solicitors for the appellants.
Harold Shephard—Solicitor for the respondents.

THE COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR

versus

SIR S. M. CHITNAVIS, SINCE DECEASED (NOW REPRESENTED BY KRISHNA RAO, MINOR, THROUGH HIS GUARDIAN PARWATI BAI LADY CHITNAVIS)*

Civil
1932
April 26
Lord Blanesburgh
Lord Russell of Killowen
Sir Dinshah Mulla

Income-tax Act (XI of 1922), Sec. 10—Business profits—Ascertainment of—Bad debts of the year to be deducted—What debts bad—Question of fact—To be decided by appropriate tribunal—Statute barred debts not necessarily bad.

In assessing the amount of profits and gains of a year chargeable to income-tax account must be taken of all losses incurred during the year and for this purpose each year is a separate and self-contained period of time in regard to which profits earned or losses sustained before its commencement are irrelevant. Consequently a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining profits of that year because loss had not been sustained in that year.

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions of fact to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The assessee has no option of declaring debts bad in any particular year. A statute barred debt is not necessarily bad; neither is a debt which is not statute barred necessarily good.

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*P. C. A. 71 of 1930

CIVIL

1932

COMMISSIONER OF INCOME TAX, C. P.
v.
S. M. CHITNAVIS

Lord Russell of Killowen

APPEAL from a decision of the Court of the Judicial Commissioner of the Central Provinces. (For a report of the judgment under appeal see *Commissioner of Income Tax, Central Provinces* v. *S. M. Chitnavis*, A. I. R. [1929] Nag. 50.)

A. M. Dunne, K.C. and *R. P. Hills* for the appellant.

Latter, K.C. and *Jinnah* for the respondent.

The following judgment was delivered by

LORD RUSSELL OF KILLOWEN—This is an appeal from a judgment of the Court of the Judicial Commissioner, Central Provinces, upon a reference of questions of law, made at the instance of an assessee, under Section 66(2) of the Indian Income Tax Act, 1922, which will hereafter be referred to as the Act.

The questions involved were considered by the said Court to be of such importance that the case was (after argument before two Commissioners) re-argued before a full Bench.

Two separate and distinct matters were raised for decision before the said Court, and its adjudication upon each was adverse to the present appellant. In respect of one of such matters he made no attempt to appeal, and the dispute in regard thereto is at an end. In regard to the other matter, however, he applied to the said Court for leave to appeal to His Majesty in Council, and in response to that application the Court certified that the requirements of Section 109(*c*) of the Code of Civil Procedure, 1908, were fulfilled, "inasmuch as a question of great public importance is involved in the case."

Their Lordships draw attention to this aspect of the case at the outset in view of the contentions which were advanced before them on behalf of the respondent.

The facts of the case may now be stated.

Sir Shanker Rao Chitnavis (who will be referred to as the assessee) for the purpose of assessment to income tax for the year 1926-1927 had, under Section 22 of the Act, to make a return of his total income during the year 1925-1926. He returned that income at Rs.74,668. The Income Tax officer, proceeding under Section 23 of the Act, by his order dated January 17, 1927, assessed the total income at a figure of Rs.1,16,480. In arriving at this figure the officer had (*inter alia*) disallowed certain deductions which had been made by the assessee. The assessee appealed, under Section 30 of the Act, against the assessment to the Assistant Commissioner, who, by his order dated April 25, 1927, reduced the amount of the assessment to Rs.1,13,012. The Assistant Commissioner allowed some, but disallowed others, of the said deductions.

Among the deductions which the assessee had made from the gross income of his business was a sum of Rs.17,983-11-6 for bad debts. The officer had disallowed Rs.7,481-13-9 of this deduction, thereby increasing the figure of assessment by that amount. The Assistant Commissioner affirmed this disallowance. It is round this sum of Rs.7,481-13-9, and the right of the assessee to deduct it, that this appeal revolves.

The officer, in his order, dealt with the matter thus:—

> Bad debts claimed amount to Rs.17,983-11-6. Lists were called

> for and scrutinized and found that as much as Rs.7,481-13-9 are very old and time-barred.

He accordingly would not allow the Rs.7,481-13-9 to be deducted.

The Assistant Commissioner, in his order, used the following language:—

> It is urged that the whole of the bad debt amounting to Rs.17,982 should have been allowed. Lists were called for showing details of dates when the amounts were due in order to ascertain when the debts were really ascertained to be bad and on examination it was found that Rs.7,481 were on account of old bad debts which could not be allowed in the account year. The rest were allowed. Mr. Zinzarde argues that it should be left to the assessee to declare when the debts were bad and the Income-tax Officer should not go on the presumption that the amount had become time-barred in previous years. It appears to me that the criterion to know when the debt is bad is that all the legal remedies to recover fail. The assessee could not be said to be able to recover an old debt although he may entertain a hope to recover. Mere hope will not convert an irrecoverable loan into a recoverable item. It is, I think, not right to allow sums which had become time-barred long before the account year.

The assessee then required the Commissioner to refer to the High Court, under Section 66(2) of the Act, certain questions of law alleged to arise out of the order of the Assistant Commissioner, that which related to the said sum of Rs.7,481-13-9 being described in the assessee's petition in these terms:—

> Has not the assessee got the option of declaring debts bad when he finds after sufficient waiting that from the circumstances of the debtors he is unable to recover them? Can the Income-tax authority deprive the assessee of this option? Should not the Income-tax Officer and the Assistant Commissioner have allowed Rs.7,481-13-9 to the assessee on the same considerations on which the remaining amount out of Rs.17,982 claimed by him was allowed?

An oral affirmation was made by the general agent of the assesee, which contained the following statement in regard to the bad debts:—

> The bad debts, amounting to Rs.7,481, had already gone bad, owing to their being time-barred much before the account year. That is they had gone time-barred in previous account years. But we did not write them off in the hope that they would be collected later on. But as they did not come to be so collected, they were written off during the account year.

The Commissioner, in accordance with Section 66(2) of the Act, drew up a statement of the case and referred it, with his own opinion thereon, to the Court of the Judicial Commissioner. The statement contains two passages which require to be set out. The first is this:—

> Rs.7,481-13-9.—In all, the assessee had claimed a deduction of Rs.17,982 on account of bad debts. Of these, debts amounting to Rs.10,105 were such as had fallen bad during the account year and were written off in that year and were allowed. Debts amounting to Rs.7,481-13-9 were very old and had become bad on account of being time-barred or otherwise much before the account year. They should have been written off in those years and were therefore not allowed.

The other passage runs thus:—

> I beg to say that the assessment is to be made on the income

> of the previous year. This is arrived at after making certain deductions or allowances specified in the Act. These deductions or allowances must also relate to the previous year. Expenditure, actual or notional, that does not relate to the previous year cannot be allowed. The Act does not allow losses to be carried forward from one year to another. Bad debts are a form of notional expenditure and such expenditure must be deemed to be incurred when the debts become bad, that is when they are found to be irrecoverable. When they become bad is, a question of fact to be determined by the Income-tax Officer. It is clear, I submit, that an assessee cannot be allowed to accumulate bad debts and write them off in a year when he will escape the largest possible amount of income-tax by doing so. This answers the first two parts of the first question. The contention that the bad debts amounting to Rs.7,481 should have been allowed on the same ground as the balance of the total claim of Rs.17,982 was allowed does not hold good, in as much as the remaining debts became bad during the account year and were written off during that period and as such were correctly allowed. I submit therefore that this part of the question should be answered in the negative.

The opinion of the Full Bench was unanimous on the points involved in the reference, and in accordance therewith the Court of the Judicial Commissioner by order of December 13, 1928, answered the question in relation to bad debts as follows:—

> The assessee has the option of declaring debts bad when he finds, after sufficient waiting, that from the circumstances of the debtors he is unable to recover them. As the law at present stands the income-tax authority cannot deprive the assessee of this option. The present non-applicant was, therefore, entitled to the deduction of Rs.7,481-13-9 on the same consideration on which the balance of the amount of Rs.17,892 was allowed.

The grounds for this decision are contained in the opinion delivered by Mr. Kinkhede, additional Judicial Commissioner, with which the two other members of the Court merely expressed their agreement. He took the view as their Lordships read his opinion, (1) that an assessee is entitled in ascertaining his profits for a year to deduct such debts as he adjudges to be in that year bad debts; (2) that in assessing the taxable profits for any account year the assessee is entitled to have deducted the whole amount which the assessee has in fact written off as irrecoverable in his accounts of that year; (3) that in this regard the assessee is the sole arbiter, and that his decision is final. That this correctly represents the view of the Judicial Commissioner may be seen from the following passages in his opinion. After stating that the argument of the assessee's counsel (based upon some official Manual) was correct, he said: "It entitles the assessee to urge that in deducing the taxable income in the shape of book profits of the account year, the whole of the amount of bad debts written off by him in his account as irrecoverable in the account year must be deducted." And later on he uses the following language: "The assessee must for obvious reasons be the sole arbiter of his own rights and privileges as regards the business he conducts in his own interest. What is to his interest, and what is prejudicial to him, must depend upon his own decision. It therefore follows that on the question whether to treat any particular debt as bad or irrecoverable, his word or decision must be final; for he alone is or can be the judge of the risks, chances and circumstances which may effect the recovery or non-recovery of that debt from his debtor." In other words the Judicial Commissioner thinks that the assessee is the sole person to decide whether a debt is bad and when it became bad.

The Judicial Commissioner in coming to this view seems to have been to some extent influenced by the mistaken belief that if a creditor writes a debt off in his books as bad, that act in some way puts an end to any right ever to recover the debt. This would appear from the following extract from his opinion:

> An entry in the creditor's account books writing off a debt as a bad debt in any particular year is under such circumstances likely to be interpreted by the debtor as *prima facie* good evidence of conduct on the part of the creditor wherefrom an abandonment of his right to demand it might reasonably be inferred so as to serve as a good answer to any future demand, on the occasion of any adjustment or fresh loan. Such an entry is, in my opinion, a conscious act on the creditor's part whereby he determines his election, once and for ever, to treat the debt referred to therein as bad or irrecoverable. It, therefore, stands to reason that the creditor must have full discretion in the matter, because, it is he, and not the Income-tax Officer, who knows, or must be deemed to know, the circumstances and risks as well as chances of recovery from his debtor. The Income-tax Officer cannot, therefore, legally insist that the assessee must subordinate his own will or discretion and even his decision in the matter to his decision.

Their Lordships are of opinion that the views of the Judicial Commissioner enumerated above are erroneous, and that the assessee has no such decisive voice as suggested.

Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains. But the losses must be losses incurred in that year. You may not, when setting out to ascertain the profits and gains of one year, deduct a loss which had in fact been incurred before the commencement of that year. If you did, you would not arrive at the true profits and gains of the year. For the purpose of computing yearly profits and gains, each year is a separate self-contained period time, in regard to which profits earned or losses sustained before its commencement are irrelevant. It thus follows that a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining the profits of that year, because the loss had not been sustained in that year.

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad; neither is a debt which is not statute barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact, to be determined after consideration of all relevant circumstances.

If, therefore, the order and decision of the Court of the Judicial Commissioner depend upon the view that this question of fact is one as to which the sole arbiter is the assessee, that order and decision cannot stand.

It was, however, argued by Mr. Latter on behalf of the respondent that the appeal must be dismissed. He conceded that an assessee was not entitled, in computing his business profits and gains of one year, to deduct a loss in fact incurred in an earlier year. Further he said that he was not concerned to argue that an assessee was the sole arbiter to decide whether a debt was bad, and when it had become bad, because this particular assessee was entitled to succeed upon the evidence as it stood in this particular case. He claimed that in this particular case, the deduction of the Rs.7,481-13-9 had been disallowed by the officer and the Assistant Commissioner solely upon the insufficient ground that the debts represented by that sum had become statute-barred before the year in question; and that accordingly the debts being admittedly bad there was no evidence to justify the disallowance of the deduction in the particular year.

Their Lordships are not prepared to accept the view that the disallowance rested solely on the fact that the limitation period had expired. The debts are stated to be not only time-barred, but are also described as "very old," and as "old bad debts which could not be allowed in the account year."

However this may be, it is clear that the members of the Court of the Judicial Commissioner intended to decide and thought that they were deciding, not a question affecting only a particular assessee and depending upon the state of the evidence in a particular case, but a question of great public importance affecting assessees generally, and depending upon general principles.

The questions for reference under Section 66 of the Act (which were framed by the assessee) are, perhaps, not very happily worded; but the use of the word "option" and the question whether the income-tax authority can deprive the assessee of the alleged option help to throw light upon what was the real issue between the parties. Their Lordships feel no doubt as to what that issue was, and how it arose. The officer (under Section 23 of the Act), after considering the evidence and account books produced, disallowed the deduction; and the Assistant Commissioner confirmed the disallowance. The argument on behalf of the assessee is apparent in the order of the Assistant Commissioner. He states therein that the pleader for the assessee "argues that it should be left to the assessee to declare when the debts were bad, and the Income-tax officer should not go on the presumption that the amount had become time-barred in previous years." From this their Lordships are satisfied that the attitude adopted by the assessee, when challenged, was to decline to establish by evidence that these old debts had not already become bad before

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the commencement of the year of account, and to claim the right to be sole arbiter of the question in dispute. That was the real issue between the parties which the Court of the Judicial Commissioner (wrongly, as their Lordships conceive) decided in favour of the assessee.

In their Lordships' opinion the question which was referred to the Court in relation to bad debts should have been answered as follows:—

"The assessee has no 'option' of declaring debts bad. Whether a debt is bad, and when it became bad, are questions of fact to be determined in case of dispute not by the assessee or by the exercise of any 'option' on his part, but by the appropriate tribunal upon a consideration of all relevant and admissible evidence. In the circumstances of the present case it is not possible to say that the Income-tax Officer and the Assistant Commissioner should have allowed Rs.7,481-13-9 to the assessee on the same consideration on which the remaining amount of Rs.17,982 claimed by him was allowed."

Their Lordships will, accordingly, humbly advise His Majesty that this appeal should be allowed and the order of the Assistant Commissioner dated, April 25, 1927, restored so far as relates to the Rs.7,481-13-9.

There will be no costs of this appeal.

Appeal allowed

Solicitor, India Office—Solicitor for the appellant.

Hy. S. L. Polak and Co.—Solicitors for the respondent.

HIGH COURT

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June 21

MUKERJI, J.
BANERJI, J.
KING, J.

LACHMAN SINGH AND OTHERS (*Defendants*)

versus

SURENDRA BAHADUR SINGH AND OTHERS (*Plaintiffs*)*

Transfer of Property Act, Sec. 59, Evidence Act, Secs. 68 to 71 and Registration Act, Secs. 58 and 59—Suit to enforce mortgage—Execution and attestation not admitted—No specific plea that the deed, for want of proper attestation did not operate as a mortgage deed—What must mortgagee prove to obtain a decree—Signature of Sub-registrar and identifying witnesses—Whether sufficient attestation.

Where a mortgagee sues to enforce his mortgage and, on the one hand, the execution and attestation of the deed are not admitted and, on the other, there is no plea that the deed for want of proper attestation does not operate as a mortgage deed, the mortgagee need prove only this much that the mortgagor signed the document in the presence of the attesting witness called (or the attesting witness received from the executant a personal acknowledgment of his signature) and the attesting witness signed in the presence of the executant, provided the document on the face of it bears the attestation of more than one person.

But if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses.

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*F. A. 183 of 1929

Ram Dei v. *Munna Lal,* I.L.R. 39 All. 109, *Uttam Singh* v. *Hukam Singh,* I. L. R. 39 All. 112, *Shib Dayal* v. *Sheo Ghulam,* I. L. R. 39 All. 241 and *Balbhadar Singh* v. *Lakshmi Bai,* [1930] A. L. J. 623 *discussed.*

Neither the registering officer nor the witnesses identifying the executant at registration sign as attesting witnesses, and they cannot therefore be treated as such for the purpose of the validity of the mortgage.

Shiam Sundar Singh v. *Jagannath Singh,* 26 A. L. J. 28, *Sarkar Barnard and Co. v. Alak Manjari Kuari,* A. I. R. [1925] P.C., 89 *relied on. Veerappa Chettiar* v. *Subramania Ayyar,* I. L. R. 52 *Mad.* 1923 *dissented from.*

FIRST APPEAL from a decree of MAULVI TUFAIL AHMAD, Subordinate Judge of Etawah.

K. N. Katju, Baleshwari Prasad and *S. N. Seth* for the appellants.

P. L. Banerji and *M. L. Chaturvedi* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This case has been referred to a Full Bench for decision of two points of law. They have been formulated as follows:—

1. When a mortgagee sues to enforce his mortgage, and execution and attestation of the deed are not admitted, what must the mortgagee prove in order to obtain a decree?

2. Whether the signatures of the sub-registrar and of the witnesses identifying the executant at registration are sufficient attestation of the deed for the purposes of the Transfer of Property Act, assuming that the sub-registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence?

The first point as framed above is meant to decide whether when a plaintiff sues on a mortgage deed and, the mortgage deed not being admitted by the defendant or defendants, he has formally to prove it, it is necessary for him to give evidence of the fact that the deed had been attested by two witnesses; or whether it would be enough for him to comply with the provisions of Sections 68 to 71 of the Evidence Act. In other words, when it is not specifically in dispute whether there were two or more attesting witnesses to the deed or less than two, whether it is enough for a party seeking to prove the document to call a marginal witness to prove the signature of the executant and the witness's own signature on the margin, the deed itself bearing on the face of it the attestation of more than one attesting witness. Again, in other words, the question is whether in the three cases decided in this Court, *Ram Dei* v. *Munna Lal*[1], *Uttam Singh* v. *Hukam Singh*[2] and *Shib Dayal* v. *Sheo Ghulam and Lachman Prasad*[3], have been correctly decided.

The argument for the appellants as advanced by Dr. Katju was this. In order to make a mortgage deed admissible in evidence it may be enough for a party to examine only one attesting witness and to prove that the attesting witness attested the document and that the mortgagor signed it. To comply with the rules contained in Sections 68 and 69 of the Evidence Act it may be enough for the party propounding the document not to adduce any further evidence. But, if he contented himself with a bare compliance with Sections 68 and 69 of the Evidence Act, he may succeed in making the document capable of being read by the court, but the evidence would not be enough to prove that the document creates or created a valid mortgage, and, therefore, if a mortgage has to be enforced it must be proved that it was duly attested by at least two witnesses according to law.

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[1] I. L. R. 39 All. 109

[2] I. L. R. 39 All. 112

[3] I. L. R. 39 All. 241

The argument on the other side is that in the absence of anything to show that a mortgage bond, which on the face of it is attested by two or more witnesses, was not actually so attested it is enough to prove that one marginal witness attested the deed and the mortgagor executed it.. It is urged in support of this argument that the presumption under Section 114 of the Indian Evidence Act would be that the mortgage deed had been executed in the manner required by law and that everything that was likely to have happened at the execution of a mortgage did happen. Certain English cases have been quoted in support of this contention, which rely on a presumption of the correctness of things, and these are *Wright* v. *Sanderson*[4] relied on in *Uttam Singh* v. *Hukam Singh*[5] and *Harris* v. *Knight*[6] and an Indian case *Jagendra Nath* v. *Nitai Charan*[7] has also been cited. The first two were cases of a will and the last one was a mortgage case. It was further argued on behalf of the respondents that the rules laid down in the three cases reported in I. L. R. Volume 39 have so long held good in this court that it would be undesirable to pronounce them bad law after such a length of time.

It becomes necessary to examine the three cases in Volume 39 of the Allahabad Series.

In *Ram Dei* v. *Munna Lal*[8] the pleadings of the parties do not appear from the report. We have sent for and examined the paper book. We find that the suit was by the mortgagee on a simple mortgage alleged to have been executed by one Bachchu Lal, the late husband of the defendant. The defendant pleaded that so far as she was aware Bachchu Lal never executed any mortgage deed in favour of the plaintiff as alleged by him. On these pleadings it was held that the plaintiff had done all that was needed of him by law if he examined one of the attesting witnesses who said that the mortgagor had signed in his presence and he (the witness) had signed the deed as an attesting witness. It was pointed out at page 111 of the Report that "It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to the contrary that there was not another attesting witness". The matter, therefore, stood thus. There was a denial on the part of the defendant of the execution of the mortgage deed by the mortgagor and there was no question as to whether the deed was operative or not, assuming that the mortgage deed had been executed (signed by the mortgagor after it had been written out). It was held that there was no necessity for the plaintiff to prove affirmatively that the execution had been witnessed by at least two of the attesting witnesses.

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[4] L. R. 9 P. D. 149

[5] I. L. R. 39 All 112

[6] L. R. 15 P. D. 170 at 172

[7] 7 Cal. W. N. 384

[8] I. L. R. 39 All. 109

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LACHMAN SINGH v. SURENDRA BAHADUR SINGH

Mukerji, J.

In the second case of *Uttam Singh* v. *Hukam Singh*[9] the pleadings are not apparent on the face of the Report. We have examined the paper book in this case also and find that the plaintiff Hukam Singh sued on foot of a mortgage executed in favour of one Tulsi Singh by one Torhi Singh. Torhi Singh was dead and he was represented by his son and other members of the family. The defence of one set of defendants was that the execution and receipt of the consideration money of the mortgage deed sued on by Torhi Singh were not admitted (by the contesting defendant). Another set said that Torhi Singh did not execute and complete the mortgage deed sued on. The issue framed in the court of first instance was (1) "Did Torhi Singh execute the deed in suit for consideration? Does the deed in suit amount to a mortgage? Is the deed binding on the defendants?" The marginal witnesses who were three in number were all dead and the signatures of two were identified by their relations. There was no question raised as to whether the requirements of Section 59 of the Transfer of Property Act had been complied with or not, in the sense that at least two witnesses should have witnessed the execution of the deed by the mortgagor. It was held by the High Court that if the provisions of Section 69 had been complied with, the document had been proved as a deed of mortgage, and it was not necessary to prove further that the mortgage had in fact been executed by the executant in the presence of the attesting witnesses. As we have said, in deciding this case the learned Judges, namely, Richards, Chief Justice and Rafiq, J. relied on the case of *Wright* v. *Sanderson*[10]. In the third case of *Shib Dayal* v. *Sheo Ghulam*[11] the mortgage deed on the face of it appeared to have been attested by a large number of witnesses. The execution of the deed had been denied and one marginal witness was examined to prove the execution of the document by the mortgagor and the witness's own attestation. There was no proof that the mortgagor signed in the presence of two attesting witnesses; nor was there any proof to the contrary. It was held following the case of *Uttam Singh* v. *Hukum Singh*[12] that the requirements of the law had been complied with.

The principle laid down in these cases which were decided by four Judges was followed in this Court in *Narain Das* v. *Dilawar*[13] by Chief Justice Richards and Banerji, J., the Judges who decided the case in *Ram Dei* v. *Munna Lal*[14]. Again, the principle laid down in the case in I. L. R. 39 Allahabad was affirmed in *Lalta Prasad* v. *Darshan Singh*[15] and in *Pateshwari Prasad* v. *Shankar Dayal*[16]. It was argued by Dr. Katju that the cases in I. L. R. 39 Allahabad have really been dissented from by a Division Bench in this Court in the case of *Balbhadar Singh* v. *Lakshmi Bai*[17]. No doubt there are some dicta of Sen, J. which might be construed as going in favour of the appellants, but the learned Judge himself distinguished the case of *Ram Dei* v. *Munna Lal*. Indeed no occasion for dissenting from the decisions in Volume 39 of the Indian Law Report

[9] I. L. R. 39 All. 112

[10] L. R. 9 P. D. 149

[11] I. L. R. 39 All. 241

[12] I. L. R. 39 All. 112

[13] 17 A. L J. 141

[14] 39 All. 109

[15] [1924] A. I. R. 149

[16] [1924] A. I. R. 217

[17] [1930] A. L. J. 28 at 623

Allahabad series arose, because in the case of *Balbhadar Singh* v. *Lakshmi Bai* it had been found as a fact that when the donor put his name on the deed of gift only one attesting witness was present and the other two were not there. Thus it was clearly established on facts that the deed had never been completed as a deed of gift, as required by Section 123 of the Transfer of Property Act. We are, therefore, not prepared to say that the cases in I. L. R. 39 Allahabad were dissented from in *Balbhadar Singh's* case.

Now let us consider the merits of the arguments. For the appellants it is urged that by compliance with the provisions of Sections 68, 69 and 71 of the Evidence Act a party succeeds only in making the mortgage deed, or any other deed like a deed of gift required to be attested by at least two witnesses, admissible in evidence, but, in order to be able to show that the document is a valid deed of mortgage or a valid deed of gift, he must also prove further that it was attested by two witnesses. It is conceded on behalf of the respondents and indeed the matter cannot be disputed that where the *validity* of the deed propounded either as a deed of mortgage or as a deed of gift is *specifically* in question, on the ground whether or not the requirements of Sections 59 and 123 of the Transfer of Property Act had been complied with, the party relying on the deed must prove that it had been attested by at least two attesting witnesses. But the question is where the mere execution of a document has to be proved either because of the case being *ex parte* or because of a mere denial of the execution, whether it would still be necessary to prove that the document was attested by two attesting witnesses. The cases in I. L. R. 39 Allahabad lay down that it is not necessary. They relied on the express language of Sections 68 and 69 of the Evidence Act. These sections make a document which is attested admissible in evidence if the requirements of those sections are complied with. If the documents become admissible in evidence, they become admissible *to prove what they contain,* that is to say, they would become admissible to prove whether a mortgage had been executed or a gift had been made. There seems to be no warrant for an argument that a deed may be *merely* admissible, and yet may be incapable of being read as a document of the kind which it professes to be. When the Legislature enacted Sections 68 and 69 of the Evidence Act, they must have known that there might be titles for the creation of which attestation of the title deed by at least two witnesses would be necessary. It is true that in 1872 when the Evidence Act was enacted, the Transfer of Property Act had not come into force, but the latter was enacted in 1882 and, although 50 years have passed since it was enacted, the Legislature did not think it necessary to amend the Indian Evidence Act, which had been enacted ten years earlier. This circumstance would go to show that in order to make a mortgage deed admissible in evidence as a mortgaged deed or in order to make a deed of gift admissible in evidence *as a deed of gift,* it is enough to comply with the provisions of Section 68 or Section 69, as the case may be, of the Indian Evidence Act. But if the question be whether the document did create a mortgage or gift or not, it must be proved that the requirements of law as contained in Section 59 and Section 123 of the Transfer of Property Act have been complied with.

Thus on the merits, and on the ground that long established decisions of the Court should not be lightly interfered with, we are of opinion that we should answer the question No. 1 as follows:—

> Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person;
>
> But if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses.

On the second point also there appears to be a conflict of decisions among the different High Courts. In *Veerappa Chettiar* v. *Subramania Ayyar*[18] it was held that where it was proved that the mortgagor admitted execution of the document before the sub-registrar and the two identifying witnesses who appeared at the registration, the requirements of Section 59 of the Transfer of Property Act had been complied with. In *Bunkates Sewak Singh* v. *Rama Das*[19] a more or less similar view was taken by a bench of two Judges of this Court. In *Ram Charan* v. *Bhairon*[20] the views taken in *Bunkates Sewak Singh* v. *Rama Das* and *Veerappa Chettiar* v. *Subramania Ayyar* were accepted without any examination. In Oudh a Division Bench has expressly dissented from the view taken in the cases quoted above, see *Mt. Chandrani Kuar* v. *Lala Sheo Nath*[21].

There being no question of upholding a current of decisions, we must decide the question on principle alone. Section 59 of the Transfer of Property Act requires that for the creation of a mortgage other than a possessory mortgage of a small value, (with which we are not concerned here) there should be a registered instrument "signed by the mortgagor and attested by at least two witnesses." The safeguards, therefore, that are needed are (1) the signature of the mortgagor on the instrument (2) attestation by at least two witnesses and (3). registration of the document. The object of having a document attested by two or more witnesses is to provide contemporaneous evidence and to safeguard against the admission of perjured and false evidence. With respect to a document which need not be attested for its validity any man can come forward and say that he saw it being executed. There is no guarantee that the witness was present at the execution of the document. On the other hand, if a document is required by law to be attested, there is this safeguard against fabrication of false evidence, that there would be at least two persons in whose presence the document would be signed or before whom the mortgagor would admit the execution of the document, either at the date of the execution of the document or immediately afterwards.

[18] I. L. R. 52 Mad. 123 (F.B.)

[19] 6 A. L. J. 737

[20] [1930] A. L. J. 1561

[21] A. I. R. 1931 Oudh 146

Under the definition of the word "attested" as it now stands, it is not necessary that the executant should sign the document in the presence of the attesting witnesses, but all that is necessary is that the executant should personally acknowledge his signature or mark on the document and the attesting witnesses should sign the instrument in the presence of the executant. Thus the executant will see before a document has the validity or force of a mortgage that his signature is there and at least there are two persons who have signed before him, the persons being such as have received a personal acknowledgment of the execution of the bond from him (the mortgagor).

After the deed has been signed and attested, it is to be taken to the registration office for registration. If we dispense with the previous signing of the document by the mortgagor and the previous attestation by the two marginal witnesses, we reduce the guarantee of genuineness required by Section 59 of the Transfer of Property Act. Further, if we permit the registration and what may happen at the time to take the place of execution and attestation which, according to the plain language of the section must precede registration, we break the entire spirit of the enactment.

The duty of a registering officer is contained in several sections of the Registration Act (1908). When the document is presented to him, he is to enquire of the person making the presentation, if he happens to be the person executing the document whether the presentor executed the document or where the presentor is not the executant, whether the person who professes to have executed the document really executed the same. Then he has to satisfy himself as to the identity of the person or persons appearing before him and alleging that they have executed the document. *See* Section 34, Sub-section (3), Clauses (*a*) and (*b*). Then Section 52 requires that the day, hour and place of presentation shall be endorsed on every document at the time of presentation. Then Section 58 requires that the signature and addition of every person examined in reference to a document as also the signature and addition of every person admitting the execution of the document shall be obtained. Where, therefore, the registering officer does not know the executant of the document personally and has to ask certain persons as to whether they know the executant, the signatures of these persons; ordinarily known as the identifying witnesses, have to be taken down. Section 59 requires that the registering officer shall affix the date and his signature to all endorsements made under Sections 52 and 58. Thus, we find that, although the registering officer receives a personal acknowledgment from the executant of the fact of his executing a document and although he puts down his signature under a statement recorded by himself or his clerk that the executant admitted the execution, he does not sign as an *attesting witness.* Section 59 requires that the registering officer shall affix the date and his signature *on the same day* on which the endorsements were made; thus he will do his duty according to law if all the endorsements are prepared in his presence and all signatures are taken in his presence and *he at*

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the end of the day's work, sits down and signs all the endorsements made in the course of the day. At that time neither the executants nor the identifying witnesses need be present.

An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment of the execution of the document by the executant. Thus, there is no guarantee that a registering officer shall sign the document in the presence of the executant and will thus fulfil the requirements of an attesting witness.

Then again, the identifying witnesses may be present when the executant admits the execution of the document in the presence of the sub-registrar, or they may not be so present. They may be sent for after the executant has made his admission. They sign the endorsement on the document only in token of the fact that they have identified the executant before the sub-registrar. Thus they do not sign as attesting witnesses, and they never profess to be attesting witnesses.

It follows that the guarantee as to the genuineness of the transaction, expected to be furnished by attesting witnesses, disappears. There is no guarantee that the registrar signed the document in the presence of the executant. There is no guarantee that the identifying witnesses signed the document in the presence of the executant. Again, there is no guarantee that the identifying witnesses heard the executant admitting the execution of the document. It would then remain for the mortgagee to try to persuade the sub-registrar and the identifying witnesses to appear in court and to state that, as a matter of fact, they heard the executant admitting execution and that they signed the registration endorsement in the presence of the executant, although they may have no recollection as to what had happened. In the case of an attesting witness, even if he does not remember what happened when he signed, if he is really an attesting witness, he can, on looking at his own signature at the margin of the deed, safely swear that, although he has no clear recollection of what had happened, he could say from his own signature that he was an attesting witness to the deed and that the mortgagor had either executed the document in his presence or had at least acknowledged the execution in his presence and that he (the attesting witness) had signed the document in the presence of the mortgagor.

Thus we see that the spirit of the enactment that a mortgage deed to be valid must be signed and attested by at least two witnesses is broken, if we accept the possibility of the sub-registrar or identifying witnesses coming forward as so many attesting witnesses.

There are again some other difficulties in the way of accepting the correctness of the decisions like *Veerappa Chettiar* v. *Subramania Ayyar*[22]. Section 47 of the Registration Act lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. Thus, the law understands that a document is presented

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[22] I. L. R. 52 Mad. 123

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for registration after it has been completed as if there had been no law of registration in existence. Again, a similar deduction can be made from the language of other sections of the Registration Act, for example, under Section 34 the registering officer is required to inquire whether the document presented before him has been executed or not. This contemplates that the document is ready there and requires registration. The registration is a guarantee against fabrication. The document is operative by its own force, but registration gives a guarantee that it is not a fabricated document. The sub-registrar is required to make his "endorsements" on the document; *see* Section 52, Section 58 and Section 59. A document, therefore, must be a document which existed before the "endorsement" was made on it. The same conclusion may be drawn from the language of Section 59 of the Transfer of Property Act. There must be under Section 59 an 'instrument' signed by the mortgagor and attested by at least two witnesses before it can be registered. If signature and attestation be permissible at the registration, why should not a further attestation be possible after the registration? Suppose a person whom a sub-registrar knows presents before a sub-registrar a document professed to be a mortgage deed but bearing no attestation. The sub-registrar accepts the admission and signs the endorsement in the presence of the executant and thus, let us take it for granted, becomes an attesting witness. Then if the mortgagor takes the document to another man and asks him to sign on the margin as an attesting witness, the deed should be treated as a valid mortgage under Section 59, for, are there not two attesting witnesses according to the contention of the respondents? In our opinion, therefore, the document must be completed by the signature of the mortgagor and by the signature of the attesting witnesses before it is presented for registration.

In the case of *Samu Patter* v. *Abdul Kadir Revuthan*[28] their Lordships of the Privy Council quoted certain English decisions with approval. These decisions define an attesting witness (at page 614) as follows:—

> In *Bryan* v. *White,* [1850] 2 Rob. 315 at 317, Dr. Lushington in 1850 laid down that 'attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the fact.

Again the Lord Chancellor summed up the conclusion in these words:—

'The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness'. Thus an attesting witness must sign a document as an attesting witness. If a man signs a document not with the idea of being an attesting witness, he cannot be called an attesting witness. Thus, we find that in the case of *Shiam Sundar Singh* v. *Jagannath Singh*[24] certain sons of a testator had been made to sign a will of a Taluqdar ostensibly as marginal witnesses. The testator said in the will:

> I have executed this will with the consent of all my sons and have got them to sign it as *witness* with this very purpose so that this will might be acted upon fully etc.

The testator himself believed that he had obtained the signatures of his sons as witnesses. Now a legatee by attesting a will forfeits the gift made by the document. Their Lordships of the Privy Council held that the sons did not lose the gifts because they could not be legally regarded as attesting witnesses. It is clear, therefore, that the mere fact that a man sees the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution and with the idea further of permitting himself to be cited as a witness, to prove the execution. This point was very clearly discussed in a Patna case in the judgment of the Patna High Court and the judgment was upheld by the Privy Council, the appeal being characterized as "hopeless"—see *Sarkar Barnard and Co.* v. *Alak Manjari Kuari*[25]. Here was a deed of mortgage which was actually attested by only one witness but it had been subscribed to by the husband of the executant in token of the fact that he approved of the transaction. The Patna High Court dismissed the suit on the ground that there were no two attesting witnesses to the deed. The Judge delivering the judgment of the Patna High Court said:

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[28] I. L. R. 35 Mad. 607

[24] 26 A. L. J. 28

> I hold that that the Maharaj Kumar (the husband) not having subscribed as witness is not a witness. It follows that the mortgage bond was not attested by at least two witnesses, and it cannot be enforced against the mortgagors.

On the authority of these two cases it must be held that neither the registering officer nor the identifying witnesses signed as attesting witnesses, and, therefore, they cannot be treated as such for the purpose of the validity of the mortgage.

On behalf of the respondents Mr. Piare Lal Banerji has relied on certain decisions in Calcutta where it has been held that the requirements of a valid will, namely, its execution before two attesting witnesses, is sufficiently complied if an otherwise defective will is taken for registration purposes before a registrar and if the testator admits execution before the registrar and the identifying witnesses. We need not quote these cases, but we can take it as an established rule of law in the Calcutta High Court and also in the Patna High Court which follows usually the decisions of the Calcutta High Court. Mr. Piare Lal Banerji's argument is that the rule of attestation of a will is similar to the rule of attestation of a mortgage deed (since the word "attested" was defined in the Transfer of Property Act) and that, therefore, the same rule should apply to a mortgage deed.

We are of opinion that the argument is fallacious and should not be accepted. A will is not required by law to be registered. Thus, it might be enough for the compliance of the rule of execution and attestation if the testator actually admits execution before the sub-registrar and the identifying witnesses. Like a mortgage deed a will need not be executed and attested first before it is presented for registration. Only two safeguards are needed for a will, namely, execution and attestation. If these are supplied at the registration, the requirements are fulfilled. The case of a will, therefore, is entirely different from a case of a mortgage and cannot be relied upon as a clear guide.

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[25] [1925] A. I. R. (P.C.) 89

Then it was argued by Mr. Piare Lal Banerji that the cases relating to a will decided by the Calcutta and Patna High Courts have been known to the Legislature, and in amending the rule as to wills by Act XXIX of 1925 the Legislature has not touched the rulings, and, therefore, it must be taken to have approved of them. It was further argued that as, after the introduction of the definition of the word "attested" in its final shape, the execution of a will and the execution of a mortgage deed are similar in nature and as the Legislature in amending the Transfer of Property Act in 1929 did not alter the law, it must be taken that it approved of the Calcutta decisions in respect of wills, as equally applicable to a case of mortgages. This argument, in our opinion, is fallacious and makes too many assumptions which are not warranted by facts. To start with, the Succession Act of 1865 was not amended by Act No. XXXIX of 1925. The Act of 1925 is only a consolidating Act putting together all the law that was to be found on similar subjects in many enactments. Thus it cannot be said that the Legislature had an opportunity to change the law as to wills and let it stand where it stood before. Secondly, the law as to wills as laid down in the Calcutta High Court was not applied except perhaps with one or two exceptions to the cases under mortgages. It cannot be said that the Legislature in the year 1929 was aware that it had been held that a mortgage could be validly executed by admission before the sub-registrar and the identifying witnesses. The Madras Full Bench ruling was delivered on September 4, 1928 and in all probability did not appear in the Law Reports till the end of 1929.

On a careful consideration of the entire arguments, we are of opinion that the answer to the second question must be in the negative and we decide so.

Let these our answers be sent to the Division Bench which made the reference.

Reference answered

PRIVY COUNCIL

MOHAMMAD SADIQ ALI KHAN (*Defendant*)
versus
FAKR JAHAN BEGAM AND OTHERS (*Plaintiffs*)*

Civil
1931
Oct. 19
Lord Thankerton
Sir John Wallis
Sir George Lowndes

Mohammedan Law—Gift of immovable property to wife—Deed stating possession delivered—Actual vacation by husband not necessary—Gift to infant daughter—Bona fide intention to give—Valid gift—Oudh Taluqdari Estate —Non-taluqdari properties—Presumption as to custom of descent—Rebuttal of presumption—Oudh Estates Act (I of 1869), Sec. 32A—Alleged accretions to Taluqa—Absence of statutory declaration.

A Mohammedan executed in favour of his wife a deed of gift of immovable property which declared that he delivered possession over it to her

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*P. C. A. 131 and 132 of 1929

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as absolute owner. The deed was handed over to the donee and remained in her possession, but there was no mutation of names. She did not take actual possession until after her husband's death, but during his life she frequently resided with him on the premises. *Held,* that the declaration made by the husband in the deed, followed by the handing over of the deed, were amply sufficient to establish a transfer of possession, and the gift was valid. In the case of an intended gift by a husband to his wife, Mohammedan Law does not require an actual vacation by the husband and an actual taking of separate possession by the wife. *Muhammad Mumtaz Ahmad* v. *Zubaida Jan,* 16 I. A. 205, *Humera Bibi* v. *Najm-un-nissa Bibi,* I. L. R. 28 All. 147 *relied on.*

A Mohammedan purchased immovable property, taking the conveyance in the name of his five years old daughter. The income was credited to a separate account, but it was in part applied to purposes with which she had no concern. On the occasion of her marriage the deed was placed upon a tray and sent for the inspection of her father-in-law. After the death of the donor it was contended that the purchase was *benami. Held,* that in the case of a gift by a Mohammedan father to his infant child, no transfer of possession is required, it is only necessary to establish a *bona fide* intention to give, which was established, and there was therefore a valid gift to the daughter. Though there may be no presumption of advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon,* 2 I. A. 87 at 104 *applied.*

Where a family custom which governs the succession to the *taluqdari* estate is of comparatively recent origin, two well-established instances of division of *non-taluqdari* property according to Mohammedan Law are sufficient to rebut the presumption based on *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan,* 43 I. A. 269, viz., that the family custom of primogenitary succession being established in respect of the *taluqdari* property, it must be held to govern also what is *non-taluqdari. Zarif-un-Nisa v. Shafiq-uz-zaman Khan,* 55 I. A. 303 at 316 *followed.*

Apart from the provisions of Sec. 32A of the Oudh Estates Act of 1869 as amended in 1910, there cannot be incorporation of acquisitions in the *taluqdari* estate. *Rajindra Bahadur Singh* v. *Rani Raghabans Kunwar,* 45 I. A. 134 *followed.*

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

W. H. Upjohn, K.C. and *L. Jopling* for the appellant.

L. De'Gruyther, K.C., B. Dube, K.C. and *W. Wallach* for the respondents.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—The principal question of the many, involved in these appeals is as to the right of succession to an important *taluqdari* estate in Oudh, known as Kunwa Khera. The last holder was Nawab Baqar Ali Khan, who died intestate on January 17, 1921. He left him surviving two widows, four sons, of whom Nawab Mirza Mohammad Sadiq Ali Khan was the eldest, and one daughter. The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below, the names of females being printed in italics:—

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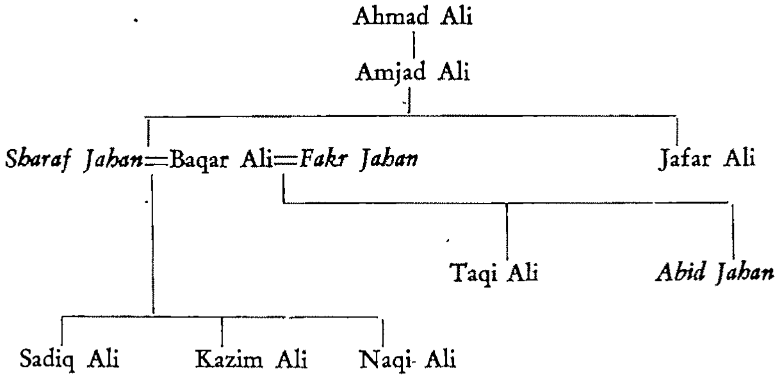

The appeals arise out of two separate suits, the first of which was instituted by the junior widow, Fakr Jahan Begum, and her two children, Taqi Ali and Abid Jahan, who will be referred to in this judgment as the plaintiffs. They claimed their shares according to the Shiah Mohammedan law, to which the parties are subject, in the whole estate of Baqar Ali, including the Kunwa Khera property. To this suit the other widow and her three sons, and also Jafar Ali, the brother of Baqar Ali, were joined as defendants. Jafar Ali died pending the suit, and his heirs were brought on the record in his place, but took no part in the proceedings. Naqi Ali also died, *pendente lite,* and is now represented by his widow, Jaddo Begum. Neither she nor her assignee, Dilawar Ali, have appeared before the Board.

The second suit was brought by Fakr Jahan alone, claiming the sum of Rs.50,000 as due to her for dower out of the property left by Baqar Ali. To this suit all the other parties, with the exception of Jafar Ali, were defendants.

The first suit involved various questions as to Baqar Ali's estate, including the validity of a number of dispositions of property made by him during his lifetime, as to most of which there were concurrent findings of the Courts in India. There are now five appeals before the Board, which have been consolidated; four of them arise out of the first and principal suit and the remaining one out of the dower suit. The parties are ranged on different sides on the various questions involved, according to their individual interests. On the question as to the succession to the Kunwa Khera estate, with which their Lordships will first deal, Sadiq Ali, claiming as the eldest son by the rights of primogeniture, is opposed by all the other parties. His claim succeeded in both the Indian Courts, but is disputed before the Board.

The estate was the subject of two *sanads,* dated respectively in 1858 and 1861, by each of which it was granted to Amjad Ali, the father of Baqar Ali, subject to descent by the rule of primogeniture. The reason for the two *sanads* is unexplained. They are to all intents in the same terms.

Upon the passing of the Oudh Estates Act, I of 1869, Amjad Ali's name was included in the first and second of the lists prepared under Section 8 of the Act. Against his name in the first list was entered the estate of Kunwa Khera. By Section 10 the entry of his name in the lists is conclusive evidence that he was a *taluqdar* to whom the provisions of the Act applied; the effect of the inclusion of his name in the second list was a statutory declaration that the Kunwa Khera estate by family custom ordinarily devolved upon a single heir: *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[1]. By Section 22 of the Act, upon the death of Amjad Ali intestate the estate would descend upon his eldest son, Baqar Ali, and from Baqar Ali to Sadiq Ali, and, if the section applied, the claim of the plaintiffs, so far as the estate was concerned, would necessarily fail. Amjad Ali in fact left a will, dated March 16, 1874. By it he purported to provide for the division of his Sitapur property, which included at all events the greater part of Kunwa Khera, among his heirs according to Mohammedan law. The will, however, did not comply with the requirements of the Act. It has been held by both Courts in India to be invalid on this account, and their finding is not disputed before the Board. It would seem to follow that the title of Sadiq Ali to the estate was *prima facie* unassailable, but it is attacked by the plaintiffs and the defendants who side with them on three grounds.

In the first place, it is contended that though Kunwa Khera appears in list No. 1 as the *taluqdari* estate of Amjad Ali, the Act did not in fact apply to it. It was said that the definition of estate in the Act applies only to villages and lands named in the list attached to the *kabuliyat* executed by the *taluqdar*, and that the list in the case of Kunwa Khera was not executed by Amjad Ali, but by his slave Abdul, with whom the settlement was made on his behalf. Their Lordships think that there is no substance in this contention.

In the next place, it is contended that Baqar Ali did not take the estate under the Act, but by an independent title, and that therefore it devolved on his death by the ordinary Shiah Mohammedan law. In support of their contention reliance is placed upon certain transactions which took place after Amjad Ali's death and were, no doubt, inspired by the provisions of his will, to which reference has been made above. Amjad Ali died on March 7, 1875, and on different dates in April and June of the same year three deeds of compromise were executed between Baqar Ali, his brother Jafar Ali, and the other heirs of Amjad Ali, under which Baqar Ali's title to the Kunwa Khera estate was recognised, and that of Jafar Ali to another estate not concerned in these appeals, and provision was made for the other heirs. It is contended for the plaintiffs and their supporters that the effect of these compromises was that Baqar Ali took the estate by transfer from his brother and the other heirs and not by succession under the Act or under the *sanads*, and that it so became in his hands property which would be divisible on his death according to the ordinary rules of Mohammedan law. This contention has been rejected by both Courts in India, and their Lordships have no hesitation in affirming their conclusion. They think that it is impossible to regard the compromises as being in any way the root of Baqar Ali's title, which, even if the original *sanad* could be disregarded, was clearly established by the Act. The compromises were, in their Lordships' opinion, only a recognition of his right to succeed to the estate.

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[1] 43 I. A. 269 at 280

The only remaining contention to which reference need be made on this part of the case is based upon a supposed deed of gift of June 1, 1857, by which Ahmad Ali, the father of Amjad Ali, is alleged to have transferred the estate to Baqar Ali, and it is said, therefore, that when the *sanads* were subsequently granted to Amjad Ali, and his name was entered in the lists provided for by the Act, he must be taken to have held the estate merely as a trustee, and that nothing in the Act applied to it in Baqar Ali's hands. Their Lordships think it sufficient to say, in answer to this contention, that the deed of gift has not been proved. Both the lower Courts have so held, and their Lordships see no reason to differ from the conclusion to which they have come.

In the result their Lordships are satisfied that the title of Sadiq Ali to the Kunwa Khera estate has been established; that it was not divisible according to the ordinary rules of Mohammedan law among the heirs of Baqar Ali, and that the plaintiffs' suit so far as it sought to effectuate this claim has failed.

Their Lordships now turn to the subsidiary questions raised by the various contending parties, which are many and diverse. It will be convenient to take up first the questions upon which Sadiq Ali is the appellant.

His main contention is that he is entitled to suceed not only to Kunwa Khera, as a *taluqdari* estate, but to all the property left by Baqar Ali to the exclusion of the other parties to these appeals. The ground of this claim is that the family custom of primogenitary succession being established in respect of the *taluqdari* property, it must be held to govern also what is *non-taluqdari.* The contention is based upon the decision of this Board in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (*supra*). In that case Mr. Ameer Ali, in delivering the judgment of the Board, draws a distinction between the position of a Hindu family governed by the law of the Mitakshara and a Mohammedan family. In the former case, he points out, self-acquired property may go in a different line of succession to ancestral property, but the Mohammedan law allows of no such differentiation. In the case of a Mohammedan family, therefore, "if a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the *taluqa* to establish it."

In the present case the Subordinate Judge by whom the suit was tried recognised the importance of this presumption, and held that it was for the plaintiffs to prove that in their family the succession to *non-taluqdari* property followed the ordinary Mohammedan law by which the family was governed. This he held that they had satisfactorily established, and the Appellate Court accepted his finding. There being thus concurrent findings on what is obviously a question of fact, the matter could not, according to the ordinary practice of the Board, be reopened here. But it was contended by Mr. Upjohn, who appeared for Sadiq Ali, that there was no evidence to support this finding. Their Lordships are unable to accept this contention. Without going into the evidence at length it is sufficient to state that in at least two cases of succession in the family *non-taluqdari* property has been divided according to Mohammedan law, there being no trace of any claim in either case that it was not so divisible by reason of a family custom.

It is admitted that Kwaja Safi, the paternal grandfather of Ahmad Ali, migrated from Persia to India. There is no suggestion of a custom so directly at variance with the Mohammedan law having been introduced from Persia, and their Lordships think that it can only have originated in India, and therefore at a comparatively recent date. It may well, they think, have been a special custom attached only to a special grant from the ruling authority in Oudh. That there may be such a custom affecting only the principal estate of a family is recognised by the judgment of Lord Phillimore in *Zarif-un-Nisa* v. *Shafiq-uz-zaman Khan*[2] also a Mohammedan case. This view receives further confirmation from the terms of the *sanads* of 1858 and 1861. In any case, however, their Lordships think that where a family custom is, as here, of comparatively recent origin, two well-established instances of division according to the Mohammedan law are not only material upon which the Courts in India might hold in favour of the plaintiffs upon this question, but are in themselves sufficient to rebut the presumption upon which counsel for Sadiq Ali relies. In the opinion of their Lordships, therefore, it has been rightly held that the property left by Baqar Ali other than the Kunwa Khera estate is divisible among his heirs according to Shiah Mohammedan law.

The next question to be considered is the claim by Sadiq Ali to a number of items as accretions to the *taluqdari* estate. They consist largely of subordinate interests in the estate which were owned by outsiders and had been bought up by Baqar Ali. Both Courts in India have rejected his claim to the alleged accretions. Sadiq Ali appeals against their decision and is opposed before the Board by all the other parties. Their Lordships think that the claim is clearly not maintainable. Both Courts have found that there was no intention on the part of Baqar Ali to incorporate any of these acquisitions in the *taluqdari* estate, and their Lordships would not be disposed to disagree with this finding. But the matter does not rest merely on the proof or disproof of such intention. Apart from the provisions of Section 32A of the Act of 1869 as amended in 1910, which, it is admitted, do not apply in the present case, no incorporation of other property would be possible. This is clear on the judgment of the Board in *Rajindra Bahadur Singh* v. *Rani Raghabans Kunwar*[3], which has been rightly interpreted by the Chief Court.

Another item of immovable property which is affected by similar considerations is what is called the Khairabad House, but is really the estate office of the *taluqa*. It was not part of the Kunwa Khera estate at the dates either of the *sanads* or the statutory lists, but was purchased by Baqar Ali.

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[2] 55 I. A. 303 at 316

[3] 45 I. A. 134

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Sadiq Ali claimed it as an "appurtenance" to the estate, and his claim was allowed both by the trial Judge and the Chief Court on appeal, who found that it had been so used for many years. In their Lordships' opinion, the principle affirmed in *Rajindra Bahadur's* case cited above applies with as much force to this property as to the alleged accretions, and Baqar Ali, not having availed himself of the provisions of Section 32A, could not by any form of user incorporate it in the *taluqdari* estate, or subject it to a rule of descent at variance with the Mohammedan law. Mr. Upjohn for Sadiq Ali does not deny that the property was purchased by Baqar Ali, but, founding upon a passage in the judgment in *Rajindra Bahadur's* case (at pp. 146-7), contends that a *sanad* from the Government should be presumed granting the house to the *taluqdar*. Their Lordships can see no possible foundation for this contention. The house was the property of Baqar Ali, and if he had desired to incorporate it in the *taluqa* he could have done so by the special procedure introduced in 1910. There was no necessity and no occasion for a *sanad*. The question of the Kaiser Bagh House in *Rajindra Bahadur's* case was on a different footing altogether. It was the property of Government and had been allotted to the *taluqdar*.

Their Lordships therefore think that the Courts in India were wrong in allowing Sadiq Ali's claim to this property, and that it forms part of the divisible assets of Baqar Ali in which all the heirs are entitled to share.

It will be convenient here to take up another and possibly more difficult question affecting a portion of the Kairabad property known as the Mahal Serai. By a duly registered deed of gift dated February 28, 1916, Baqar Ali purported to make over this serai to his wife, Fakr Jahan. The deed recites the donor's desire to arrange for her residence at Kairabad when she wishes to live there; sets out in detail the particular portions of the property which she is to have, and continues:—

> and I deliver possession over the gifted property to the aforesaid second wife of mine from this date, like myself. Now, the said wife has power to keep the gifted property in her proprietary possession, in whatsoever manner she desires and I or any heir of mine shall never have any occasion for raising any kind of objection. Now with effect from this date the gifted property has, with all the external and internal rights been transferred to the aforesaid Nawab Fakhr Jahan Begam in the capacity of an absolute proprietor like myself.

The gift is attacked by Sadiq Ali and his branch of the family upon two grounds, viz., (1) that the deed was merely colourable, there being no intention on the part of Baqar Ali to transfer the property to the lady, and (2) that the gift was not completed by such a change of possession as is requisite under the Mohammedan law to validate a gift of immovable property.

These two objections must be considered separately. The first is purely a question of fact; the second has been argued mainly as a question of law.

The trial Judge thought that the gift was fictitious, and held that nothing passed by it. The Chief Court disagreed with him, finding nothing suspicious in the transaction. It was not disputed, the learned Judges

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say, that after the deed was executed the lady frequently visited Kairabad and resided on the premises. They therefore held that she had taken possession, and that the gift was effective.

The first objection being against the tenor of the deed, the burden of proof is clearly upon those who dispute the gift. No possible reason is suggested why Baqar Ali should have desired to put a portion of this property in anyone else's name, except, possibly, an inherent propensity for *benami* or *ism farzi* transactions. On the other hand, the reason recited in the deed that he desired to provide his favourite wife with an alternative residence at Kairabad is, to say the least of it, understandable. The portion assigned to her contained the *zenana* quarters, where she ordinarily put up when accompanying her husband on his apparently not infrequent visits to the *kothi*, and it is clear from the evidence of his other gifts to her which are now established that he had a great desire to provide for her future comfort on a generous scale. Against this all that can be said is that during his lifetime she exercised no individual acts of proprietorship over any portion of the Kairabad establishment; that in her and her husband's absence the serai was occupied by the servants of the estate; that such repairs as were necessary were done at Baqar Ali's expense, and that no mutation of names was made in the Government records. In their Lordships' opinion, these facts are not sufficient to establish that the transaction was merely colourable. The deed was handed over to the donee and remained in her possession, and their Lordships have no doubt that Baqar Ali intended to make a genuine gift of the property to her.

The second objection involves some consideration of the Mohammedan law. It is not disputed that a gift of immovable property must ordinarily be completed by a transfer of possession and there seems to be no difference on this point between Hanafi and Shiah law. The Chief Court thought it was clear that Fakr Jahan had taken actual possession, but it is pointed out that this was only after her husband's death. So long as Baqar Ali was alive she merely resided there with him, and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement "I deliver possession of the gifted property to my said wife", and this as a declaration of fact must be regarded as binding on the heirs of the donor: see *Sheikh Muhummad Mumtazahmad* v. *Zubeda Jan*[4]. In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, their Lordships do not think that Mohammedan law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion, the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to establish a transfer of possession. In *Shaik Ibhram* v. *Sheik Suleman*[5], West, J. laid it down as a principle for the determination of questions of this nature that "when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession". This statement of the law was cited and followed by Sir Lawrence Jenkins in

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[4] 16 I. A. 205

[5] I. L. R. 9 Bom. 146

1905 (*Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*[6], a case between Shiahs), and also independently in the same year by the Allahabad Appellate Court *Humera Bibi* v. *Najm-un-nissa Bibi*[7]. It has also been followed in two Madras cases, and is cited with approval in the late Mr. Ameer Ali's work on the Mohammedan Law, 3rd Ed., p. 71. It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Mohammedan donors and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law, and they adopt it as applicable to the case before them. In their opinion, therefore, the gift of this portion of the Kairabad property by Baqar Ali to Fakr Jahan was effective, and the conclusion come to by the Chief Court was correct.

Their Lordships must now turn to the long series of cases where purchases in the names of one or other of the plaintiffs are charged as *benami*. These have been examined with great care by the trial Judge, and in nearly every case where they were disputed on appeal his findings were confirmed by the Chief Court. No adequate reasons have been suggested why these concurrent findings of fact should not be accepted by the Board in accordance with the ordinary rule, and it is therefore unnecessary to burden this judgment with their details. Mr. Dube, for the second plaintiff, Taqi Ali, disputes concurrent findings in 25 different instances, but his contentions amount to no more than that upon the evidence the Courts should have come to the opposite conclusion. In many cases the material documents have not been printed, and he is unable to give even the dates of the transactions which he is instructed to support.

There are, however, two cases in which the Courts in India have come to different conclusions, in addition to the case of the Mahal Serai at Khairabad, which has already been dealt with, and these require consideration.

The first concerns the village of Jiamau, which was conveyed to Fakr Jahan by a deed dated January 12, 1920. The purchase price of the property was Rs.51,000. Out of this two sums of Rs.1,000 and Rs.600 for earnest money, and a small additional sum for stamp duty were admittedly advanced by Baqar Ali. Fakr Jahan has sworn that these sums were repaid by her and that the balance came from her own funds. The trial Judge was not prepared to accept her statement without further corroboration. The Appellate Court thought that there was no reason to disbelieve it. As the lady's evidence was taken on commission, the Judges of the Chief Court were in at least as good a position to appreciate its credibility as the trial Judge, and their Lordships must naturally attach the greater weight to their estimate. They have perused the evidence in question, and see no reason to disagree with the conclusion to which the learned Chief Judge and his Indian colleague have come. It is not denied that Fakr Jahan was in possession of sufficient means to pay for the property; the purchase deed appears to have been all along in her possession and mutation was effected in her name. There is no affirmative proof that the balance of the purchase money was paid by Baqar Ali, nor does the admission as to the earnest money, even if it was not repaid, necessarily lead to this conclusion.

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[6] I. L. R. 29 Bom. 468

[7] I. L. R. 28 All. 147

In their Lordships' opinion, the *prima facie* title of Fakr Jahan has not been displaced by the oral evidence, and they think that the finding of the Chief Court with respect to this property should be affirmed.

The other case is that of a property known by the picturesque name of "Sher Darwaza." It was purchased on November 12, 1910, by Baqar Ali, but the conveyance was taken in the name of his daughter, Abid Jahan, the third plaintiff, then an infant of about five years old. The property was during her minority managed by Baqar Ali in her name, and though the income was apparently credited to a special account, and certain sums were paid out of it to her husband, it seems clear that it was in part appropriated to purposes with which Abid Jahan had no concern.

In the case of a gift by a Mohammedan father to his infant child, no transfer of possession is required, it is only necessary to establish a *bona fide* intention to give: see *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*[8].

There is no doubt that Baqar Ali did in many instances, which have been fully discussed by the trial Judge, purchase immovable properties in the names of various members of his family without any intention, so far as the evidence adduced discloses, of benefiting the particular nominee, and the only question is whether there is sufficient in the case of the Sher Darwaza property to take it out of this category of *benami* purchases. The trial Judge thought there was not. The Chief Court came to the opposite conclusion. The deed, which was produced at the hearing by Fakr Jahan, was on the occasion of Abid's marriage in 1914 placed upon a tray and sent for the inspection of her father-in-law, and this was in the view of the learned Judges conclusive of Baqar Ali's intention.

The purchase of this property was a very natural provision by Baqar Ali for the daughter of his favourite wife, and though there may be no presumption of advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. The sending of the deed for the inspection of the lady's father-in-law, which the Chief Court held to be established, was clearly a representation that the property was hers, and their Lordships agree with the learned Judges in the conclusion to which they came. They think, therefore, that the Sher Darwaza property should be excluded from the divisible estate of Baqar Ali.

An attempt has been made to press the same argument in the case of a mortgage upon certain property in Husain Ganj and Baragaon, which was taken in the name of Abid Jahan, but both the trial Judge and the Chief Court have held against the third plaintiff as to this, and their Lordships see no reason to re-examine the evidence upon which they have come to this conclusion.

The next matter over which the parties are at variance concerns a sum of about five and a-half lakhs of rupees in Government Promissory Notes. This has been held by both Courts in India to belong to a charitable fund

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[8] 2 I. A. at 104

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known as the Radd-i-Mazalim, which is said to mean "Atonement for Crimes of Violence." It has accordingly been treated as outside the estate. Sadiq Ali apparently claimed to be the trustee of it, and the trial Judge acceded to his claim. The Chief Court, while affirming the trust, held that the question of the trusteeship was not before them. Sadiq Ali does not contest this before the Board, but supports the trust;, the other parties contend that the trust is bad under Mohammedan law, and that the notes form part of the divisible estate.

The ground of this contention is that Government Promissory Notes, being interest-bearing securities, cannot be the subjcet of a dedication to God, which is an essential feature of every Mohammedan *Waqf*. On this question there has been a conflict of opinion in India. The authorities were discussed in the Chief Court, and the learned Judges came to the conclusion that, taking modern ideas into account, the objection was unsustainable. They therefore agreed with the trial Judge that the notes did not form part of Baqar Ali's estate.

The origin of the fund is uncertain. The earliest reference to it to which their Lordships' attention has been drawn is in the will of Ahmad Ali, the grandfather of Baqar Ali, dated September 2, 1857. The notes in question were directed by his will to be applied as part of the Radd-i-Mazalim fund. It is clear on the terms of the will that the trust had been created in the previous generation. There is nothing to show of what it originally consisted, but the fund was evidently in the keeping of Ahmad Ali, and he seems to have allocated the notes in question to it either as representing its investment in his hands, or possibly only as the equivalent of a sum for which he regarded himself as accountable.

After Ahmad Ali's death a suit was instituted for the administration of his estate, to which Amjad Ali was a party. The suit eventually came up to this Board in 1867 (*Nawab Umjad Ally Khan* v. *Mussumat Mohundee Begum*[9]. The Radd-i-Mazalim fund figured in the proceedings as a "family religious and charitable fund." Trustees were appointed of it by the Court, and a scheme of management was directed, and these provisions were affirmed by the Order in Council.

Upon these facts, which have not been disputed on the present appeals, it seems difficult to see how the validity of the trust can now be questioned. It is not denied that the *Wakf* has been recognised by the members of the family for three-quarters of a century or more, and that the income of the fund has been applied, at all events in the main, consistently to charitable purposes. The notes clearly came into Baqar Ali's possession as representing the *corpus* of the fund, and even if they were an improper investment of it, as to which their Lordships express no opinion, this could not make them his property.

If the trust could be regarded as having been created by Ahmad Ali, and as originally invalid for the reason now suggested, the fund might have been divisible among his heirs, but that is not a question which arises in the present proceedings. So far as Baqar Ali was concerned, he was

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[9] 11 Moo. I. A. 517

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bound by the result of the suit above referred to, and in his hands the notes were clearly trust property.

Under the circumstances, their Lordships find it unnecessary to attempt a solution of the interesting problem of Mohammedan law which was propounded to the Chief Court. The only material question in these appeals is whether the fund formed part of Baqar Ali's divisible estate, and for the reasons given their Lordships have no doubt that it did not.

A small question has been raised by Mr. Wallach, who appears for the first and third defendants, Sharaf Jahan and Kazim Ali, as to the order for costs made by the Chief Court. In their appeal, No. 24 of 1926, which failed, they were directed to pay the costs of "the other side," separate sets of costs being allowed to each party or group, with the result that they have had to pay the costs of Jaddo Begum, the widow of Naqi Ali, and her assignee, Dilawar Ali, who were, apparently, separately represented in the Chief Court, but have not appeared before the Board. This, it is contended, is manifestly unjust, as Naqi Ali had made a joint defence to the suit with Mr. Wallach's clients. Their Lordships think that if this was a slip, the attention of the Judges should have been called to it in India. If it was not, as appears more likely, it is manifest that this Board is not in a position to review the discretion of the Appellate Court in such a matter. It is very rarely that the Board interferes in a matter merely of costs, and there is no reason why an exception should be made in the present case.

Their Lordships have now dealt with all the matters which have been submitted for their consideration in the first suit, and it only remains for them to deal with the question of dower, which was the subject of the second suit in which Fakhr Jahan is the sole plaintiff.

It is not disputed that the dower fixed on Fakhr Jahan's marriage was the sum of Rs.50,000, which she claimed from her husband's estate. The defence set up by Sadiq Ali and the other members of his branch of the family is that the debt was satisfied by payments made to her by Baqar Ali in his lifetime. It is admitted that she received sums of money from her husband which in the aggregate exceeded the Rs.50,000, but these payments were made from time to time in varying amounts, the largest of which was only Rs.3,000. There is no evidence that Baqar Ali allocated any of these payments to the dower debt, nor was there any attempt at the trial to show that the lady accepted them as such. She referred in her deposition to "presents" received from her husband in addition to a liberal allowance, but it does not seem to have been suggested to her in cross-examination that any of these moneys were payments on account of dower. The dower deed was produced by her at the trial, and no payments are endorsed or noted upon it. There is in reality nothing in the evidence to rebut her claim. Reliance is placed upon the maxim, "*Debitor non-præsumitur donare,*" but their Lordships doubt if it has any application as between husband and wife—at all events when the relations between them are such as are established in the present case. It is certain that in many cases Baqar Ali did make presents to his wife quite irrespective of her dower,

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and it can hardly be presumed that a man in his position would desire to discharge such an obligation by driblets.

A previous dower case in the same family is also cited in favour of the defence: *Iftikar-un-nissa Begum* v. *Nawab Amjad Ali Khan*[10]. Here the dower debt was held to have been discharged after the husband's death by the transfer of Government Paper of substantially the equivalent in value of the debt, but their Lordships are unable to see any resemblance between the facts of the two cases.

The trial Judge held that the debt was satisfied by the aggregate of the payments and dismissed the suit. The Chief Court took the opposite view and allowed the claim of the plaintiff. Their Lordships think that the decision of the Chief Court was clearly right.

Before closing their judgment their Lordships would desire to express their appreciation of the great care with which these cases have been tried by both Courts in India. They are also indebted to the learned counsel who have appeared before them for their assistance in extracting the necessary material from a heavy record.

On the whole case, in their Lordships' opinion, the conclusion come to by the Chief Court were right and should be upheld, except in the matter of the Khairabad House, which was one of the subjects of Oudh appeal No. 20 of 1928, in the Chief Court. Their Lordships think that this question should have been decided in favour of the plaintiffs, and that the decree of the Chief Court on this appeal should be varied by declaring that the so-called Khairabad House, as apart from the Mahal serai, is not appurtenant to the *taluqa* of Kunwa Khera, but forms part of the divisible estate of Baqar Ali. They think that in all other respects the decrees of the Chief Court in both the suits should be affirmed, and they will humbly advise His Majesty accordingly. There will be no order as to the costs of these appeals.

Decree affirmed

Barrow, Rogers and Nevill—Solicitors for the appellant.

Hy. S. L. Polak and Chapman, Walker and Shepherd—Solicitors for the respondents.

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[10] 7 Beng. L. R. 643

HIGH COURT

BADRI CHANDAN (*Judgment-debtor*)
versus
INDRAJIT PERTAB BAHADUR (*Decree-holder*)*

Civil

1932

March 3

Mukerji, J.
Bennet, J.

Civil Procedure Code, Sec. 60(1)(c)—Decree against assets of deceased person in the hands of his successor—Deceased not an agriculturist—Successor an agriculturist—House occupied by successor attached—Whether exempted from attachment.

A decree was passed against the assets of a deceased person (who was not an agriculturist) in the hands of his successor-in-interest (who was an agriculturist). The decree-holder attached a house, which was occupied by

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*E. F. A. 546 of 1930

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the successor, with a view to auction sale; *held*, that it is the occupation of the person in whose hands the assets are at the present time, which should be considered, and the house is therefore exempt from attachment and sale under Sec. 60(1)(*c*). *Girwar Dayal* v. *Narain Singh*, A. I. R. 1928, All. 211 *relied on.*

EXECUTION FIRST APPEAL from a decree of BABU BISHUN NARAIN TANKHA, Additional Subordinate Judge of Gorakhpur.

M. Waliullah for the appellant.

Sankar Saran for the respondent.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is an appeal by a judgment-debtor whose house and shed, otherwise called bungalow, have been attached by a decree-holder with a view to auction-sale. The claim of the judgment-debtor is that the house and shed are exempt from attachment and sale, because they are those of an agriculturist, under Sec. 60(1)(*c*) C. P. C. which exempts "Houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him." The decree-holder's case is that the decree was passed against the assets of Ramjas, father of the appellant Badri, in the hands of Badri, and that the evidence shows, as the lower court has found, that Ramjas was not an agriculturist, but that he was a licensed stamp-vendor and a thekedar. The question, therefore, before us is whether under a decree such as the present against the assets of a deceased person in the hands of his successor, which person is to be an agriculturist, whether it is the person, who is deceased and against whose assets the decree has been made, or whether it is the person in whose hands the assets are at the present time? Now in this case Ramjas and Badri formed a joined Hindu family, and after the death of Ramjas, Badri was apparently the only adult male member of that joint Hindu family. The house and bungalow in question are now owned by the joint Hindu family and the decree states that there is a liability against the assets of the father which are in the hands of Badri. The ownership is with the present joint Hindu family, and for this reason we consider that it is the occupation of Badri which we should consider and not the occupation of Ramjas, his father. The intention of Section 60 in the Proviso in question is that an agriculturist should not be deprived of his means of livelihood by having his house and other buildings taken from him. That result would follow if we allow this execution appeal, as Badri is admittedly an agriculturist.

Learned counsel referred to the ruling of single Judge of this Court, reported in *Girwar Dayal* v. *Narain Singh*[1] which followed a previous ruling reported in *Radha Kishen Hokumji* v. *Balvant Ramji*[2]. These rulings liad down the principle of exemption in question in regard to assets of a deceased debtor. Accordingly we allow this appeal with costs.

Appeal allowed

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[1] A. I. R. 1928, All. 211

[2] I. L. R. 7 Bom. 530

KAULPATI KUNWAR AND ANOTHER (*Plaintiffs*)
versus
RAM BARAN SINGH AND OTHERS (*Defendants*)*

Civil
1932
May 31
Sulaiman, C. J.
Mukerji, J.
Banerji, J.

Court of Wards Act (Local Act IV of 1912), Secs. 3 (3), 10, 12, 15, 55 and 37—Joint Hindu family—Of father and sons—Application by father under Sec. 10—Declaration—Notification—Entire joint property under management of Court of Wards—Whether sons, major or minor, deemed to be 'wards' and subject to disabilities under Secs. 37 and 55.

The plaintiffs sued to recover the money due to them under an agreement executed by the defendants. The defendants took the plea that they were 'wards' and no suit could be maintained against them in their names under Sec. 55 of the Court of Wards Act, 1912, and the contract made by them was void in law under Sec. 37 of the said Act. It appeared that the defendants and their father formed a joint Hindu family. The father made an application under Sec. 10, Court of Wards Act, for the ancestral property being placed under the superintendence of the Court of Wards. The Court of Wards made the declaration required by Sec. 10, and the order of assumption of superintendence was notified in the gazette. The names of the defendants did not appear in the notification. The entire property belonging to the joint family came under the actual management of the Court of Wards. The defendants remained in possession of the estate which they inherited from their maternal grandfather.

Held (1) that the sons having made no application under Sec. 10 and their names not appearing in the declaration and the notification, they did not come within the second portion of the definition of 'ward' in Sec. 3 (3); (2) that even if some of the sons were minors on the date of assumption of superintendence, they were never treated as minors whose property the Court of Wards in the exercise of its discretion under Sec. 12, decided to place under its own management, and they cannot therefore come under the first portion of the definition of 'ward' in Sec. 3 (3). The mere accident that their property is physically under the superintendence of the Court of Wards will not make them 'wards'; (3) that the defendants not being 'wards' did not suffer the disabilities enumerated for a ward in Sec. 37 and Sec. 55 of the Court of Wards Act.

Chotelal v. *Brij Raj*, 26 A. L. J. 90 *overruled*. *Gulab Singh* v. *Gokal Das*, I. L. R. 40 Cal. 784 *distinguished*.

SECOND APPEAL from a decree of HARISH CHANDRA ESQ., District Judge of Benares, confirming a decree of V. MEHTA ESQ., Additional Subordinate Judge.

The following is the Referring Order:—

BANERJI and KING, JJ.—This is a plaintiffs' appeal in a suit for recovery of money.

The plaintiffs and one Bhim Singh deceased were co-sharers in certain zamindari property situate in the districts of Rangpur and Bogra, in the Bengal Presidency as well as in the district of Ghazipur. Bhim Singh took a lease of the plaintiffs' share and on September 6, 1913 executed a *qabuliat*. Bhim Singh died on or about the year 1921 and the present plaintiffs had some claim for money on account of the agreement on September 6, 1913. The defendants are six in number and the plaintiffs stated that at the entreaties of the defendants who were in possession of the estate of Bhim Singh the plaintiffs did not institute a suit. The defendants admitted that Rs.2,416-8-0 were due to the plaintiffs and executed an agreement on August 20, 1921 by which they made themselves liable to the claim of the plaintiffs. That amount not having been paid on due date a suit was instituted out of which this appeal has arisen for recovery of the money due to the plaintiffs. The suit was decreed as against defendants 1 to 3 but defendants 4 to 6 entered a plea that the frame of the suit as against them was bad inasmuch as they being wards of court under the Court of Wards Act could not be sued in their personal capacity. A preliminary issue on this point was decided by the learned Subordinate Judge and he held that the defendants being wards of court the suit as framed was defective. An appeal by the plaintiffs against the decree dismissing the plaintiffs' suit as against defendants 4 to 6 was preferred to the learned District Judge of Benares. He having accepted the correctness of the view taken by the learned Subordinate Judge dismissed the appeal, hence this appeal before us. The courts below have followed a ruling of this Court in the case of *Chhotey Lal* v. *Brijraj Singh,* 26 A. L. J. 90. We have examined the Gazette Notification relating to Binda Prasad, father of defendants 4, 5 and 6. There is clearly no notification declaring defendants 4, 5 and 6 as wards of court. In the case of *Lalta Singh* v. *Chhattar Singh,* 19 O. C. 306 the interpretation put upon the relevant sections of the Court of Wards Act was different from that put in the case of *Chhotey Lal* v. *Brijraj Singh.* We are doubtful as to the correctness of the ruling in *Chhotey Lal* v. *Brijraj Singh* and we, therefore, direct that the case be laid before the learned Chief Justice to constitute a larger Bench for the decision of this case.

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*S. A. 1810 of 1928

K. N. Katju for the appellants.

Mukhtar Ahmad and *Mansur Alam* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This second appeal has been referred to a Full Bench because the learned Judges of the Division Bench before whom the appeal came in due course were doubtful of the correctness of a decision of this Court, namely, *Chhotey Lal* v. *Brijraj Singh*[1].

It appears that the defendants in the suit out of which this appeal has arisen undertook to pay a certain sum of money to the plaintiffs under an agreement, dated August 20, 1921 which was registered under the law of registration. The plaintiffs sued to recover the money due under the agreement, principal and interest. They were met with the plea on behalf of the defendants 4 to 6 that they were wards of the Court and no suit could be maintained against them in their names under Section 55 of the Court of Wards Act, 1912, and that the contract made by them was void in law under Section 37 of the said Act.

The defence found favour with the court of first instance and the suit was decreed only against the defendants 1 to 3 and as against the defendants 4 to 6 it was dismissed.

On appeal the learned District Judge upheld the decision of the first court and thereupon the plaintiffs filed this second appeal.

Section 55 of the Court of Wards Act of 1912 (local) lays down that "No ward shall be sued in the civil court otherwise than in the name of the Collector in charge of his property .". If, therefore, the defendants 4 to 6 be wards of the Court, the suit is not maintainable. Again under Section 37 of the said Act "A ward shall not be competent to enter into any contract which may involve him in peculiar liability . " Again if the defendants 4 to 6 be wards of the Court, the agreement of 1921 is void as against them and cannot be enforced in a court of law.

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[1] 26 A. L. J. 90

We have to see whether in the circumstances of the case the defendants 4 to 6 are wards of the Court within the meaning of Section 3, Sub-section (3) of the United Provinces Court of Wards Act (Act No. IV of 1912).

As to the facts, the following seems to be common ground. The father of the defendants 4 to 6, Binda Prasad, owned a certain share in an estate in the district of Benares known as the Sakaldiha Estate. The defendants 4 to 6 (whom we shall describe hereafter as the defendants for the sake of brevity) and their father formed a joint Hindu family. Binda Prasad and his co-owners of the Estate of Sakaldiha made an application under Section 10 of the Court of Wards Act 1912 for their property being placed under the superintendence of the Court of Wards. The Court of Wards on being satisfied that it was expedient to undertake the management of the property made a declaration to that effect and under Section 15 of the Act issued a notification in the local gazette, being Notification No. 732 N|X-1117-12 dated May 30, 1914, to be found printed in the United Provinces Gazette, dated June 6, 1914, part II, page 1334. On the same page and under the same date and under No. 731 N|X-1117-72 there appears another notification by which it was declared that the Court of Wards had assumed the superintendence of the estate of the two minors mentioned therein who were part proprietors of the Sakaldiha Estate. The names of the defendants do not appear in either of the notifications. Possibly one of the defendants was at the date of the notifications a major and probably the other two were minors.

On these facts the question is whether the defendants are to be treated as wards of the Court within the definition of Section 3, Sub-section (3) of the Act.

On behalf of the respondents strong reliance has been placed on a decision of their Lordships of the Privy Council in *Gulab Singh* v. *Gokul Das*[2]. It is urged that their Lordships have held that it is open to a father of a joint Hindu family to hand over the entire estate to the court of wards where such act would be beneficial to the interest of the family. Reliance is placed on the observation of their Lordships to be found at page 799, namely, that "in their Lordships' opinion Maharaj Singh and Dulli Chand in making that application acted within their powers and authority as the managing members of the joint family". We have carefully considered this case, but we are of opinion that this case has no application to the facts of the case before us and to the question we have to decide.

What we have to decide is whether the sons of the person or persons who hand over the joint family property are to be treated or not as 'wards' within the meaning of the word to be found in Section 3 (Sub-section (3)) of Act IV of 1912 and whether the said sons are to suffer or not the disabilities enumerated for a ward in Section 37 and Section 55 of the Act of 1912. Their Lordships of the Privy Council never had this question to answer in the case of *Gulab Singh* v. *Gokul Das* and for this reason alone the decision has no bearing on the case before us. Secondly the decision was given under Act XVII of 1885 which is in many respects very different from the Act which we have to construe. A third point also differentiates the decision from the case before us and it is this; while the reason for the handing over of the management of the estate in *Gulab Singh* v. *Gokul Das's* case is clearly set forth in the judgment, we are entirely in the dark in this case as to the circumstances which led to the application by Binda Prasad and his co-owners for handing over the management of the estate to the court of wards.

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[2] I. L. R. 40 Cal. 784

The first and third grounds for differentiation of the Privy Council case from the case before us do not call for any further remarks, but we shall say a few words as to the second ground. Act XVII of 1885 gives an entirely different meaning to the word "ward" from the definition to be found in Section 3 of the Act IV of 1912. Then again, we could not discover any provision in the Act of 1885 corresponding to the provision contained in Section 10 of the Act of 1912. In the Calcutta case, the property of Dulli Chand and Maharaj Singh had been handed over by them to the Court of Wards under Section 7, Clause (*c*) of the Act XVII of 1885 which provided for the property of those persons being taken over for management as were declared by the Chief Commissioner to be incapable of managing their own property on their own application. Again we do not find that all the drastic disabilities which are contained for a ward in Section 37 of the Act of 1912 are to be found in the Act of 1885 beyond what are stated in Sections 22 and 23 of that Act.

The question before their Lordships of the Privy Council was whether it was open to the Court of Wards to validly assume superintendence of the shares of the sons also of the applicants, and the case before us is whether assuming that the sons' share can be lawfully managed by the Court of Wards, the sons become by the fact of that management alone subject to the liabilities imposed on a ward under the Act of 1912.

We are of opinion that the present case is not governed by the decision of their Lordships of the Privy Council in *Gulab Singh* v. *Gokul Das*[8].

Now let us consider the provisions of Act IV of 1912. Section 3 of the Act defines a proprietor as "a person entitled as a proprietor to beneficial interest in a mahal". This would mean that a person, who has a share in a property in a mahal, is a 'proprietor' although his name may not be recorded in the khewat. It will also be noticed that where a joint Hindu family owns property, every member of that family is a proprietor, because every such member has a beneficial interest in a mahal. The definition does not give any encouragement to the argument that the father of the family alone is the proprietor and not the sons or that the father

[8] I. L. R. 40 Cal. 784

is entitled to assume the role of the sons or to act for them with reference to the provisions of the Court of Wards Act.

Then we come to the definition of the word "ward". A ward may be of two kinds. One is a disqualified proprietor whose property or person is under the superintendence of the court of wards and the other is "a proprietor in regard to whose property a declaration has been made under Section 10". This takes us to a consideration of the provisions of Section 10 which runs as follows:—

> A proprietor may apply to the Collector to have his property placed under the superintendence of the Court of Wards and the court of wards may on being satisfied that it is expedient to undertake the management of such property make a declaration to that effect.

An application under Section 10 can be made only by a person who is an adult; for by definition a proprietor may be a minor and in that case he is incapacitated by the law of the land from acting on his own behalf. Section 10 does not say that a proprietor may apply on behalf of himself and on behalf of another proprietor even if that other proprietor be the applicant's son.

The provisions of Section 8 read with Section 12 show that the presence of minors interested in an estate, as in the case of minors in a joint Hindu family, need not in any way stand in the way of the Court of Wards exercising its beneficial functions over the property of the minors, even though the father or the guardian be not entitled to make an application on their behalf. By Section 8, minors by the very fact of their minority, are to be deemed disqualified to manage their own property. In that case it is open to the Court of Wards, in the exercise of its discretion conferred on it by Section 12, to assume the superintendence of the minors' property. Thus, if a father in a joint Hindu family consisting of himself and some sons, of whom, let us assume, some are majors and the others are minors, wants to hand over the management of the property to the Court of Wards, all that he has to do is to persuade his adult sons to make an application under Section 10 and to apply under that section to the Collector and to induce the Collector to ask the Court of Wards to take under its superintendence the property of the minors. Thus, without any difficulty whatsoever and without giving the father an authority to hand over the entire estate on behalf of the family, it is possible for a joint Hindu family to obtain the benefits of management by the Court of Wards. If in a joint Hindu family the father wants to hand over the estate belonging to the entire family to the Court of Wards but the adult sons decline to do so, we take it, it would not be possible for the Court of Wards to take over the management of the property under Section 10 of the Court of Wards Act, in the teeth of the adult sons' opposition, unless the adult sons can be declared disqualified proprietors unable to manage their own property under Section 8 of the Act.

From what we have said above, it follows that the ordinary scheme of the Act is that every adult person who has a beneficial interest in any property must apply under Section 10 and in the case of the minors action should be taken under Section 8. This is exactly what was done in this case, for we find from the notification in the U. P. Gazette (part II at page 1334) dated June 6, 1914, that in the case of adult co-owners applications were made under Section 10 and in the case of minor proprietors action was taken under Sections 8 and 12 of the Court of Wards Act. Both the notifications are under Section 15 of the Court of Wards Act 1912 which requires that the order of an assumption of management ought to be notified in the local gazette. Apparently the names of the sons of Binda Prasad, namely, the defendants, were not entered in the khewat and their existence was simply overlooked. Our guess may not be correct, but whether correct or not, the reason why the names of the defendants were omitted from the notifications does not affect our decision.

It is common ground that the entire property belonging to the joint family, namely, Binda Prasad and the defendants, is actually being managed by the Court of Wards through the Collector of Benares, the property being situated in the district of Benares.

Now the question is whether the defendants are to be treated as wards of the Court for the purposes of disabilities which are suffered by a ward.

We take it that in respect of the defendants there was no application under Section 10, and, therefore, there is no declaration under that section. The defendants do not come within the first portion of the definition of the word "ward"; for they have not been found to be 'disqualified proprietors whose property has been taken over by the Court of Wards under Section 12 of the Act.' Even if some of the defendants were minors in 1914, from the fact that they were never treated as minors whose property the Court of Wards decided to place under its own management, the defendants cannot come under the first head of the definition of a ward. In the definition the words "whose property is under the superintendence of the Court of Wards" mean and must mean "whose property is under the superintendence of the Court of Wards under the provisions of Act IV of 1912". In the case of persons whose property as such the Court of Wards never undertook to administer, the mere accident that their property is physically under the superintendence of the Court of Wards will not make them 'wards' within the meaning of the definition.

Then let us consider the second portion of the definition of ward. We have already said that we have got no material before us to show that in the case of the defendants there has been made any declaration under Section 10. The declaration under Section 10 must mention two things, first the name of the proprietor and the fact that it has been deemed expedient that his property is to be taken under the management of the Court of Wards. A mere description of the property of a person without mention of the name of that person will hardly be a good declaration under Section 10. Suppose a declaration said that the Court of Wards was satisfied that "Property *A*" should be taken under the management of itself, we take it, this would not make the owner of the property, whoever he may be, a ward; and the reason is plain. The law requires by Section 17 that, on the publication of a notification under Section 15, the Collector shall publish notices calling upon persons having claims on the estate to notify the same. It could hardly have been contemplated that creditors, some of whom may be entirely unsecured creditors, should find out from the notification who the proprietor was and then to find out whether the proprietor was their debtor or not. For a valid notification, therefore, the name of the proprietor must appear in the gazette and in the orders. We note that in the two notifications actually issued, the names of the proprietors appear and the mention of their property is in the vaguest possible manner.

In this view, although the defendants' property may be under the physical possession of the Court of Wards, who undertook to manage their father's property, it cannot be said within the meaning of Section 3, Sub-section (3) that the defendants are proprietors in regard to whose property a declaration has been made under Section 10. We need hardly repeat that a declaration under Section 10 could be made only in respect of a proprietor who has made the application and the defendants are not proprietors who have made any such application.

Where the language of the law is clear, it is not necessary to see whether the interpretation put on the law is likely to lead or not to hardships and to absurdities. But this test may be applied to see whether the interpretation is a sound one or not; for if a contrary interpretation is likely to lead to hardships, we may take it that the interpretation put which does not create any hardship is the correct one.

Take this case itself for consideration. The defendants, as grandsons of one Bhim Singh, have inherited a large estate. The defendants' ancestral property, let us assume, is in debt and has been taken over for management by the Court of Wards. If the defendants are wards of the Court, then their property, which has been inherited by them and which has nothing to do with the payment of the debts of the father of the family, will also be taken over for management by the Court of Wards and the defendants will be incapable of entering into any contract in respect of these properties, although the defendants themselves had never agreed as to their ancestral property being handed over to the management of the Court of Wards.

Assuming that it is open to a father to hand over the entire family property to the Court of Wards without the consent of his sons, it would not follow from the handing over of the property that the sons themselves would become wards of the Court. A ward with certain disabilities is a creation of law and can have no existence outside the law. A Division Bench of this Court in *Mahabir Prasad* v. *Mahesh Prasad*[4] held under the Bundelkhand Land Alienation Act that although the father of a joint Hindu family might be an 'agriculturist' within the meaning of Act II of 1903, (Local) it did not follow that his sons were also agriculturists. The case would be somewhat similar to the case of a father's insolvency. When a father becomes an insolvent, it is open to the receiver of the father's estate to sell the entire family property including the shares of the sons to pay the father's debts not tainted with immorality. But it does not follow that the sons' shares vest in the receiver and the sons are incapacitated from exercising their privileges which accrue to them by the fact of their having a share in the joint family estate, e.g., a right to seek pre-emption. This was held by their Lordships of the Privy Council in the case of *Sat Narain* v. *Behari Lal*[5]. *See* also in this connection the Full Bench decision of this Court in *Anand Prakash* v. *Narain Das*[6].

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[4] 1931 A. L. J. 45

The result is that in our opinion the defendants, that is to say, the defendants Nos. 4 to 6 in the suit out of which this appeal has arisen are not wards of the Court, and there is no bar to the maintenance of the suit against them and the agreement, if any, that may have been entered into by these defendants with the plaintiffs is not void under Section 37 of the Court of Wards Act. In this view the case of *Chhotey Lal* v. *Brij Raj*[7] is not good law.

In the result, we allow the appeal, modify the decrees of the courts below and remand the suit so far as the defendants 4 to 6 are concerned through the lower appellate court to the court of first instance for decision according to law. Costs here and hitherto, so far as the defendants 4 to 6 and the plaintiffs are concerned, shall abide the result.

Appeal allowed

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[5] I. L. R. 6 Lah. 1

[6] 1931 A. L. J. 122

[7] 26 A. L. J. 90

Civil
1932
April 22
Sulaiman, C. J.
Mukerji, J.
Banerji, J.
King, J.
Pullan, J.

KALU RAM (*Defendant*)
versus
BABU LAL AND ANOTHER (*Plaintiffs*)*

Court-Fees Act (VII of 1870), Schedule I, Art. 1, Sec. 7(iv)(c) and Schedule II, Art. 17(iii)—Suit for cancellation of an instrument (e.g., mortgage deed or compromise) under Sec. 39, Specific Relief Act—Suit for 'cancellation of a decree'—Whether relief declaratory—'Consequential relief'—Meaning of.

Where a suit is for the cancellation of an instrument under Section 39 of the Specific Relief Act, the relief is not a declaratory one. It falls neither under Sec. 7(*iv*) (*c*) nor under Schedule II, Art. 17(*iii*), but under the residuary Article, Schedule I, Art. 1. *Karam Khan* v. *Daryai Singh*, I. L. R. 5 All. 331 *overruled.*

The expression 'consequential relief' in Sec. 7(*iv*) (*c*) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.

Where the plaintiffs claim the following reliefs, viz., (1) that a certain registered mortgage deed may be adjudged void and ineffectual as against the plaintiffs, and that it may be cancelled; (2) that the compromise, the

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*F. A. 345 of 1928

CIVIL

1932

KALU RAM
v.
BABU LAL

preliminary decree and the final decree in a certain suit may be cancelled. *Held,* (1) that relief No. 1 is governed by Schedule I, Article 1; (2) that relief No. 2 is one consolidated relief (and not distinct reliefs) and it also falls under Schedule I, Article 1 and the court-fee is payable on the value of the final decree only.

FIRST APPEAL from the decision of the Subordinate Judge of Jhansi.

The following is the Referring Order:—

KING, J.—This is a reference under S. 5 of the Court Fees Act 1870.

The plaintiffs claim the following reliefs:—

1. That a certain registered mortgage deed may be declared ineffectual as against the plaintiffs and may be cancelled.

2. That a compromise and decree passed against the plaintiffs in a certain suit may be cancelled.

The suit was valued at Rs.11,276-3-9 and a court-fee of Rs.20 only was paid. The Chief Inspector of Stamps contends that the court-fee ought to be paid on the jurisdictional value of the suit, that is, a fee of Rs.520 should be paid for the trial court and also for the court of appeal, as it is a suit for declaration with a consequential relief.

As regards the court-fee payable in respect of the first relief, the appellant relies upon the Full Bench ruling of this Court in *Karam Khan* v. *Daryai Singh,* I. L. R. 5 All. 331. That was a suit for the cancellation of a mortgage deed. The taxing Judge expressed an opinion that the suit was of the kind mentioned in S. 39 of the Specific Relief Act and that it was in the nature of a simple declaratory suit. The point was referred to a Full Bench of five Judges who delivered the following judgment: "We concur in the opinion expressed in this reference that the case is in the nature of a simple declaratory suit". On this view, a fixed court-fee of Rs.10 only is payable under Article 17 (*iii*) of the Second Schedule.

I think it must be conceded that the appellant's contention must prevail, so far as the first relief at least is concerned, if this Full Bench ruling is followed. The judgment is unfortunately brief and no reasons are given. I cannot understand why a suit for cancellation of an instrument, such as a mortgage deed, imposing liability upon the plaintiffs' property, should be held to be a suit for a mere declaration where no consequential relief is prayed. The cancellation of such an instrument seems to me to involve a substantial relief and to be quite different from a mere declaration. The legislature seems to have made a clear distinction between suits for cancellation of instruments, which are dealt with in Chapter V of the Specific Relief Act, and suits for declaratory decrees, which are dealt with in Chapter VI of the same Act. *Prima facie* therefore the legislature recognised a distinction between suits for cancellation of instruments and suits for declarations. There is moreover in my opinion a substantial difference between such suits. The cancellation of an instrument which imposes a liability upon the plaintiffs' property is a substantial relief and not equivalent to a mere declaration of non-liability.

This Full Bench ruling has been expressly dissented from or not followed by several High Courts. In *Shamia Mavali* v. *Minammal,* I. L. R. 23 Mad. 490 where the suit was for setting aside a registered sale deed, it was held that this was a suit for a declaration with consequential relief and the court-fee was payable under S. 7 (IV) (*c*) of the Court fees Act. The ruling in *Karam Khan* v. *Daryai Singh* was expressly dissented from.

In *Parvati Bai* v. *Vishvanath Ganesh,* I. L. R. 29 Bom. 207 the suit was for the cancellation of a sale deed. The court held that the suit was one for a declaration with a distinct prayer for consequential relief and expressly dissented from the ruling in *Karam Khan* v. *Daryai Singh.*

According to Desai's index (11th edition) the Allahabad ruling has also been expressly dissented from in *Maung Kyin* v. *Po Thin,* 2 L. B. R. 266 [1901]. Unfortunately the report of that case is not available in this library. That case was however referred to in the case of *Sit Soe* v. *Ma Thin,* 84 I. C. 201 which shows that the former ruling decided that a suit for setting aside documents affecting land must be treated as a suit for a declaration involving consequential relief.

In *Arunachalam* v. *Rangasawmy,* I. L. R. 38 Mad. 922 it was held by a Full Bench of the Madras High Court that a suit for a declaration that an instrument is not binding upon the plaintiff amounts to a suit for cancellation of the instrument and the court-fee is governed by S. 7(IV) (*c*). The ruling in *Karam Khan* v. *Daryai Singh* was cited and not followed. In *Mst. Noowooagar* v. *Sridhar Jha,* 3 Pat. L. J. 194 a suit for the avoidance of a registered deed of gift was held to involve consequential relief and the ruling in *Karam Khan* v. *Daryai Singh* was cited but not followed. In *Kuber Saran* v. *Raghubir,* A. I. R. 1929 Oudh 491 where the suit was for a declaration that certain deeds are voidable against the plaintiff and that the deeds should be cancelled, it was held that the suit was one for a declaration with a prayer for consequential relief. The ruling in *Karam Khan* v. *Daryai Singh* was discussed and not followed.

So far as I can ascertain, the only reported case in which the Allahabad Full Bench ruling was followed is *Durga Bakhsh* v. *Mirza Mohammad Ali Beg,* I. O. C. 123.

It appears therefore that the Allahabad Full Bench ruling has been dissented from, or referred to and not followed, in a number of rulings of other High Courts. Personally I regard the ruling as wrong for reasons already given, and the decision is certainly unsatisfactory, being so brief as to suggest that the question was not fully discussed and considered. In *Radha Krishna* v. *Ram Narain,* 1931 A. L. J. 235 to which decision I was a party, it was suggested that the ruling in *Karam Khan* v. *Daryai Singh* was unsatisfactory, but we were able to distinguish it for the purpose of deciding that case.

It has been held in *Kachera* v. *Kharag Singh,* 7 A. L. J. 842 that a division bench has no jurisdiction to hear a stamp reference even when it is referred to them by a taxing Judge. I think however there is no legal objection to referring the point to a Full Bench and this seems to be the only practicable course when it is necessary to decide whether a previous Full Bench ruling of this Court should be maintained or overruled.

As regards the second relief for cancellation of the decree there is abundant authority for the view that the suit should not be treated as one for a mere declaration, but as a suit for a declaratory decree where consequential relief is prayed or as a suit on which a court-fee is payable on the value of the decree. Even when the plaintiff has worded his relief so as to seek a mere declaration that a decree is void and ineffectual as against him, it has been held that it amounts to a suit for a declaration involving a consequential relief and that the court-fee is payable under S. 7(IV) (*c*). I may refer to the rulings in *Arunachalam* v. *Rangasawmy,* I. L. R. 38 Mad. 922, *Sripal Singh* v. *Jagdish Narain,* 24 O. C. 361, *Deokali* v. *Kedarnath,* I. L. R. 39 Cal. 704, *Harihar Prasad* v. *Shyam Lal,* I. L. R. 40 Cal. 615 and *Ganesh Bhagat* v. *Sarada Prasad Mukerji,* I. L. R. 42 Cal. 370.

The appellant has relied upon *Radha Krishna* v. *Ram Narain,* 1931 A. L. J. 235. But this ruling does not help him, as in that case the plaintiff sued for a mere declaration that a decree was not binding upon him and he deliberately omitted a prayer for cancellation of the decree. In the present case there is an express prayer for cancellation of the decree; so the ruling has no application.

It is also argued that the court-fee payable on the second relief is governed by the authority of the Full Bench ruling in *Karam Khan* v. *Daryai Singh.* I think that ruling can be distinguished since a decree cannot, I think, be held to be an "instrument" and therefore a suit for the cancellation of a decree would not come strictly within the terms of S. 39 of the Specific Relief Act. There is however undoubtedly some similarity between a suit for the cancellation of a decree and a suit for the cancellation of an instrument; so it is open to difference of opinion whether the ruling in *Karam Khan* v. *Daryai Singh* is applicable. This point may also be referred to a Full Bench. If it is held that a suit for the cancellation of an instrument or decree is not a suit "to obtain a declaratory decree where no consequential relief is prayed" the further question arises whether it should be held to be a suit "to obtain a declaratory decree where consequential relief is prayed" or a suit not specifically provided for, and so governed by Schedule I, Art. I.

This point is of some importance, since there is much authority for the view that, if S. 7(IV) (*c*) applies, the plaintiff's valuation of the relief must be accepted, however inadequate and arbitrary it may be.

I suggest that with the permission of Hon. Chief Justice the following questions be referred to a Full Bench:—

1. What provisions of the Court Fees Act determine the court-fee payable in respect of relief No. 1, i.e., that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled?
2. What provisions of the Court Fees Act determine the court-fee payable in respect of relief No. 2, i.e., that the specified compromise and decrees may be cancelled?

Let the case be submitted to Hon. Chief Justice for orders.

N. C. Vaish for the appellant.

U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

King, J.

KING, J.—The Taxing Judge has referred two questions of law to a Full Bench. The case itself has not been referred to us. Section 5 of the Court Fees Act has in no way been contravened. The final order will be passed by the Taxing Judge himself in the light of the observations of this Full Bench.

The suit was instituted by the nephew and the son of Sunder Lal, who had executed a mortgage deed on December 20, 1918 in favour of the defendant-appellant Kalu Ram. In the mortgage suit the present plaintiffs also were impleaded under the guardianship of their grandmother. The suit was decreed and a preliminary decree was passed on September 16, 1925, which resulted in a final decree on April 2, 1927.

In the present suit the plaintiffs sought to avoid the mortgage deed on the ground that it was fictitious and without consideration and legal necessity, the compromise on the ground of fraud, and the decree on the ground of negligence and collusion of the guardian. Two main reliefs claimed were as follows:—

(1) The mortgage deed, dated December 20, 1918, and registered on December 21, 1918 may be adjudged void and ineffectual as against the plaintiffs and it may be cancelled.

(2) The compromise and the preliminary decree, dated September 16, 1925 and the absolute decree, dated April 2, 1927 of the court of the Subordinate Judge of Jhansi (*in re*) *Kalu Ram* v. *Sunder Lal* may be cancelled.

The plaintiffs valued the first relief at Rs.5,000 and paid Rs.10 as court-fee thereon and valued the second relief at Rs.6,276-3-9 and paid another Rs.10 on it. A difference arose between the Registrar, who is the Taxing Officer of this Court, and the appellant's counsel, and the former referred the matter to the Taxing Judge, who has referred the following questions to us:—

1. What provisions of the Court Fees Act determine the court-fee payable in respect of relief No. 1, i.e., that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled?

2. What provisions of the Court Fees Act determine the court-fee payable in respect of relief No. 2, i.e., that the specified compromise and decrees may be cancelled?

The main question for consideration is whether the reliefs fall under Section 7 (*iv*) (*c*), and are to obtain a declaratory decree where consequential relief is prayed, or under Article 17 (*iii*) of the Second Schedule to obtain a declaratory decree where no consequential relief is prayed, and if not, whether under Article 1 of the First Schedule, as a plaint not otherwise provided for in the Court Fees Act where the amount or value of the subject-matter in dispute can be ascertained, or under Article 17 (*vi*) of the Second Schedule, that is, a suit not otherwise provided for and where it is not possible to estimate at a money value the subject-matter in dispute. It is quite clear that if the reliefs fall under either of the first two provisions of law, the last two general articles would not be applicable.

The learned counsel for the appellant relies strongly on the Full Bench ruling of this Court in *Karam Khan* v. *Daryai Singh*[1] in which it was laid down that a suit in which the relief for the cancelment of a mortgage deed is claimed is in the nature of a simple declaratory suit. The report of the case is very brief and the judgment is also very short. The original plaint in the vernacular is not available in this Court. If the learned Judges meant to lay down that a suit for the cancellation of an instrument under the provisions of Section 39 of the Specific Relief Act was a mere declaratory suit under Schedule II, Article 17 (*iii*), then with great respect we are unable to agree with that view.

The only reported cases brought to our notice in which this ruling has been followed are *Hira Lal* v. *Wali Bhagat*[2] and *Durga Bakhsh* v. *Mirza Mohammad Ali Beg*[3]. We may point out that the Full Bench ruling has been expressly dissented from by some of the other High Courts, *vide Samiya Mavali* v. *Minammal*[4], *Parvatibai Kom Mahadeo* v. *Vishvanath Ganesh*[5] and *Noowooagar Ojain* v. *Sridhar Jha*[6]. But in these cases it has been taken for granted without any discussion of Section 39 of the Specific Relief Act that a relief for the cancellation of an instrument is a consequential relief.

Section 42 of the Specific Relief Act covers cases where a declaration can be granted to a person entitled to any legal character or to any right as

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[1] I. L. R. 5 All. 331
[2] 1889 A. W. N. 124
[3] I. Oudh Cases 123
[4] I. L. R. 23 Mad 490
[5] I. L. R. 29 Bom. 207
[6] 3 Pat. L. J. 194

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to any property, except where the plaintiff being able to seek further relief than a mere declaration of title omits to do so.

Under Section 39 of the Act "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cacelled". In the case of cancelling a registered instrument, the law further provides that the court shall also send a copy of its decree to the officer in whose office the instrument has been registered.

The illustration to the section makes it obvious that the relief is available even to persons other than parties to an instrument, and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable, and need not in express terms ask for it to be delivered up and cancelled. Even though no relief of cancellation is asked for, a court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose.

The court has discretion to adjudge a written instrument void or voidable and has also discretion to order it to be delivered up and cancelled. Section 39 cannot mean that where the court adjudges an instrument void or voidable, it is bound to order it to be delivered up and cancelled. It is easy to conceive of cases where the court, while adjudging it void or voidable, may not think it fit or possible to order it to be delivered up and cancelled. For instance, an instrument executed by another person may not bind the plaintiff and may yet bind the executant. In such a case it cannot actually be cancelled. Or the original registered instrument may have been lost, in which case it cannot be ordered to be delivered up.

A relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.

We may note that Section 39 of the Specific Relief Act is in Chapter V which is headed "Of the cancellation of instruments", whereas there is a separate Chapter VI headed "Of declaratory decrees". Obviously the Legislature intended to draw a distinction between a decree adjudging a written instrument void or voidable, which may result in its cancellation, and a mere declaratory decree. Though the Specific Relief Act was passed some years after the Court Fees Act, the distinction existed before the Specific Relief Act was passed and it cannot be said that for the purposes of Court Fees Act a relief for adjudging an instrument void is of a declaratory nature.

In our opinion, the expression "consequential relief" in Section 7 (*iv*) (*c*) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. A consideration of all the Clauses (*a*) to (*f*) of Sub-section (IV), S. 7 of the Court Fees Act leads to the same conclusion.

The Court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of Section 7 of the Court Fees Act. If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. Suppose a plaintiff asks for a declaration that the defendant is liable to pay him money due under a certain bond and also asks for recovery of that amount; or suppose that he asks for a declaration that he is the owner of certain property and is entitled to its possession and asks for recovery of its possession; surely the relief for the recovery of money or for the recovery of possession cannot be treated as a mere consequential relief which can be arbitrarily valued at any low figure and court-fees paid on that arbitrary valuation only. In our opinion where a suit is for the cancellation of an instrument under the provisions of Section 39 of the Specific Relief Act the relief is not a declaratory one. It falls neither under Section 7 (*iv*) (*c*) nor under Schedule II, Article 17 (*iii*), but under the residuary article, Schedule I, Article 1 of the Court Fees Act. We hold therefore that the court-fee payable on the first relief is governed by Schedule I, Article 1.

As regards the second relief, the prayer that the compromise may be cancelled is similar to a relief for the cancellation of the mortgage-deed and is governed by the same Article.

In our opinion a relief for the cancellation of a decree, or to be more accurate, for the setting aside of a decree, is not a declaratory relief only. The effect is not merely a declaration as to a person's character or status as contemplated by Section 42 of the Specific Relief Act, but the effect will be to render the decree void and incapable of execution and will free the plaintiff from all further liability under it. The claim, therefore, is not merely for a declaratory relief falling under Schedule II, Article 7 (*iii*). Nor does the relief fall under Section 7 (*iv*) (*c*). There is no prayer for a declaration that the decree is void, or for a declaration of any sort, so the relief that the decree be set aside cannot be regarded as a "consequential" relief in any sense of that word. We hold that the court-fee in respect of the prayer for cancellation of the decree is payable under Schedule I, Article 1 on the value of the decree.

As the compromise has merged in the final preliminary decree and the latter has merged in the final decree, we consider that the cancellation of the compromise, the preliminary decree and the final decree are not "dis-

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tinct subjects" within the meaning of Section 17, but in reality only one subject. The court-fee for the second relief is payable on the value of the final decree only.

Accordingly our answers to the questions referred to us are as follows:—

(1) Relief No. 1 is governed by Schedule I, Article 1.

(2) Relief No. 2 is one consolidated relief (and not distinct reliefs) and it also falls under Schedule I, Article 1.

Reference answered

PRIVY COUNCIL

NISAR ALI KHAN (*Defendant*)

versus

MOHAMMAD ALI KHAN (*Plaintiff*)*

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1932
April 21
Lord Blanesburgh
Lord Tomlin
Lord Russell of Killowen
Sir George Lowndes
Sir Dinshah Mulla

Will—Series of successive interests—Each legatee given powers like testator—Bequests of life-interests only—Tests for determination of—Evidence Act, Sec. 115—Principle of—Person entering into possession under an invalid instrument—When estopped—Whether his son not claiming through him also estopped.

Where a testator appointed *A* as the successor to his property and the will recited that whatever powers the testator had in respect of the property, the legatee shall have like himself, the very same powers with powers of possession and enjoyment as owner and on the death of *A*, *B*, if alive, was to be his successor with the same powers as were bestowed on *A*. Similarly after *B*, *C* was to be his successor. After all these three successors the property was to pass to some one or more persons selected in a specified manner. *Held*, that successive life-interests only were conferred on *A*, *B* and *C*. The dominant intention of the testator was that the property should pass to three persons in succession, and this intention was inconsistent with the idea of a series of absolute interests, and the gift in the will of the same powers as the testator had, must be read as a gift of such powers so far as was consistent with the subsequent provisions of the instrument.

By a deed, Government made a grant of property to *A* for his life. On *A's* death the deed laid down the mode of selection of his successor. *A* by his will bequeathed life-interests in the property to *B* and *C* in succession, and this portion of the will was invalid at any rate as against the Government as it was inconsistent with the terms of the grant. *B* went into possession of the property under the will. On *B's* death his son entered into possession of the property. On a suit for possession by *C*, who maintained that *B's* son was estopped from disputing the title of the remainderman under the will, *B's* son relied on his possession as a squatter. *Held*, that although *B*, as he went into possession under the will, might be estopped from denying the remainderman's title, his son entering into possession after his father's death without any title at all and not through his father, because his father had nothing to pass to him, cannot be affected by any such estoppel.

Board v. *Board*, L. R. 9 Q. B. 48 *distinguished*.

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*P. C. A. 116 of 1930

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NISAR ALI KHAN
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Lord Tomlin

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

L. De'Gruyther, K.C. and *W. Wallach* for the appellant.

A. M. Dunne, K.C. and *J. M. Parikh* for the respondent.

The following judgment was delivered by

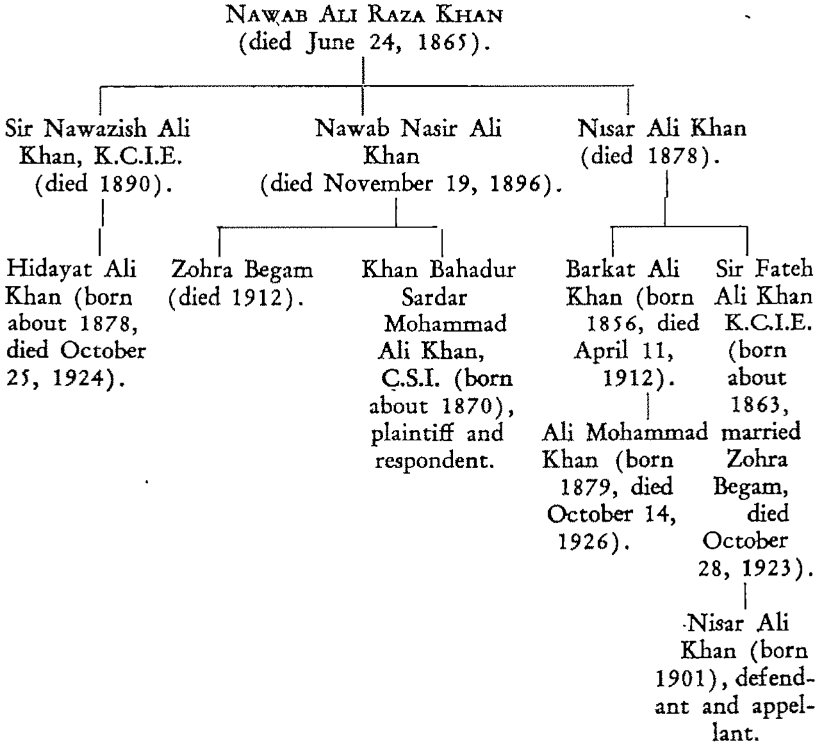
LORD TOMLIN—These consolidated appeals are concerned with four properties, one in Oudh and three in the Punjab, of which at his death on October 28, 1923, the late Sir Fateh Ali Khan, K.C.I.E., was in possession.

Nisar Ali Khan, who is the appellant in the first appeal and respondent in the second appeal, and is hereinafter called the appellant, is Sir Fateh's son.

Mohammad Ali Khan, who is the respondent in the first appeal and appellant in the second appeal, and is hereinafter called the respondent, is a first cousin of Sir Fateh, being a son of Sir Fateh's uncle Nawab Nasir Ali Khan, who died on November 19, 1896, in possession of the four properties.

On the death of Nawab Nasir, Sir Fateh entered into possession of the estates in question and remained in possession thereafter until his death.

The following pedigree sufficiently explains the descent of Sir Fateh and the positions in the family of the appellant and respondent respectively:—


NAWAB ALI RAZA KHAN (died June 24, 1865).
Sir Nawazish Ali Khan, K.C.I.E. (died 1890).
Nawab Nasir Ali Khan (died November 19, 1896).
Nisar Ali Khan (died 1878).
Hidayat Ali Khan (born about 1878, died October 25, 1924).
Zohra Begam (died 1912).
Khan Bahadur Sardar Mohammad Ali Khan, C.S.I. (born about 1870), plaintiff and respondent.
Barkat Ali Khan (born 1856, died April 11, 1912).
Sir Fateh Ali Khan K.C.I.E. (born about 1863, married Zohra Begam, died October 28, 1923).
Ali Mohammad Khan (born 1879, died October 14, 1926).
Nisar Ali Khan (born 1901), defendant and appellant.

The family are Shia Mohammedans of the Asna Ashari sect governed by the Imamia Law. By family custom women do not inherit.

Sir Fateh's grandfather, Nawab Ali Raza Khan, who died in 1865, was granted for distinguished service to the British Government a property in the Bahraich district of Oudh, described in the lists 1 and 5 attached to the Oudh Estates Act of 1869 as the estate of Nawabganj.

This property, being a Taluqa governed by the Act to which reference has been made, is held for a heritable and transferable estate. If the Taluqdar makes a will in accordance with the Act such will is valid irrespective of any personal law as to testamentary disposition to which he may be otherwise subject. Under Section 8 of the Act intestate succession to the estate is regulated by the rule of primogeniture.

On his death Nawab Ali Raza Khan was succeeded in this property by his eldest son, Sir Nawazish Ali Khan. This property is hereinafter referred to as the Oudh property.

By a deed dated May 9, 1868, Government, after the death of Nawab Ali Raza Khan, made a grant to Sir Nawazish Ali Khan of a property in the Lahore district known as and hereinafter called the Rakh Khamba property.

The deed granted the property to Sir Nawazish Ali Khan for life, then to his next brother Nasir Ali Khan for life, and then to his youngest brother Nisar Ali Khan for life. It then provided that on the death of the survivor the estate "shall go and belong to whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate, his heirs and successors .. and in the event of the said male heirs being unable to agree within a reasonable time then to such one of the lawful heirs of the said Nawab Ali Raza Khan as His Honour the Lieutenant Governor may consider fittest to succeed to the said estate, his heirs and successors." There were certain conditions attached to the Grant including conditions that the holder of the estate should make due provision for the maintenance of certain persons and that the Local Government might at any time require the holder to set aside from the proceeds of the estate such sum as it thinks necessary for that purpose.

Nisar Ali Khan, the youngest son of Nawab Ali Raza Khan, was the father of Sir Fateh, and died in 1878 in the lifetime of Sir Nawazish.

By a deed dated September 23, 1871, there was conveyed to Sir Nawazish on a purchase by him from the Government a property in the Punjab called and hereinafter referred to as the Khalikabad property. This property was held for a heritable and transferable estate subject to the ordinary law of inheritance by which the family was governed.

By a deed dated April 25, 1886, Government granted to Sir Nawazish in full proprietary rights a property in Tahsil Lahore known as and hereinafter referred to as the Juliana property. This property was also subject to the ordinary law of inheritance by which the family was governed.

Sir Nawazish died in 1890, and on his death Nawab Nasir Ali Khan succeeded without dispute to all four properties—as to the Rakh Khamba property as the next tenant for life named in the grant, and as to the other three properties under a will of Sir Nawazish presumably in the case of the Khalikabad and Juliana properties with the consent of the heirs, as under the appropriate law only one-third of such properties could be disposed of testamentarily without such consent.

On January 1, 1892, Nasir Ali Khan was created an hereditary Nawab by a *sanad* granted by the viceroy. After the death of Nasir Ali Khan Sir Fateh was recognised by the Government as his successor in the Nawabship.

On June 17, 1892, Nasir Ali Khan executed a deed of endowment and the Khalikabad property was included in the *wakf.* He named himself as the first trustee and provided that after him "the trusteeship would revert to that person who would be my successor and this office would devolve in future upon other successors in the same manner." On his death Sir Fateh entered into possession of the property as trustee and remained in possession until his death.

On July 15, 1896, Nasir Ali Khan made two wills, one relating to the Oudh property and the other relating to the Juliana and Rakh Khamba properties. These wills were, with one exception to which attention will be directed, identical *mutatis mutandis.*

Both wills were signed by the respondent and his sister, but both Courts below have held that they did not sign as witnesses but to show their assent to the provisions of the will. The will relating to the Oudh property, according to the translation accepted in the Courts below, was as follows:—

> In the name of Allah the most beneficent and the most merciful.
>
> I am Haji Nawab Nasir Ali, son of the late Nawab Ali Raza Khan, may God forgive him, caste Qizilbash, *malik* (owner) and Taluqdar of Nawabganj Aliabad, Bahraich district in the Province of Oudh, at present resident of Lahore—whereas the borrowed life is transitory, wherefor considering the appointment of an executor and my successor one of the necessities and a duty—while in possession of sound senses and stable intellect, without repugnance and compulsion—do hereby affirm and write that whereas the estate comprising Taluqdar Nawabganj Aliabad, parganas Charda and Bhinga, district Bahraich, and also situate in Bahraich city proper, in the province of Oudh along with all property and articles movable and immovable, and all internal and external rights and right of easement, which was given to me by my elder brother the late Sir Nawab Haji Nawazish Ali Khan Sahib, may God forgive him, by means of the registered will dated February 14, 1882 A.D. made under Section 11 of Act I of 1869 A.D. and subsequently in 1889 A.D. the said Sir Nawab Sahib in his lifetime having got this very above-mentioned Taluqdari estate, with all rights and interests, mutated in my name made me like himself owner without anyone else's partnership, *bila shirkat ghaire*—accordingly I have been continuously and am still in possession (*qabiz*) and owner (*malik*) of this very Taluqdari estate from the date of mutation till to-day. Now, under Section 11 of Act I of 1869 A.D. I, by means of the will, do hereby appoint Nawab Fateh Ali Khan, son of my late brother Nawab Nisar Ali Khan, may God forgive him, my executor and successor of all this Taluqdari estate with all the rights and interests aforesaid and do hereby authorise the legatee that whatever Taluqdari powers over the above-mentioned

> Ilaqa and over all the properties movable and immovable I the said declarant have, my legatee, to wit, Nawab Fateh Ali Khan, after my lifetime shall have like myself (*misl maire*), the very same powers with powers of possession and enjoyment as owner (*'wohi ikhtiarat ba qabz-o-tasarruf-e-malikana'*) provided he be alive. Similarly after the lifetime of the legatee Nawab Fateh Ali Khan, my son Nawab Mohammad Ali Khan, shall, if alive, be his successor. He shall also have the very same powers as have been bestowed on Nawab Fateh Ali Khan by means of this deed of will. After the lifetime of my son Nawab Mohammad Ali Khan, Nawab Hidayat Ali Khan, son of the late Sir Nawab Haji Nawazish Ali Khan Sahib shall be his successor, provided he be alive. After all these three successors the fit amongst the descendants of the successors shall succeed. The last legatee shall have power to nominate his successor anyone whom he considers fit amongst the descendants of each of the three successors; and if the last legatee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsoever they consider fit and superior amongst themselves.
>
> The line of successors shall continue according to this very rule. In the event of disagreement the Government shall have power to appoint as successor anyone amongst the descendants of each of the three successors whom it considers the fittest. And if anyone amongst our family claims maintenance contrary to the wishes of the Taluqdars, to wit, my successors, he shall, in no way, be entitled as of right to get maintenance. The successors shall have power to give or not (?) maintenance in the event of good conduct and obedience. And if anyone of our family or heirs makes any claim of proprietary rights in respect of the said Ilaqa or any movable or immovable property whether in whole or in part, as against the successors, it shall then be invalid and unentertainable. I, therefore, execute this deed of will under Section 11 of Act I of 1869 A.D., so that it may remain a 'Sanad' (documentary proof) and may be of use in case of necessity.

In the will relating to the Punjab properties instead of the phrase "that whatever Taluqdari powers over the above-mentioned Ilaqa and over all the properties movable and immovable I the said declarant have" and the phrase "contrary to the wishes of the Taluqdars to wit my successors" there were substituted respectively the phrase "that whatever powers I, the declarant, have in respect of the said movable and immovable properties" and the phrase "contrary to the wishes of the grantee and owner (*muafidar* and *malik*) to wit my successors."

Nawab Nasir died on November 19, 1896, and the *soem* or third day ceremony after his death took place on the morning of November 21, 1896. In the afternoon of the same day the *dastarbandi,* or tying of the turban ceremony, took place.

There was at the trial a serious conflict of evidence as to what took place at this afternoon ceremony, it being alleged on the one hand by the appellant that Sir Fateh was then elected to succeed to the Rakh Khamba property in accordance with the terms of the grant, and on the other hand by the respondent that Sir Fateh, the respondent, and Sir Nawazish's son, Hidayat Ali Khan, were recognised by the family as successors to all four properties in accordance with the terms of Nawab Nasir's wills.

At any rate Sir Fateh entered into possession of all four properties,

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but in the case of the Khalikabad property as trustee and remained in possession until his death on October 28, 1923.

On the death of Sir Fateh his eldest son, the appellant, took possession of the four properties, and on December 9, 1925, the respondent instituted in Oudh the suit out of which these appeals arise.

The trial Judge held that upon the true construction of the wills Sir Fateh took a life-interest only and that after his death the respondent succeeded to the properties which the wills affected either as next tenant for life or as heir of Nawab Nasir. He also held that so far as was necessary for the disposition of the entirety of any property affected by the wills the heirs of Nawab Nasir had assented to the wills. His conclusion therefore was that the respondent had made out his title to the Oudh and Juliana properties.

With regard to the Rakh Khamba property the learned Judge took the view that having regard to the terms of the grant Nawab Nasir had no power of testamentary disposition that there had been no election of a successor in accordance with the terms of the grant but that Sir Fateh had been recognised by the family as succeeding to this property under the will and that the defendant was estopped from denying that he had so succeeded.

As to the Khalikabad property the learned Judge held that he had jurisdiction (which the appellant questioned) to decide the matter and that the respondent having succeeded to Rakh Khamba property must be treated as successor of Sir Fateh and therefore trustee of the waqf.

The learned Judge therefore made a declaration of the respondent's right to possession of all four properties.

On appeal to the Chief Court of Oudh the judgment below was affirmed as to the Oudh and Juliana properties, but reversed as to the Rakh Khamba, and Khalikabad properties. As to the Rakh Khamba property the Chief Court took the view that Sir Fateh had been selected either by the heirs or by the Government in accordance with the terms of the grant to succeed to the Rakh Khamba property, and therefore that the appellant as his heir was entitled to this property.

As to the Khalikabad property the Court was of opinion that whoever succeeded to the hereditary Nawabship would be entitled to be trustee of the *waqf*, but that as no selection for the Nawabship had been made the respondent could show no title and the suit must fail against the appellant who was in possession. Both parties appealed to His Majesty in Council.

Before their Lordships' Board it was argued by the appellant that the Courts below were wrong with regard to the Oudh and Juliana properties because the wills of Nawab Nasir upon their true construction conferred a series of absolute interests, and therefore that Sir Fateh took absolutely as the taker of the first absolute interest, all subsequent interests and provisions being repugnant and bad.

It is a matter of difficulty to determine from translations the true effect of testamentary instruments framed in the vernacular by persons with customs and habits of mind differing widely from the customs and habits of mind of testators in this country, and it would be unwise to adhere too rigidly to rules of construction formulated for the interpretation of instruments created in a different environment.

Their Lordships have been referred to a number of decisions of the Board with reference to the word *malik,* and these decisions are in their Lordships' minds in arriving at their conclusions upon the wills in the present case.

Their Lordships are of opinion that there is no substantial difference between the two wills and that it would not be possible to give to one a meaning which the other would not bear. The dominant intention of the testator as displayed by each of the wills is in their Lordships' judgment an intention that the property should pass to three persons in succession and thereafter to some one or more persons selected in a specified manner. This intention is inconsistent with the idea of a series of absolute interests and could only be given effect to with such a series if each taker voluntarily denied himself the exercise of all power of alienation, *inter vivos,* and disposed of the property testamentarily to the next taker in accordance with the testator's scheme.

Without a succession of limited interests, the dominant intention cannot have effect regarding each will as a whole their Lordships are of opinion that life-interests only are conferred. This view receives additional support from the fact that the gift to each subsequent taker is expressed to be to him if alive or provided he be alive and after the lifetime of the previous taker and that the testator refers to all three named takers as his successors.

The gift in the Oudh will of Taluqdari powers and in the Punjab will of the same powers as the testator had, must in their Lordships' opinion be read as a gift of such powers so far as is consistent with the subsequent provisions of the instrument.

The appellant's appeal therefore fails as upon this construction their Lordships are of opinion that the respondent was entitled on Sir Fateh's death to succeed to the Oudh and Juliana properties as next tenant for life, both Courts below having held that the will was assented to by Nawab Nazir's heirs so far as was necessary to comply with Mohammedan Law in regard to the Juliana properties.

Their Lordships express no opinion as to the effects of the wills after the death of the respondent the third tenant for life being already dead.

The respondent on his own appeal seeks to restore the order of the trial Judge in regard to the Rakh Khamba and Khalikabad properties.

With regard to the Rakh Khamba property it is not sufficient for the respondent to displace the title of the appellant who is in possession. He must establish substantively a better title in himself. He sought to do so before their Lordships' Board by alleging some agreement between

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Lord Tomlin

members of the family either in the life of Nawab Nazir or on his death that effect should be given to the Punjab will in regard to this property. There seems to their Lordships to be three fatal objections to this case, namely, (1) it has not been pleaded or proved, (2) the defendant was not born at the time and would not be given to the agreement at any rate as against the Government as it is inconsistent with the terms of the grant.

He further alleged that there was in the circumstances some estoppel against Sir Fateh which bound the appellant and precluded him from denying that the Punjab will had effect in regard to the Rakh Khamba property.

The following passage occurs in para 9 of the amended plaint:—

> Nawab Sir Fateh Ali Khan enjoyed full benefits given him by the wills and the deed of *waqf* aforementioned and it is not now open to the defendant to assert a title inconsistent with the terms of the said deeds.

Except for this passage their Lordships do not find that any case of estoppel was hinted at in the pleadings, but issue No. 12 was settled in the following terms: "Is the defendant estopped from claiming that any portion of the wills of 1896 is invalid?" and the learned trial Judge found that both by acceptance of the wills as a whole and by assertions which led the respondent to suppose that he was the accepted heir, Sir Fateh created an estoppel to the present claim of his son that one portion of the property, namely, the Rakh Khamba property, came to him by some means other than the will on which his original title was based.

Their Lordships are unable to accept the view that the assertions to which the trial Judge refers even if they were sufficient to estop Sir Fateh could create an estoppel against the appellant.

It was, however, said that Sir Fateh in fact went into possession under the wills and that upon the principle of the decisions in *Board* v. *Board*[1] and *Dalton* v. *Fitzgerald*[2], the appellant is estopped from disputing the title of remainderman under the wills.

Now the argument proceeds on the basis that there was no selection of Sir Fateh in accordance with the terms of the grant. Obviously if such a selection was proved, that fact would be inconsistent with the allegation that Sir Fateh went into possession under the wills.

Ex hypothesi, therefore, Sir Fateh had no title at all, and although if he went into possession under the wills he might be estopped from denying the remaindermen's title, their Lordships are unable to see upon what principle the appellant entering into possession after his father's death without any title at all because his father had nothing to pass to him can be affected by any estoppel.

In each of the cases cited the entrant into possession under the invalid instrument had acquired a good title from another source and his purchaser or devisee of that good title was not allowed to set it up, because as such purchaser or devisee he was a privy of him who was estopped by having entered under the invalid instrument.

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[1] L. R. 9 Q. B. 48

[2] [1897] 1 Ch. 440 and [1897] 2 Ch. 86

Here on the hypothesis of no selection the appellant takes nothing through his father, and the mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purposes of the rule in *Board* v. *Board*. He can rely on his own possession as a squatter.

It follows therefore in their Lordships' judgment that the respondent's appeal in respect of the Rakh Khamba property must fail, whether he proves or fails to prove that Sir Fateh entered under the wills. If he fails to prove it he has no basis for his plea of estoppel from which alone he seeks to evoke a title for himself. If he does prove it, he cannot in their Lordships' opinion for the reason already indicated support the plea of estoppel against the appellant.

In these circumstances it is unnecessary for disposing of this appeal to determine the issue of fact whether or not there was any selection of Sir Fateh to succeed to the Rakh Khamba property in accordance with the terms of the grant, and this issue will therefore remain open to be adjudicated upon on some future occasion should circumstances so require.

There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the *waqf* he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from those which found the proceedings in respect of the other three properties.

Their Lordships are unable to find any justification for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such justification cannot in their Lordships' judgment be found in Section 17 of the Code of Civil Procedure upon which the respondent relied.

There were certain *ex parte* applications made by the respondent at an early stage of the suit as the result of which he determined to combine and did in his plaint combine his claims in respect of all four properties in one suit in the Court in Oudh. The appellant in his written statement at once took objection to the jurisdiction so far as the claim in respect of the Khalikabad property was concerned.

There was nothing in what occurred in connection with the respondent's *ex parte* applications to render the appellant's objection to the jurisdiction inadmissible. That objection has been properly considered in the Courts below, and is proper to be adjudicated upon before their Lordships' Board. The objection in their Lordships' judgment succeeds and is fatal to the respondent's appeal in respect of the Khalikabad property.

It becomes therefore unnecessary to consider the true effect of the grant creating the *waqf*, and their Lordships must not be taken as expressing any views upon the conclusions reached on this matter in the Courts below.

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Lord Tomlin

A number of minor issues were considered and dealt with in the Courts below but were not debated before their Lordships' Board.

In the result therefore both appeals fail and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

There will be no costs on either side except that as regards K. B. Sardar Mohammad Ali Khan's petition for the discharge of a receiver. K. B. Sardar Mohammad Ali Khan will pay to Sardar Nisar Ali Khan his costs of that petition as directed by Order in Council of July 23, 1931.

Appeal dismissed

Hy. S. L. Polak and Co.—Solicitors for the appellant.

T. L. Wilson and Co.—Solicitors for the respondent.

HIGH COURT

KING-EMPEROR

versus

MIRZA MOHAMMAD IBRAHIM*

CRIMINAL

1932

June 7

KENDALL, J.

Criminal Procedure Code, Secs. 498 and 561A—Bail granted by High Court—Conditions on which bail granted not violated—Whether it can cancel the order.

The High Court is not specifically empowered by Sec. 498, Criminal Procedure Code, to cancel bail granted by itself; but it can hardly be argued that it will be exercising the wide powers with which it is endowed by Sec. 561A improperly, if it follows the procedure that would be observed by a Sessions Judge or Magistrate, and directs the arrest of a person who has been released on bail under its orders, for the reason that there do now appear to be reasonable grounds for believing that he has committed a non-bailable offence.

U. S. Bajpai (Government Advocate) for the Crown.

P. L. Banerji, Mukhtar Ahmad and *Saila Nath Mukerji* for the opposite party.

The following judgment was delivered by

Kendall, J.

KENDALL, J.—This is an application on behalf of the Crown for the cancellation of an order passed by me on December 7, 1931, granting bail to one Mirza Mohammad Ibrahim. The arguments on the application have given rise to the legal question of whether when the High Court has passed an order under Section 498 Cr. P. C. granting bail, that order for bail may be cancelled without the accused person having done anything since the order to violate any condition on which bail was granted.

When an application for bail on behalf of Mirza Mohammad Ibrahim was made before me the position was that Mirza Mohammad Ibrahim was being prosecuted for offences under Sections 302 and 307 I. P. C. The actual enquiry had not started, but both the enquiring magistrate and the Sessions Judge had refused to release him on bail. I directed his release as appears from the order of December 7, 1931 on grounds that might have been the basis of an order under Section 497, Sub-section (2) of the Criminal Procedure Code, but there can be no doubt that the order was actually passed under Section 498. The discretion of this Court to release accused persons on bail under Section 498 Cr. P. C. is not fettered in any way, but an order under that section must of course be passed for judicial reasons and not arbitrarily. The reasons given in my order amount to this that the case against Mirza Mohammad Ibrahim was one instituted on complaint, that the evidence according to the affidavit against the accused was scanty and that the application had not been opposed by the Crown. It is not possible to say definitely that these were the only reasons, but in so far as any reasons are expressed they amount to this that there were no 'reasonable grounds for believing that the accused had committed a non-bailable offence' as expressed in Sub-section 2 of Section 497.

The Government Advocate has pointed out that the affidavit now

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*Cr. Mis. 309 of 1932

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Kendall, J.

filed on behalf of the Crown proves that the Magistrate's enquiry has been completed, that the accused including Mirza Mohammad Ibrahim have been committed for trial, and then the Magistrate has expressed the opinion that a strong *prima facie* case has been made out against the accused. The position is therefore radically different from that which existed when the bail order was passed. Mr. P. L. Banerji, in opposing the application, has pointed out that the bail order was passed under Section 498 Cr. P. C. which contains no provision empowering the High Court to cancel a bail order passed under this section. The only section of the Code of Criminal Procedure by which the High Court is empowered to cancel such an order is, it is argued, Section 561A, viz:—

> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Now it is quite clear that there is no question here of giving effect to any order under this Code, and there is no evidence to show that Mirza Mohammad Ibrahim has done anything that could be interpreted as an abuse of the process of the Court, e.g., by breaking any condition on which he was allowed to be released on bail. It is not suggested that he has been trying to abscond or to tamper with witnesses, nor indeed was any condition expressed in the order directing his release. It is true that the court has inherent power to pass such orders as may be necessary ' to secure the ends of justice,' but it is argued that it has not been shown in the present case that any such order is necessary.

I have to consider that if the case had come before me now for the first time, and if it had been brought to my notice that Mirza Mohammad Ibrahim had been committed to sessions under Secs. 302 and 307 I. P. C. after an enquiry by the Magistrate involving the recording of evidence, and the application had been opposed as it has now been opposed on behalf of the Crown, it would not have been proper to pass an order releasing the accused on bail for the reason that there are not good grounds for believing that the accused has committed a non-bailable offence. Mr. Banerji has however argued that though Mohammad Ibrahim may have been lucky to be released, he has as a matter of fact been released, and he cannot legally be consigned to jail merely on the ground that he has now been committed for trial.

I agree with Mr. Banerji to this extent, that neither the Magistrate nor the Sessions Judge was empowered to cancel the bail and to consign the accused to jail in the face of my order of 7-12-31. They could not read into that order a direction which was not expressed there, to the effect that if at any time they were satisfied that there were reasonable grounds for believing that the accused had committed the offence they should be at liberty to cancel the bail. It has been suggested by the Government Advocate that such a direction was implied in the order, but with this I cannot agree, because as a matter of fact both the Magistrate and the judge appear to have been sufficiently satisfied about the case against Mohammad Ibrahim when application was made to them for his release on bail. My order of December 17, as it appears from the order itself, was passed on the ground that I did not agree with the Magistrate and Judge that there were reasonable grounds for believing that the accused had committed the offence.

The circumstances are now different, because neither of the two elements now exist which induced me to release Mohammad Ibrahim. It cannot be said that there are not reasonable grounds for believing that the accused has committed the offence, and the prosecuting authorities are pressing to have the bail cancelled. There can be no doubt that if Mohammad Ibrahim were now applying for bail his application would have to be dismissed. A Sessions Judge or a Magistrate who has released an accused person under Sub-section (2) of Section 497 of the Code of Criminal Procedure, is empowered by Sub-section (5) to cause that person to be arrested and committed to custody, and would no doubt do so in the circumstances of the present case. The High Court is not specifically empowered by Section 498 to cancel bail granted by itself; but it can hardly be argued that it will be exercising the wide powers with which it is endowed by Section 561A improperly, if it follows the procedure that would be observed by a Sessions Judge or Magistrate, and directs the arrest of a person who has been released on bail under its orders, for the reason that there do now appear to be reasonable grounds for believing that he has committed a non-bailable offence. I therefore order that Mirza Mohammad Ibrahim be arrested and committed to custody.

PRIVY COUNCIL

GOPAL SARAN NARAIN SINGH (*Defendant*)

versus

SITA DEVI (*Plaintiff*)*

CIVIL
1931
Nov. 19
LORD THANKERTON
LORD SALVESEN
SIR GEORGE LOWNDES

Grant—By Hindu in favour of Christian woman—Whom he married according to Arya Samaj *rites—Deed described her as 'my wife'—Whether grant dependent upon validity of marriage—Whether a* dum casta *condition implied—Contract Act, Sec. 25 (1)—Whether applicable to such grant.*

A Hindu executed a deed in favour of an Australian woman, whom he had married according to the rites of the *Arya Samaj* sect after she became a convert to Hinduism. By this deed he purported to grant to her, "her heirs, executors, administrators and assigns," a perpetual annuity charged upon specified immovable properties. In the deed he described her as "my wife", and the grant was expressed to be made out of "love and affection." *Held,* (1) that the deed was not a contract and was in form and substance a gift; (2) that the grant was not intended to be in any way dependent upon the validity of the marriage, and there was no room for the implication of a *dum casta* condition.

APPEAL from a decision of the High Court of Judicature at Patna. (For a report of the judgment under appeal see *Sita Devi* v. *Gopal Saran Narain Singh,* 111 In. Cas. 762).

L. De'Gruyther, K.C. and *W. Wallach* for the appellant.

The other side was not represented.

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*P. C. A. 39 of 1931

CIVIL
1931
GOPAL SARAN NARAIN SINGH v. SITA DEVI
Sir George Lowndes

The following judgment was delivered by

SIR GEORGE LOWNDES—The question raised by this appeal is as to the right of the respondent to enforce the terms of a deed dated July 18, 1917, by which the appellant purported to grant to her, "her heirs, executors, administrators and assigns," a perpetual annuity of Rs.15,000 charged upon specified immovable properties. The Subordinate Judge by whom the case was tried held that the deed was unenforceable on various grounds. The High Court came to the opposite conclusion.

The suit out of which the appeal arises was instituted by the respondent in the Court of the Subordinate Judge of Gaya. It was founded upon two deeds, both admittedly executed by the appellant. By the first, dated April 16, 1913, he purported to settle upon her a life annuity of Rs.36,000. The second was in the terms set out above, and in effect reduced the life annuity just referred to by Rs.15,000 per annum. The plaintiff claimed a declaration of her rights under the combined deeds and the payment of arrears. Both Courts in India have rejected her claim under the earlier deed. She has not appealed against this decision, nor has she appeared upon the present appeal.

The material facts of the case are not in dispute. The plaintiff was an Australian by birth, and apparently an actress by profession. On June 11, 1903, she was married in Capetown to an American of the name of Stillwell. On June 26, 1906, they were divorced by a decree of the Supreme Court of New South Wales. Subsequently she came to India and was associated with the appellant. In 1909 she became a convert to Hinduism, adopting the name of Sita Devi, and on May 2 of that year she was married according to the rites of the Arya Samaj sect to the appellant, who was by birth a Bhumihar Brahmin.

The parties admittedly lived together openly as husband and wife for a number of years, and seem to have been on the best of terms in 1917 when the deed in question in this appeal was executed. The annuities under the deeds were paid till 1921, when payment was stopped in consequence of her infidelity, which has been affirmed by the judgments of both Courts in India. The deed of 1913 has been held to be unenforceable on the ground that, being on the face of it a provision for her maintenance, a *dum casta* condition must be implied. As already stated, there is no appeal by the lady, and their Lordships are therefore not concerned with the correctness of this decision. The only question before them is as to the second deed, to which different considerations apply.

Various defences to the suit were raised by the appellant and many questions have been discussed in the Indian Courts upon which their Lordships do not find it necessary to come to any conclusion. It was, for instance, contended that the divorce of 1906 was obtained by fraud and was without jurisdiction, and that the marriage with the appellant in India was invalid under his personal law. Upon these questions there was a considerable divergence of opinion between the Subordinate Judge and the High Court, but they clearly could only be material if the deed of July 18, 1917, was conditioned upon the existence of a valid marriage.

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1931
GOPAL
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Sir
George
Lowndes

Reading the document as a whole in the light of the surrounding circumstances, their Lordships think that this is not the case. In their opinion, the reference to the respondent in the deed as the wife of the appellant is merely descriptive, and they have no doubt that the grant was not intended to be in any way dependent upon the validity of the marriage. It is also, their Lordships think, obvious that in this case there is no room for the implication of a *dum casta* condition.

But it is further contended for the appellant that the question of the marriage is raised at least indirectly by another aspect of the case. The deed, it is said, though in form unilateral, and purporting to be a grant by the appellant, is really in the nature of a contract between the parties, and founding upon Section 25 (1) of the Contract Act, it is contended that the grant being expressed to be made out of "love and affection," it would only be binding if the parties were validly married.

If their Lordships could regard the document as merely contractual, they might have to consider whether the words used in the sub-section above referred to, "between parties standing in a near relation to each other," would not be reasonably applicable to persons who had lived together as husband and wife for a number of years, even though their marriage might have been invalid for one or other of the reasons assigned in the present case. It would also be a matter for consideration whether the acceptance by the respondent of the reduction in her life annuity under the earlier deed would not of itself be sufficient to validate the later transaction. But, in their Lordships' opinion, the deed of July 18, 1917, was clearly not a contract at all. It was in form and substance a gift for which no consideration was necessary.

A last attempt to impugn the validity of the deed was made by reference to a passage cited from the Navada Smriti in Golapchandra Sarkar's well-known treatise on Hindu Law (3rd edition, p. 488). In this passage the compiler of the *Smriti,* in dealing with the subject of gifts, lays down that "what is given to a person not a proper object of the gift but representing himself, and mistaken by the donor through ignorance, to be a proper object" may be resumed. It is sufficient to say in answer to this contention that there is no evidence of misrepresentation by the respondent, or of the mistake or ignorance of the appellant. He did not in fact go into the witness-box, and there is no indication that he was deceived.

There was a suggestion that the respondent had improperly retained certain "family jewels" of the appellant, and that her claim under the deed should only be affirmed upon the condition of their return. The High Court was of opinion that there was "no evidence worth the name" to substantiate this allegation, and their Lordships are in complete agreement with their finding on this head.

For the reasons given their Lordships think that the decree passed by the High Court was right and that this appeal fails, and they will humbly advise His Majesty accordingly.

Appeal dismissed

Douglas, Grant and Dold—Solicitors for the appellant.

CIVIL

1932

March 3

LORD BLANESBURGH
LORD TOMLIN
SIR GEORGE LOWNDES

THE OFFICIAL LIQUIDATOR OF M. E. MOOLLA SONS, LIMITED

versus

MRS. PERRIN R. BURJORJEE*

Registration Act (XVI of 1908), Sec. 49—Admitted document—Not registered—When court compelled to take notice of non-registration—Practice—Appeal—Question of law raised for the first time—When to be entertained.

There is nothing in Sec. 49 of the Registration Act to compel the court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in such document.

When the only claim is one for damages for breach of an admitted agreement to purchase immovable property against an alleged undisclosed principal who denies he was a principal and the property affected by the agreement has passed out of the picture—the parties having arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent—, the proceedings do not in any respect affect any immovable property.

When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. *Connecticut Fire Insurance Co.* v. *Kavanagh,* [1892] A. C. 473 at 480 *followed.*

APPEAL from a decision of the High Court of Judicature at Rangoon.

W. H. Upjohn, K.C. and *T. B. W. Ramsay* for the appellant.

A. M. Dunne, K. C. and *A. Pennell* for the respondent.

The following judgment was delivered by

Lord Tomlin

LORD TOMLIN—This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.

On December 23, 1929, the trial judge on the original side of the High Court of Judicature at Rangoon held that the proof was rightly rejected. On August 4, 1930, this decision was reversed on appeal to the appellate side of the Court.

The proof in question was for Rs.63,219-15-0, damages alleged to have been incurred by the respondent by reason of the failure of the Company to complete the purchase of property agreed to be sold by the respondent by an agreement dated July 27, 1921.

The only question in issue or debated at the hearing before the trial Judge, or on the appeal, was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the Company was the undisclosed principal of Moolla in respect of such agreement.

The trial judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefit of it to the Company and that therefore the Company was under no liability to the respondent.

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*P. C. A. 96 of 1931

The appellate court held that the Company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected.

Against this decision the liquidator appealed to His Majesty in Council and before their Lordships' Board raised the contention that the agreement of July 27, 1921, required registration under the Indian Registration Act, that it could not be used for any purpose whatever and ought to be ignored by the Court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail.

The questions therefore which arise for their Lordships' consideration are:—

(1) Ought the appellant to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement?

(2) If the question as to registration can now properly be raised (*a*) did the agreement, which admittedly was not registered, require registration, and (*b*) if it did require registration, what is the effect of non-registration in regard to the respondent's right to claim damages under the agreement?

(3) If the question as to registration cannot now be properly raised, or if it can be properly raised but upon consideration of the merits of the question, it is held that the non-registration of the agreement does not preclude the respondent from putting forward a claim for damages under the agreement, whether the Company was or was not the undisclosed principal of M. E. Moolla in regard to the agreement?

[Their Lordships then stated the facts so far as they were proved or admitted.]

The first question for consideration, therefore, is ought the applicant to be allowed at this stage to raise for the first time the point of non-registration?

In *Connecticut Fire Insurance Company* v. *Kavanagh*[1], Lord Watson, in delivering the judgment of their Lordships' Board, said as follows:—

> When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea.

Section 49 of the Registration Act, which states the results of non-registration is, so far as material, as follows:—

> 49. No document required by Section 17 to be registered shall—

[1] [1892] A. C. 473 at 480

> "(a) affect any immovable property comprised therein.
>
> * * * *
>
> or
>
> (c) be received as evidence of any transaction affecting such property , unless it has been registered.

Their Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immovable property. The immovable property affected by the agreement long since passed out of the picture [the parties having arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent], and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non-registration.

They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement of July 27, 1921.

In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non-registration of the document.

It becomes therefore unnecessary to consider the second question as to the necessity for registration.

There remains the third and last question, one of fact upon which the Courts below have differed, viz., was the Company the undisclosed principal of Moolla in relation to the agreement of July 27, 1921.

Their Lordships are satisfied that the Company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points strongly in the direction of his having acted as the Company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the trial Judge. In their Lordships' opinion the learned judges of the appellate side reached a correct conclusion upon the issue of fact.

In the result, therefore, the appeal fails and must be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed

Barrow, Rogers and Nevill—Solicitors for the appellant.

J. E. Lambert—Solicitor for the respondent.

Civil

1932

The Official Liquidator of M. E. Moolla Sons, Limited *v.* Mrs. Burjorjee

Lord Tomlin

MOHAMMAD RAZA, SINCE DECEASED (REPRESENTED BY SYED MOHAMMAD ABBAS AND OTHERS) AND OTHERS (*Defendants*) *versus* ABBAS BANDI BIBI (*Plaintiff*)*

Civil

1932

April 12

Lord Blanesburgh
Lord Tomlin
Sir Lancelot Sanderson
Sir George Lowndes
Sir Dinshah Mulla

Transfer of Property Act, Sec. 10—Absolute estate—By family settlement—Restraint against alienation outside the family—Whether repugnant.

In compromise of their conflicting claims a family settlement was come to between *A* and *B*, by which it was agreed that *A* should take an absolute estate in what she claimed, saddled with the condition that she would not alienate the property outside the family. *Held,* that an agreement of this nature was not contrary to justice, equity and good conscience and the condition was binding upon *A*. *In re Macleay,* L. R. 20, Eq. 186, *Gill* v. *Pearson,* 6 East 173 *relied on.*

Under Sec. 10, Transfer of Property Act, 1882, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos,* be regarded as repugnant, and there is no authority suggesting that before the Act of 1882 a different principle was applied by the courts in India.

Quaere—Whether the Shia Law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person.

Appeal from a decision of the Chief Court of Oudh at Lucknow. (For a report of the judgment under appeal *see* I. L. R. 4 Luck. 452).

A. M. Dunne, K.C. and *W. Wallach* for the appellants.

L. De'Gruyther, K.C. and *Jopling* for the respondent.

The following judgment was delivered by

Sir George Lowndes

Sir George Lowndes—The facts necessary for the decision of this appeal are within a small compass.

In 1868 one Sughra Bibi brought a suit against her cousin, Afzal Husain, claiming a half-share in certain immovable properties in Oudh which had been entered in his name at the post-mutiny settlement. The litigation ended in a compromise upon which a decree was passed in the suit on September 19, 1870. The compromise was in the following terms:—

> We are Musammat Sughra Bibi, plaintiff, claimant of a share in Mahal Shadipur, Nusha, &c., pargana Tanda, and Surhurpur, and Syed Afzal Hasan, son of Syed Tegh Ali Qanungo, Lambardar of the aforesaid Mahal, defendant.
>
> Whereas between the parties to the above-mentioned case in which a share is claimed an amicable settlement has been arrived at to the effect that the plaintiff's marriage by way of *nikah* with the defendant may be

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*P. C. A. 97 of 1930

> performed in the next month, accordingly in view of a marriage settlement, there no longer exists any dispute regarding a share, and insomuch as the defendant's first wife, the daughter of Raja Syed Abbas Ali, deceased, is alive, it has been settled that both wives should, in accordance with this agreement, in their capacity as wives, from this very time be declared permanent owners [*malik mustaqil*] of a moiety each of the entire Mahal Shadipur, and that the names of Musammat Fatima Begam, the first wife, and Musammat Sughra Bibi, plaintiff, be entered in the public records as owners of half and half [*bil munasfa milkiatan*]. The said females shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on the legal heirs of both the above-named wives, from generation to generation; and the management and collections of the entire estate of Shadipur shall be in the hands of their husband, Syed Afzal Husain, in his capacity of a husband; if on the part of the husband there is any act of neglect or estrangement towards either of the wives, then, in that case, the wife's only remedy will be to have the management of her share performed by the Government through the Court of Wards; but during the lifetime of Afzal Husain neither of the wives shall have the power on her own authority to have the management of the share which is owned by her performed by any member of her father's family, and if in contravention of this agreement the Defendant refuses to marry the plaintiff by way of *nikah,* then the plaintiff shall in accordance with this document remain owner of a moiety, and if the plaintiff acts contrary to the stipulation of *nikah,* she shall cease to have any rights whatever. If, God forbid, contrary to custom the divorce of either of the wives takes place, then, even in that case, ownership shall remain vested in the wives, as before, subject to the conditions mentioned above; provided that the divorced wife should regard herself as an undivorced wife, and like a woman without a husband continue to live in the house, and be it understood that the aforesaid conditions shall apply to whatever share exists in the villages comprised in Mahal Shadipur, as detailed below:—(1) Shadipur, (2) Ninawan, Behari, Daudpur, Nandapur, Qutubpur, Belahri, Daryapur; moreover, whatever property, such as Chitoi and Nausanda and Musha, &c., pargana Tanda and Halimpur and Lodhna and Nathupur, pargana Surhurpur, &c., exists at present, or may be acquired in future, shall, during the lifetime of Mir Teg Ali and myself (the Defendant), continue to remain in possession of the Defendant, and after me (the Defendant) this property also shall devolve on the two wives or their descendants (*aulad*) in equal shares.
>
> Hence this agreement is made in writing in order that it may serve as evidence thereof and the pending case may be decided in accordance with its terms.

Afzal Husain thereafter duly married Sughra Bibi and died in 1872 childless, his first wife Fatima Begum having predeceased him in 1871. Sughra Bibi took possession of her share in the properties, but had sold or mortgaged it all before her death, which occurred on July 26, 1914. Her transferees remained in undisturbed possession for nearly 12 years after her death.

On March 26, 1926, the suit out of which this appeal has arisen was instituted by the respondent in the Court of the Subordinate Judge of Fyzabad for the recovery of two-thirds of Sughra Bibi's share from the appellants, in whose possession the properties had come under the alienations above referred to.

The respondent's case was that under the compromise Sughra Bibi took only a life estate without power of alienation, and that on her death the half-share passed to her heirs of whom the respondent, in right of her mother Zainab Bibi, the sister of Afzal Husain, was one, her share being two-thirds. The other heirs, taking the remaining third, were said to be certain maternal relatives of Sughra Bibi, who apparently made no claim, and were not joined as parties to the suit, but it is not suggested that it is defective on this account. The present appeal therefore is concerned only with two-thirds of the property, and the rights of the parties depend in the first instance on the validity of the alienations by Sughra Bibi, the title of the respondent, if these alienations were invalid, not being disputed.

A preliminary issue which covered this question was raised and tried by the Subordinate Judge. It was in the following terms:—

> Was the restriction placed by the compromise deed dated September 19, 1870, upon Sughra Bibi's power of alienation valid and legally enforceable?

The learned Judge after a detailed but not very informing examination of the case law on the subject, held that the restriction imposed by the deed on the lady's power of alienation was invalid and inoperative, and he accordingly answered the issue in the negative.

The hearing of some 28 other issues in the case came subsequently before another Subordinate Judge, with the result that the suit was dismissed with regard to certain of the properties claimed, but decreed with regard to others.

Both sides appealed to the Chief Court. The case was heard by Raza and Pullan, JJ., who delivered their judgment on January 4, 1929, allowing the appeal of the present respondent, and dismissing that of the appellants, with the result that the suit was decreed in full. The questions other than that as to Sughra Bibi's power of alienation are not now material. They were in part disposed of by concurrent findings of fact of the two courts, and for the rest involve matters subsidiary to the main issue as to the validity of the alienations.

The learned Judges of the Chief Court discussed the meaning of the word *malik* which has been used throughout the compromise agreement, but came to the conclusion that having regard to the express provision that the ladies were not to have power to transfer the property to a stranger, they had only a "limited ownership," with a gift over to their heirs. They then considered whether under the Shia law, by which the parties were governed, such an arrangement would be valid and came to the conclusion that it would.

Before the Board the case law has been discussed at great length, but without throwing much light upon the construction of the particular document with which this appeal is concerned. It was urged for the appellants that the true effect of the document was to constitute the ladies full owners of the two moieties of the property, and that the attempt to restrict their power of alienation should be regarded as repugnant, special reliance being placed upon the judgment of the Board delivered by the late Sir Binod Mitter in *Ragbunath Prasad Singh* v. *Deputy Commissioner,* *Partabgarh*[1]. For the respondent it was contended that, having regard to the decisions of this Board, the use of the word "malik" did not necessarily imply full ownership, and that reading the document as a whole the ladies took only life estates with vested remainders in their heirs.

In support of the appellants' contention it was pointed out that the ladies were to be "malik mustaqil," i.e., *permanent* proprietors, and were to be entered as such in the public records; that their proprietorship was to take effect from the execution of the document, and that if Afzal Husain refused to marry Sughra Bibi, she was to "remain owner of a moiety" free from restriction of any kind; that other property, to which Sughra Bibi had made no claim, was also dealt with; that it was to remain in the possession of Afzal Husain during his life and the lifetime of his father Tegh Ali, and then was to "devolve on the two wives or their descendants in equal shares"—again, as the respondent's counsel concedes, without restriction. From this it is said to be clear that the draftsman of the document was quite competent to put a life estate into direct words if that had been the intention of the parties under the first part of the agreement. It is also suggested that the words upon which the respondent relies as constituting a gift over to the ladies' heirs, are only explanatory of the restriction against transfer to a stranger, which immediately precedes them, and it is pointed out with some force that if only life estates were intended the restriction would not have been confined to the case of strangers.

Their Lordships feel the weight of these contentions, and they might have some difficulty in holding that Sughra Bibi took nothing more than a life estate. But assuming in the appellants' favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to "a stranger". Their Lordships have no doubt that "stranger" means any one who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless, therefore, this restriction can for some reason be disregarded, they had no title to the properties which can prevail against the respondent.

On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that *Raghunath Prasad Singh's* case (*supra*) is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is, in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what

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[1] 56 I. A. 372

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was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them.

The law by which this question must be judged is, their Lordships think, prescribed by Section 3 of the Oudh Laws Act, 1876, and failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India.

Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement, could hardly support their claim by an appeal to these high sounding principles, and it must be remembered in this connection that family arrangements are specially favoured in courts of equity.

But apart from this, it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos,* be regarded as repugnant; *see* Section 10 of the Act. In view of the terms of this section and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience.

It was said by Lord Hobhouse in *Waghela Rajsanji* v. *Shekh Masludin*[2], that the expression "equity and good conscience" was generally interpreted as meaning English law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would be regarded as repugnant even in the case of a testamentary gift. So in *In re Macleay*[3], Sir George Jessel, M. R., upheld a condition attached to a devise in fee that the devisee should "never sell out of the family," pointing out that this had been the law from the time of Coke; and in *Gill* v. *Pearson*[4] Lord Ellenborough in the King's Bench affirmed the validity of a similar restriction.

Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her.

Their Lordships have heard much discussion of the question whether the Shia law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person, but, in the view they take of the appellants' case, it is unnecessary for them to come to any con-

[2] 14 I. A. 89 at 96

[3] L. R. 20 Eq. 186

[4] 6 East 173

clusion upon this somewhat abstruse problem, or to consider the authorities that have been cited.

In their Lordships' opinion Sughra Bibi had no power to transfer any part of the properties to the appellants, and upon her death the respondent became entitled to the two-thirds share in the properties which she claims. They think that this appeal fails, and that the decree of the Chief Court, dated January 4, 1929, should be affirmed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed

Hy. S. L. Polak and Co.—Solicitors for the appellants.

Watkins and Hunter—Solicitors for the respondent.

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LORD RUSSELL OF KILLOWEN
SIR DINSHAH MULLA

THE BENARES BANK, LIMITED (*Plaintiffs*)

versus

HARI NARAIN AND OTHERS (*Defendants*)*

*Hindu Law—Non-ancestral business—Joint family—*Mitakshara*—Father borrows money for business by mortgaging family property—Whether minor members bound.*

Money borrowed by the father as manager of a joint Hindu family governed by the *Mitakshara* for the purpose of a business which is not ancestral, is not borrowed for legal necessity and a mortgage granted as security for such a loan is not binding on the minor members of the joint family, and the mortgage being wholly invalid does not pass the shares even of the alienating co-parceners. *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*, 49 Cal. 560 *relied on.*

APPEAL from a decision of the High Court of Judicature at Allahabad.

A. M. Dunne, K.C. and *Douglas McNair* for the appellants.

W. Wallach for the respondents.

The following judgment was delivered by

Sir Dinshah Mulla

SIR DINSHAH MULLA—This appeal involves questions which frequently arise in suits to enforce a mortgage against property which belongs to a Hindu joint family governed by the Mitakshara where the mortgage is executed by the father for himself and for his minor sons as their guardian.

The family in this case consisted of two brothers, Jagdish Narain and Raghubir Narain and their respective sons. Jagdish Narain had five sons, two of them, Suraj Narain and Dip Narain being adults, and the other three minors. Raghubir Narain had three sons, all of whom were minors.

On September 1, 1911, the adult members of the family borrowed Rs.28,000 from the Benares Bank, Limited, the appellants before this Board, and executed a deed whereby they mortgaged six properties belonging to the family, one situated at Allahabad, another at Manjhiari, and the rest in the Fatehpur district, to secure the debt and interest, each father signing as guardian of his minor sons. The mortgage deed recited that the mortgagors were in need of money to pay off two previous mortgages, one for Rs.7,000 in favour of Dwarka Bibi, and the other for Rs.11,000 in favour of Kishun Narain, and to carry on the mortgagors' business.

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*P. C. A. 95 of 1930

In 1913 the mortgagors paid Rs.4,128 to the bank. In 1919 they sold one of the Fatehpur properties, and paid a further sum of Rs.29,700. Jagdish Narain died in 1921. The balance not having been paid, the bank brought the present suit in the Court of the Subordinate Judge of Allahabad on April 27, 1923, against the surviving members of the family, who are respondents in this appeal, to enforce the mortgage against the remaining five properties.

The adult members of the family who had executed the mortgage did not defend the suit, but a written statement was filed on behalf of such of the sons of the two brothers as were minors at the date of the mortgage. The defence was that there was no consideration for the mortgage and no necessity for the loan. As to the business referred to in the mortgage deed, their case was that Jagdish Narain started a *theka* business in 1902 or 1903 and took building contracts from the Public Works Department at Benares, and that the business was the personal business of Jagdish Narain, and not a joint family business.

It would appear from the bank's books and other documents produced at the trial that Rs.18,000 was paid in cash by the bank to the mortgagors, and that the balance of Rs.10,000 was credited to the account of Suraj Narain pursuant to a letter dated September 24, 1911, addressed by the four adult members to the bank. It would also appear that Rs.6,342 out of the Rs.10,000 was transferred by the bank to the account of Bhagwati Prashad on the instructions of Suraj Narain, and the balance of Rs.3,658 was withdrawn by cheques drawn by Suraj Narain in favour of Ambika Prashad who attended to the *theka* business.

The Subordinate Judge found that the whole consideration was paid by the bank, that Rs.18,000 was applied in discharging the two previous mortgages, that Rs.6,342 was paid to Bhagwati Prashad to whom the family owed the amount, and that the balance of Rs.3,658 was used for the *theka* business which he held was a family business. He also held on some evidence given in the case (to be presently referred to) that the Allahabad and Manjhiari properties belonged to Jagdish Narain and Suraj Narain, and not to the joint family. On these findings he passed a preliminary mortgage decree for the whole debt and for costs.

On appeal to the High Court at Allahabad, the judgment of the Subordinate Judge was reversed on all points except as to Rs.18,000 which the defendants did not contest at the hearing of the appeal. As to Rs.6,342 the High Court decided that there was no evidence on the record to show that the family owed that amount to Bhagwati Prashad. As regards Rs.3,658 used in the *theka* business they held that the business was not a family business, but the personal business of some adult member of the family, and that even if it was a family business, it was not ancestral so as to render the minors' shares liable for that debt. As to the Allahabad and Manjhiari properties they took the view that they belonged to the joint family, and not to the two brothers. Their conclusion therefore was that the mortgage was valid to the extent only of Rs.18,000, and after taking certain accounts they passed a decree on August 8, 1928, in modification of the decree of the trial Judge in the following terms:—

It is ordered and decreed that this appeal be allowed in part, that in modification of the decree of the Subordinate Judge of Allahabad, the plaintiff's claim to the extent of Rs.18,000 with interest thereon, for which the mortgage in suit was valid and which has been paid up by the defendants, be dismissed as against the appellants and the mortgaged property, and that a simple money decree be and it hereby is passed in favour of the plaintiff-respondent as against Raghubir Narain, Dip Narain and Suraj Narain personally and against the heirs of Jagdish Narain deceased to the extent of the personal assets of the said deceased in their hands other than the mortgaged property, for recovery of Rs.24,794-8-0 (twenty-four thousand seven hundred and ninety-four and annas eight), viz., Rs.10,000 principal and Rs.15,242-8-0 interest at Re.0-12-0 per cent per mensem simple from the date of the bond up to August 8, 1928, the date of this Court's decree, in all Rs.25,242-8-0 minus Rs.448 excess amount paid by defendants, and that the sum of Rs.10,000 shall carry future interest at Re.0-12-0 per cent per mensem until realisation. It is further ordered that the parties shall bear their own costs throughout.

From this decree the bank has brought the present appeal to His Majesty in Council. The appeal is directed against all the points decided by the High Court against the bank.

As to the Allahabad and Manjhiari properties their Lordships were told by counsel for the bank that they were worth a good deal more than the amount claimed by the bank, and that if it were held that they belonged to Jagdish Narain and Raghubir Narain it would be unnecessary to consider the questions arising on the items of Rs.6,342 and Rs.3,658. This, no doubt, correctly represents the legal position, but their Lordships are unable to hold upon the facts that these properties belonged to the two brothers. [Their Lordships then discussed the evidence on this question.]

[Their Lordships next discussed the question relating to the item of Rs.6,342, and came to the conclusion that the mortgage as regards this item must be deemed to have been made for the payment of an antecedent debt of Jagdish Narain and Raghubir Narain and it was therefore binding upon their sons.]

The only other question is as to the item of Rs.3,658 borrowed for the *theka* business. It was urged on behalf of the bank that the business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand it was contended that the business was the personal business of Jagdish Narain and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagdish Narain and Raghubir Narain as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt.

Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1]. The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chapter I of the Mitakshara. The judgment of the Board in *Hunooman-persaud Panday* v. *Mussumat Babooee Munraj Koonweree*[2] relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

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[1] [1922] L. R. 49 I. A. 108=49 Cal. 560

It was also urged on behalf of the bank that even if the business was not ancestral, the family was liable for the debt as the bank had made reasonable and *bona fide* enquiries which led it to believe that the business was ancestral and that there was a necessity for the raising of money for the purpose of the business. Their Lordships are not satisfied that the bank made reasonable inquiries as to the ancestral character of the business.

The mortgage as to Rs.3,658, being neither for a necessity recognised by the law nor for the payment of an antecedent debt, is, in their Lordships' view, wholly invalid under the Mitakshara law as applied in the United Provinces, and it does not pass the shares even of the alienating coparceners.

A further point was raised for the first time on behalf of the bank that the bank was at least entitled to a decree for the sale of the minors' interest in execution on the principle enunciated in the second of the five propositions laid down by the Board in *Brij Narain* v. *Mangla Prasad*[3]. But the point was not taken in the Courts below, and as it might involve, as was conceded, questions of fact not yet tried, it is not open to the bank to raise it at this stage.

The result is that the mortgage is valid to the extent of Rs.24,342 instead of Rs.18,000 as held by the High Court. This will reduce the personal liability of the adult members of the family named in the decree from Rs.10,000 to Rs.3,658.

The decree of the High Court quoted above was passed after an account had been taken as directed in their judgment. The following are the material portions of the judgment:—

> Although the plaintiff Bank did not ask for it, we think it is well entitled to a simple money decree for Rs.10,000; the amount of unsecured debt. In view of the payments made from time to time, and the clear acknowledgment of liability in a large number of documents, of which Exhibit 34, dated August 29, 1919, may be cited as an exemplar, the claim for a money decree is amply within limitation. We pass a simple money decree for Rs.10,000 against Raghubir Narain, Dip Narain and Suraj Narain personally and against the heirs of Jagdish Narain, limited in the case of these heirs to the extent of the personal assets of Jagdish

[2] [1856] 6 Moo. I. A. 393

[3] [1923] L. R. 51 I. A. 129=46 All. 95

> Narain in their hands other than the mortgaged property together with simple interest at twelve annas per cent per mensem from the date of the bond up to the date of realisation, subject to the further direction, which we proceed to give.
>
> The mortgage is valid to the extent of Rs.18,000 with interest at twelve annas per cent per mensem with six monthly rests. The mortgagors have already paid to the plaintiff Bank Rs.33,828-4-9. We direct that an account be taken of the sums due and the sums received up to the date in 1919 when Rs.29,700 was received by the plaintiff Bank. If after adjustments of the debits and credits any sum of money be found due to the plaintiff Bank, a decree for the said amount be passed under Order 34, Rule 4 of the Code of Civil Procedure. If no amount be found due, the plaintiff's claim against the appellants and the mortgaged property be dismissed. If after adjustment of the debits and credits, a surplus be found in favour of the mortgagors, the same should be applied towards the reduction of the simple money debt and the simple money decree be passed only for the balance.

The account was taken as directed by the High Court, and it showed a surplus of Rs.448 in favour of the mortgagors. The result was that the bank's claim in respect of the mortgage was dismissed, and the personal liability of the adult members was reduced by Rs.448 as appears from the decree.

The account directed by the High Court was taken on the footing that the mortgage was valid to the extent of Rs.18,000 only. The mortgage being valid, in their Lordships' view, for Rs.24,342, a fresh account will have to be taken on that footing, substituting Rs.3,658 for Rs.10,000 and Rs. 24,342 for Rs.18,000, in the judgment of the High Court quoted above.

Their Lordships will therefore humbly advise His Majesty (1) that this appeal should be allowed in part; (2) that it should be declared that the mortgage is valid to the extent of Rs.24,342; (3) that the case should be remitted to the High Court to take an account on that footing of what will be due to the bank on the mortgage, and to modify their decree as regards the form and figures according to the result of the account, and otherwise to give effect to their Lordships' opinion; and (4) that the decree of the High Court should be affirmed subject to the above variations and directions. The bank will have two-thirds of the costs before the Board and in the Courts below, and the costs will be tacked to the mortgage debt. The costs of further proceedings in India will be dealt with by the High Court.

Appeal allowed in part
Case remitted

HIGH COURT

NARSINGH NARAIN (*Plaintiff*)

versus

RAM CHANDER PANDEY AND OTHERS (*Defendants*)*

CIVIL

1932

June 6

SULAIMAN, C. J.
MUKERJI, J.
KING, J.

Pre-emption Act, Secs. 19, 11,12 and 4(1)—Suit for pre-emption against a stranger —By a co-sharer—Of less than 12 months' standing—Whether maintainable.

A person, who has purchased a share in a village can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although twelve months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers. *Ram Raj Pandéy* v. *Har Prashad*, [1932] A. L. J. 109 *relied on; Abdul Ghafur* v. *Ghulam Husain*, I. L. R. 35 All. 296 *considered.*

SECOND APPEAL from a decree of BABU JAGANNATH SINGH, Additional Subordinate Judge of Basti, modifying a decree of BABU SHYAM BEHARI LAL, Munsif of Bansi.

The following is the Referring Order:—

SULAIMAN, C. J. and YOUNG, J.—This is a plaintiff's appeal arising out of a suit for pre-emption.

On February 23, 1926 Mst. Atraji sold to the present plaintiff Narsingh Narain a half pie share in patti Debi Prasad, village Jiwa, some shares in village Azamgarh and a house in Jiwa. Ganpat instituted a suit for pre-emption which was numbered as 174, for pre-emption of the share in Jiwa and half of the house. He was not a co-sharer in village Azamgarh and he claimed that the other half share in the house was his own property.

On May 1, 1926 a sale deed was executed by other persons in favour of the respondent Ram Chandar of 1½ pies share in patti Debi Prasad in Jiwa, a share in village Azamgarh and half the house. Suit No. 418 of 1927 was filed by the present appellant Narsingh Narain for pre-emption of this sale. During the pendency of this suit the plaintiff obtained a deed of gift on May 21, 1927 from a co-sharer of a small fractional share in patti Bhudeo, village Jiwa. Ganpat filed a suit No. 468 of 1927 to pre-empt this acquisition treating it as a purchase.

All the three suits were consolidated, and on January 13, 1928 the trial court dismissed Ganpat's suits Nos. 174 and 468, holding that the gift was genuine. It decreed Narsingh Narain's Suit No. 418. Three appeals were preferred to the District Judge. On June 14, 1928 the District Judge upheld the judgments in the suits Nos. 174 and 468, but modified that in suit No. 418, decreeing the claim of Narsingh Narain plaintiff with regard to village Azamgarh but dismissing it as regards Jiwa.

The main ground for the dismissal of Narsingh Narain's claim as regards village Jiwa was that he had not acquired an indefeasible title by virtue of the sale deed dated February 23, 1926 by the time the sale deed of May 1, 1926 was executed. The learned Judge took the view that the pre-emptor was not entitled to maintain a suit for pre-emption unless he had acquired an indefeasible title before the sale deed or at any rate had acquired such indefeasible title before the suit.

In appeal the learned Advocate for the plaintiff contends that the view taken by the learned District Judge is not correct. It is further urged that Narsingh Narain had become a perfect co-sharer in respect of half the house, because on the finding of the trial court which has not been set aside by the District Judge Mst. Atraji has been the owner of the entire house all along, and that in any case Ganpat in his suit for pre-emption had conveyed his claim to a half share only. This contention, however, does not help the plaintiff much, because the house stands on a joint land of which only a half pie share was sold under the deed. The house cannot be said to appertain to the half pie share sold, nor can the plaintiff be said to have acquired any definite portion of the site. By virtue of his getting a half share in the house he cannot claim pre-emption as regards the village properties.

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* S. A. 2029 of 1928

The main question in the appeal is whether if a person purchased a share in a village, he can maintain a suit for pre-emption against a stranger, who has subsequently purchased another share, although 12 months from the date of the plaintiff's purchase have not expired and he is still liable to be pre-empted by other co-sharers. In *Abdul Gafur* v. *Ghulam Husain,* I. L. R. 35 All. 296, a Bench of this Court held that a person with a defeasible title was not a co-sharer for the purpose of Order 21, Rule 88 C. P. C. so as to claim pre-emption. But the definition of the word 'co-sharer' in Section 4(1) of the Agra Pre-emption Act does not apparently imply that he should himself have acquired an indefeasible title. We think that the question is not free from difficulty, and therefore requires an authoritative pronouncement.

We accordingly refer the following question to a Full Bench:—

Whether a person, who has purchased a share in a village, can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although twelve months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers.

Mansur Alam for the appellant.

Sankar Saran for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—The point that has been referred to Full Bench is as follows:—

> Whether a person, who has purchased a share in a village, can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although twelve months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers.

The only facts that are necessary to be stated for the decision of this point are as follows:

One Mst. Atraji executed a sale deed to one Narsingh Narain on February 23, 1926. It was by virtue of this purchase that Narsingh Narain became a co-sharer in village Jiwa and by virtue of this purchase he claimed pre-emption of a subsequent transfer to be mentioned presently. On May 1, 1926, two persons Lakhpat and Mst. Kanika sold, among other properties, a share in village Jiwa to one Ram Chander. Two suits for pre-emption were brought, one against Narsingh Narain by Ganpat which was instituted on February 21, 1927 being suit No. 174 of 1927, and the other suit was filed by Narsingh Narain, seeking to pre-empt the second sale. This was instituted on May 3, 1927, being suit No. 418 of 1927. The question now is whether by virtue of his purchase dated February 23, 1926 Narsingh Narain is entitled to maintain his suit instituted on May 3, 1927, although his own purchase has not been of 12 months' standing when the second sale was held.

The case is governed by the Pre-emption Act of 1922 (Local). Sections 11 and 12 of the Act lay down in what cases a right of pre-emption accrues and who are the persons entitled to pre-emption. In S. 12 in Class IV are co-sharers in the mahal. If Narsingh Narain is a co-sharer in the mahal, he would be entitled to pre-empt the property in suit. A co-sharer is defined in S. 4(1) of the Act as follows:—"co-sharer" means any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors. It will be noticed that to be a co-sharer within the meaning of this definition it is not necessary that the co-sharer should be of any particular standing. If he made a purchase one day earlier than the day on which the sales he proposes to pre-empt took place he would be entitled to take the step as a co-sharer. Under S. 11 of the Act, his right to pre-empt accrues as soon as the sale takes place. As the sale took place in this case subsequent to the purchase, the right to pre-empt accrued to Narsingh Narain on May 1, 1926.

The argument, however, on behalf of Ram Chander is as follows: The cases have laid down that under S. 19, a purchaser who obtains a transfer in his favour in order to defeat the plaintiff's right of pre-emption must obtain a transfer which is indefeasible. This was held in *Kundan Gir* v. *Jaswant Singh*[1]. It is therefore argued that if the defendant should possess an indefeasible title in order to be able to defeat the plaintiff's right to pre-empt, it is but fair that the plaintiff himself should possess an indefeasible title in order to pursue his remedy.

This argument no doubt sounds plausible but it is not in keeping either with the language of S. 19 or with the spirit of it.

Section 19 runs as follows:

> No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the date of the decree .

All that is necessary in the case of the plaintiff is that he should have a subsisting right at the date of the decree. A subsisting right is one which merely exists and has not been lost. A right which is liable to be defeated or in other words is 'defeasible' may still be a subsisting right so long as it is not defeated.

The principle on which the ruling quoted above, namely, *Kundan Gir* v. *Jaswant Singh* was given was that we had to read Ss. 19 and 20 so as to make them consistent and not inconsistent. We need not go over the grounds which were given in that case for holding that in the case of a defendant who takes a transfer subsequent to the institution of the suit, he must acquire a title which is indefeasible. The fact that in the case of the defendant certain rules are necessary does not establish that the same rules are necessary for the case of a plaintiff. At any rate, we have not got any duty here to reconcile any two apparently inconsistent sections of the law and therefore so to read them as to make them consistent. Here, the language of the law is entirely clear and we cannot read the word "subsisting" as meaning "indefeasible".

When we are talking of a subsisting right it must of course be a subsisting right which will give the plaintiff preference over the defendant.

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[1] 27 A. L. J. 1270

Civil

1932

Narsingh Narain v. Ram Chander Pandey

Mukerji, J.

The subsisting right must be also a preferential right, but that is a point which does not arise for decision in this particular case.

The view which we are inclined to take in this case is also supported by a ruling of a Bench of this Court in *Ram Raj Pandey* v. *Har Prasad*[2].

Reliance has been placed by the learned counsel for the respondent on the case of *Abdul Ghafur* v. *Ghulam Husain*[3]. That was a case in which it was held that a person to be a co-sharer entitled to pre-empt an auction sale under the provisions of Order 21, R. 88 C. P. C. must be a co-sharer of 12 months' standing, so that his right to pre-empt as a co-sharer might not be defeated later on. When this decision was given, the Pre-emption Act of 1922 did not exist and the Civil Procedure Code does not contain any definition of the word "co-sharer". Applying the common law of the land, the decision was given. In the particular case before us, we have to interpret the word "co-sharer" as defined in the Pre-emption Act of 1922 and therefore we cannot hold that the case of *Abdul Ghafur* v. *Ghulam Husain* has any bearing on the case before us.

In the result, we answer the question in the affirmative and direct that this answer be sent back to the Division Bench which made the reference.

Reference answered in the affirmative

[2] 1932 A. L. J. 109

[3] I. L. R. 35 All. 296

Civil

1932

June 6

Sulaiman, C. J.
Mukerji, J.
King, J.

AFZALI BEGAM (*Defendant*)
versus
KANHYYA LAL (*Plaintiff*)*

Civil Procedure Code, Or. 41, R. 11—Order under—Appeal to be admitted on payment of decretal amount within specified period—Whether ultra vires.

Where an appeal is put up for hearing under Or. 41, R. 11 C. P. C., the admission or rejection of the appeal is to be on the merits. Apart from the discretion to demand security for costs under Or. 41, R. 10(1), there is no power in the appellate court to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant.

Order on application of Mst. Afzali Begam.

A. M. Khwaja and *S. B. Johari* for the applicant.

The judgment of the Court was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—This is an application in a first appeal from a preliminary decree passed under Order 34, Rule 4 in a mortgage suit for sale. The memorandum of appeal was presented in this Court and was duly admitted, and the appeal was ordered to be put up for hearing under O. 41, R. 11 either for dismissal or issue of notice. On December 8, 1931 a Bench of this Court passed the following order:—"If the appellant brings into court the sum of Rs.5,478 and Rs.500 for security for costs within four months from this date the appeal is to be admitted, otherwise the appeal is to stand automatically rejected and no further time will be given under any circumstances."

*Application in F. A. 372 of 1931

Before the expiry of the time allowed the appellant filed an application praying that the appeal should be unconditionally admitted and notice be issued to the respondent. There is no doubt that after the memorandum of appeal is admitted under O. 41, R. 9 and even before the issue of notice to the respondent under Rule 11, the appellate court has discretion under Rule 10(1) to demand from the appellant security for the costs of the appeal or of the original suit or of both. The rule goes on to provide that in certain cases such an order must of necessity be passed. But that discretion is confined to demanding security for the costs only and not for an order to deposit the whole of the decretal amount. It is only when an application for stay of proceedings of execution is made under Rule 5 that the court is given power to demand security for the due performance of such decree or order as may ultimately be binding upon the appellant.

Under Rule 11 (1) the court has power to dismiss the appeal obviously when it is of opinion that the appeal has no merits. Rule 12(1) then provides that unless the appellate court dismisses the appeal under Order 41, Rule 11, it shall fix a day for the hearing of the appeal. Similarly Rule 13 (1) provides that where the appeal is not dismissed under Rule 11, the appellate court shall send notice of the appeal to the court from whose decree the appeal is preferred.

It seems to us that apart from the discretion to demand security for costs, there is no power in the appellate court to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. The admission or rejection of the appeal is to be on the merits. Where the case is a fairly arguable one and there is a reasonable prospect of success the court has to order notice to issue, and not to impose conditions on the appellant. On the other hand, if the case has no merits, the appeal should be dismissed forthwith.

We are, therefore, of opinion that the order quoted above, which demanded not only security for the costs, but also the full decretal amount, which was to be realised by the sale of the mortgaged property after the final decree is passed hereafter, was *ultra vires*. Although it purported to be a final order involving an automatic rejection of the appeal and was not a provisional order, we think that the order being *ultra vires* must be vacated, and the appeal even though the time for deposit has expired, must be deemed to be still pending particularly as the appellant filed an application for the reconsideration of the order before the expiry of the prescribed period.

We accordingly set aside that order leaving it open to the Bench hearing the appeal under Order 41, Rule 11 either to demand security for costs under O. 41, R. 10(1) or to deal with the appeal at once under O. 41, R. 11.

Order set aside

CIVIL

1932

March 31

MUKERJI, J.
BENNET, J.

DHAPO (*Applicant*)
versus
BAKRIDI (*Opposite party*)*

Limitation Act, Art. 181 and Civil Procedure Code, Sec. 144—Application for restitution—Limitation—Whether to be counted from the decree of the lower appellate court or from the decree of the High Court confirming that decree.

In an application for restitution under Sec. 144 C. P. C., the time to be reckoned under Art. 181, Limitation Act, should be counted from the decree of the lower appellate court and the applicant is not entitled to get deduction of the period occupied by the appeal to the High Court. *Hari Mohan Dalal* v. *Parmeshwar Sahu,* I. L. R. 56 Cal. 61 *followed.*

EXECUTION SECOND APPEAL from a decree of A. P. GHILDIAL ESQ., Additional Subordinate Judge of Meerut, reversing a decree of B. P. ELHENCE ESQ., Munsif.

U. S. Bajpai and *S. B. L. Gaur* for the appellant.

S. N. Gupta for the respondent.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—Two points have been raised in this appeal. One is really a question of fact, and the other is a question of law. If we had to decide the question of fact, we, probably, would have been inclined to remit an issue, but that is not necessary in the view we take of the point of law.

One Ramji Lal got a decree for money on August 29, 1925 against the respondent Baqridi. Having got his decree, Ramji Lal proceeded to realise by attachment of an immovable property. Ramzan, Baqridi's brother, laid claim to that property. The claimant and the decree-holder came to terms, and the property was released from attachment on Ramzan paying a sum of Rs.400 towards the decree.

Baqridi appealed against the decree passed in favour of Ramji Lal, and his appeal was allowed on May 6, 1926. Ramji Lal filed a second appeal which was dismissed on February 7, 1927.

Baqridi made an application under Section 144 of the Code of Civil Procedure against Ramji Lal's widow, Mst. Dhapo, the appellant before us, for recovery of the sum of Rs.400 which had been paid by Ramzan to Ramji Lal. This application was presented on January 16, 1930.

Mst. Dhapo objected to the application on two grounds; the first is that Baqridi is not entitled to recover the money, he himself not having paid it, and the second is that the application is time-barred.

The first court dismissed the application on the ground of limitation, and the second court has allowed the application.

As we have stated, there were two questions, one of fact and the other of law. The question of fact is whether it was Baqridi's money that was paid to Ramji Lal, or whether it was Ramzan's money that Ramji Lal got.

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*E. S. A. 1374 of 1930

If Ramzan, in order to have a clear title to his property, paid money to Ramji Lal, Baqridi would have no right to recover it. As there was no clear finding on this point, if we had to decide it, it would have been necessary for us to remand an issue. But the appeal succeeds on the ground of limitation.

To this application of Baqridi Article 181 applies. This is the view taken in this Court. Then the limitation of three years begins to run from the date on which the right to apply accrues. The question is, did the right to apply for restitution accrue on May 6, 1926, or on February 7, 1927. The right to apply for restitution accrued as soon as Baqridi's appeal succeeded in the first appellate court. That right to apply for restitution was not in any way suspended by the fact that Ramji Lal filed a second appeal.

It has been argued that Baqridi took the precaution of waiting to see how the second appeal fared. That may be a matter of precaution, good for Baqridi to take, but that was no reason why he should wait for three years after the decision of the High Court. He had more than two years within which to apply after the decision of the High Court, and the taking of the precaution mentioned need not have hurt him. We have the simple words of the Third Column of Article 181 to interpret, and the only way in which we can interpret is to say that the right to apply accrued as soon as the decree in favour of Ramji Lal was reversed.

We are fortified in our opinion by the decision of three learned Judges of the Calcutta High Court in the case of *Hari Mohan Dalal* v. *Parmeshwar Sahu*[1].

The learned counsel for the respondent has referred us to the case of *Ramjhujawan Thakur* v. *Bankey Thakur*[2]. In that case the learned Judges considered that the second appellate court's date was the material date. But the facts were such as did not call for any inquiry as to whether the lower appellate court's date, or the date of the judgment of the High Court, was the material date. The application was one for ascertainment of mesne profits. That application could be made only when delivery of possession had been made in favour of the applicant. The delivery took place sometime in 1925, and the application was amply within three years from that date. In this view, the investigation of the learned Judges would appear to have been unnecessary. In any case, we prefer to follow the Calcutta case, which is in accordance with our own opinion.

We allow the appeal, set aside the decree of the lower appellate court and restore the order of the court of first instance, namely, dismissing Baqridi's application for restitution. The appellant will have her costs throughout.

Appeal allowed

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[1] I. L. R. 56 Cal. 61

[2] I. L. R. 7 Pat. 794

CIVIL

1932

March 8

SULAIMAN, J.
YOUNG, J.

NANDAN SAHU (*Defendant*)
versus
HARI SHANKAR (*Plaintiff*)*

Civil Procedure Code, Or. 10, R. 4(2)—Power 'to make such order in relation to the suit as it thinks fit'—Whether includes power to dismiss suit for default of appearance under Or. 9.

The power given to a court under Or. 10, R. 4(2) 'to make such order in relation to the suit as it thinks fit', includes a power to dismiss the suit for default of appearance under Or. 9.

Kandath Puthiyadath Chengaru Chandu, 1921 A. I. R. (Mad.) 417 *referred to.*

CIVIL REVISION from an order of BABU KRISHNA CHANDRA SRIVASTAVA, Additional Subordinate Judge of Basti.

Harnandan Prasad for the applicant.

Shiva Prasad Sinha for the opposite party.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is a defendant's application in revision from an order of the court below setting aside the dismissal of a suit and restoring it to its original number on payment of some costs.

It is urged that the court below had no jurisdiction to act under Order IX C. P. C.

On two previous dates both the parties were absent and the court adjourned the case in order that they might attend in person, with a view to take down their statements. On this last date, namely, January 12, 1931, the defendant with his pleader was present, but the plaintiff was absent. It further appears that his learned pleader made a statement in court that he had no instructions to go on with the case. The result was that the plaintiff was absent.

The court passed the following order:—

> The plaintiff is absent today. He was absent on the last date of issues also and was warned through his advocate to attend court today as I wanted to examine him. Taking action under Order X, Rule 4(2) the suit is dismissed with costs to the defendant.

On a subsequent application for restoration of the suit professedly under Order IX, Rule 9 C. P. C., the court was satisfied that there was good cause for the non-appearance of the plaintiff and restored the case.

It is urged before us that the order having been made under Order X, Rule 4(2) C. P. C., it amounted to a pronouncement of judgment and could not be an order dismissing the suit for default.

We are unable to accept the contention that under Order X, Rule 4(2) a court has no power to dismiss a suit for default of appearance. Obviously there are two alternative courses open to the court. It may either "pronounce judgment against the absent party," or "make such order in relation to the suit as it thinks fit." There is nothing to preclude the court from not pronouncing judgment on the merits, but dismissing it for default of appearance. Order IX, Rule 12 expressly covers a case where a

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*Civ. Rev. 369 of 1931

CIVIL

1932

NANDAN SAHU *v.* HARI SHANKER

Sulaiman, J.

party has been ordered to appear in person and does not appear in person or show sufficient cause for failing to appear. In such a case he is subject to all the foregoing provisions of that Order. The court, therefore, had clearly power to dismiss the suit for default of appearance.

The learned advocate for the applicant relies on the case of *Kandath Puthiyadath Chengaru Chandu*[1]. The reported judgment does not clearly indicate the exact form of the order which had been made by the court in that particular case. We are, however, not prepared to hold that the power given to a court under Order X, Rule 4(2) 'to make such order in relation to the suit as it thinks fit' does not include a power to dismiss the suit for default of appearance under Order IX.

We are also of opinion that the court in this particular case did not pronounce judgment on the merits, but really dismissed the suit for default of appearance. In fact it emphasised the fact that the plaintiff, in spite of a previous warning was again absent, and did not refer to the merits of the case.

We, therefore, think that there is no force in this application and it is accordingly dismissed with costs.

Application dismissed

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[1] 1921 A. I. R. (Mad.) 417

CIVIL

1932

April 14

KING, J.
THOM, J.

RAM CHARAN LAL (*Plaintiff*)

versus

HANIFA KHATUN AND ANOTHER (*Defendants*)*

Mohammedan Law—Deceased debtor—Suit by creditor against his legal representatives—One defendant exempted—Liability of remaining defendants—Civil Procedure Code, Sec. 2(11).

Where in a suit, based on a bond executed by a Mohammedan debtor who died before the institution of the suit, the plaintiff originally impleaded the debtor's widow, father and minor daughter who were in possession of his property as his heirs and legal representatives, but subsequently the plaintiff discharged the daughter from the array of defendants, *held,* that the plaintiff was only entitled to a decree against the two remaining defendants (i.e., father and widow) for sums proportionate to the shares of the deceased debtor's estate which devolved upon them, and a decree should not be passed for the whole debt against these two legal representatives. *Mst. Kaniz Abbas* v. *Lala Bala Din,* A. I. R. 1925 Oudh 330 *distinguished. Pirthi Pal Singh* v. *Husaini Jan,* I. L. R. 4 All. 361 and *Bussunteram* v. *Kamaluddin,* I. L. R. 11 Cal. 421 *relied on.*

CIVIL REVISION from an order of BABU BRIJ MOHAN LAL, Judge of Small Cause Court of Budaun.

P. M. L. Verma for the applicant.

M. A. Aziz for the opposite parties.

The judgment of the Court was delivered by

King, J.

KING, J.—This is an application in revision against a decree of the court of small causes. The suit was upon the basis of a bond executed by one Zahur Ahmad. Zahur Ahmad died before the institution of the suit and the creditor impleaded his widow, his father and his daughter, who were alleged to be in possession of his property as his heirs and legal representatives. There was some difficulty in the appointment of a guardian *ad litem* for the daughter, who was a minor, and the plaintiff discharged her from the array of defendants. The plaintiff's claim was proved and the trial court passed a decree against the father and the widow only in proportion to their shares of inheritance in the property of Zahur Ahmad deceased, subject to the usual condition that the decree shall be executed against the defendants to the extent of Zahur Ahmad's assets in their possession. It is contended by the plaintiff in revision that the trial court was wrong in passing a decree against the two defendants only for sums proportionate to the extent of their respective shares in the estate of Zahur Ahmad. The applicant argues that the trial court should have passed a decree for the whole debt against the two defendants, namely, the father and the widow, although he concedes that the decree could only be executed to the extent of Zahur Ahmad's assets in their possession.

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*Civ. Rev. 268 of 1931

The learned advocate for the applicant refers to the definition of "legal representative" in S. 2, Cl. 11 of the C. P. C. and argues that as the two defendants against whom the decree was passed are "legal representatives" of the deceased debtor, therefore a decree should have been passed for the whole debt against these two legal representatives. Several authorities have been cited for the applicant but we have not been shown any authority which clearly supports his contention. He has not established the proposition that each one of the legal representatives of a deceased debtor is necessarily liable, jointly and severally, for the whole debt, and that the creditor is entitled, in all circumstances, to a decree for the whole debt against any one of the legal representatives whom he chooses to implead. Much reliance is placed upon the ruling in *Mst. Kaniz Abbas* v. *Lala Bala Din*[1]. This was a case where a Mohammedan mortgagor died after a preliminary decree for foreclosure had been passed against him. He left a widow and a brother. His widow was in possession of his estate and her name was mutated with respect to the entire share of the deceased. The widow alone was impleaded as legal representative of the deceased and the final decree for foreclosure was passed. It was held that this final decree, passed against the widow, was binding on the brother also. Their Lordships took the view that the mortgagor's estate was sufficiently represented, for the purpose of the foreclosure decree by the widow. In our opinion, this ruling is no clear authority for the contention advanced by the applicant in this case. The suit which was the subject-matter of this ruling was of a totally different nature, and the decision was that the final decree for foreclosure which had been passed against the widow only was nevertheless binding upon the brother. We do not see how this ruling can have any application to the facts of this case. The suit is of a different nature, as already stated. Moreover we have this distinguishing feature that the daughter was originally impleaded and was expressly exempted by the plaintiff from the array of defendants. In such circumstances, we cannot see how a decree passed against the remaining defendants could possibly be held binding upon the minor daughter.

For the respondents several rulings have been cited which are directly in point. The case of *Pirthi Pal Singh* v. *Husaini Jan*[2] clearly supports the view taken by the trial court. In that case, the heirs to a deceased Mohammedan divided his estate among themselves according to their shares under the Mohammedan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. It was held that as such heirs had not, by sharing in the estate, rendered themselves liable for the whole of such debt, (Mohammedan law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom) and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs, for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken. The judgment of the court below is precisely in accordance with this ruling. This ruling has also been followed in *Bussunteram* v. *Kamaluddin*[3]. According to these two authorities which do not appear to have been overruled or even dissented from, it is clear that the plaintiff in the present case is only entitled to a decree against the two defendants, proportionate to the extent of the shares of Zahur Ahmad's estate which devolved upon them. This would be the result even if the plaintiff had inadvertently omitted to implead the daughter. In the present suit, the plaintiff's claim is further weakened by the fact that he has expressly exonerated the daughter from liability. It is inequitable that he should by exonerating one of the heirs, impose a greater liability upon the remaining heirs.

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[1] A. I. R. 1925 Oudh 330

We do not see that the definition of "legal representatives" which was introduced into the Code of Civil Procedure of the year 1906 has altered the rule of law which has been enunciated in the decisions cited. No authority has been shown for the view that the law on this point has been altered.

In our opinion the trial court has correctly decided that the plaintiff, after exempting the daughter from the array of defendants, is only entitled to a decree against the two remaining defendants for sums proportionate to the shares of Zahur Ahmad's estate which devolved upon them.

We accordingly dismiss the application with costs.

Application dismissed

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[2] I. L. R. 4 All. 361

[3] I. L. R. 11 Cal 421

CIVIL

1932

April 22

SULAIMAN, C. J.
MUKERJI, J.

MOHAMMAD ASGHAR AND OTHERS
versus
ABIDA BEGUM AND OTHERS*

Civil Procedure Code, Sec. 110—Application for leave to appeal—From decree in a suit for partition—Valuation—Whether value of whole estate to be taken into account.

Where an application is made for leave to appeal to His Majesty in Council from a decree in a suit for partition, the value of the whole estate is the value to be taken into account. The suit for partition could not be decreed without considering the value of the entire estate and the method in which the partition should take place and the decree therefore at least indirectly involved a question respecting the whole estate. *Lala Bhugwat Sahay* v. *Rai Pashupati Nath Bose,* 10 C. W. N. 564 *followed.*

APPLICATION for leave to appeal to His Majesty in Council.

Shiva Prasad Sinha for the appellants.

Mansur Alam for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is an application for leave to appeal to His Majesty in Council from a judgment of this Court passed in a First Appeal from Order, reversing the judgment of the lower appellate court and restoring that of the court of first instance. The suit related to the partition of house properties, the plaintiffs' share in which was valued at less than Rs.10,000. It is conceded by the applicants before us that the value of the subject-matter in dispute, viz., the share of the plaintiffs in the disputed house is less than Rs.10,000. On the other hand it is not disputed by the respondents that the value of the entire house which is sought to be partitioned is more than Rs.10,000.

The parties had agreed to abide by the statement of a referee and this High Court considered that the proceedings were not in the nature of an arbitration but amounted to a compromise, and ordered that a decree should be prepared in terms of the statement made by the referee.

The question raised in appeal is whether the proceedings were in the nature of an arbitration or a compromise. On this point there is undoubtedly some conflict of opinion in India and the question is a substantial question of law.

There was also a question as to the correct interpretation of the statement made by the referee, the answer to which depends on a consideration of the entire proceedings relating to the reference. A translation of those proceedings was not before the Bench, but it will now have to be prepared.

An objection is taken on behalf of the plaintiffs-respondents that the case does not fulfil the requirements of Section 110 C. P. C. inasmuch as the value of the subject-matter in appeal to their Lordships of the Privy Council is less than Rs.10,000. On the other hand it is contended on behalf of the defendants that the decree of this Court indirectly involves a question respecting property of the value of more than Rs.10,000.

On this question also there is a conflict of opinion between some of the

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*P. C. A. 6 of 1932

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MOHAMMAD ASGHAR
v.
ABIDA BEGUM

Sulaiman, C. J.

High Courts in India. It was held in the case of *Lala Bhugwat Sahay* v. *Rai Pashupati Nath Bose*[1] that in a suit for partition the value of the whole estate is the value to be taken into account when considering whether leave to appeal to His Majesty in Council should or should not be granted. On the other hand, the Bombay High Court in the case of *John Joseph DeSilva Sr.* v. *John Joseph DeSilva Jr.*[2] held that the value to be looked at is the value of the interests of the party prejudiced by the decree.

We think that inasmuch as the plaintiffs' claim was for the partition of the whole house and the claim could not be decreed without considering the value of the entire house and the method in which the partition should take place, it is very difficult to say that the decree does not at least indirectly involve a question respecting the whole house which is admittedly of the value of Rs.10,000. There is a difference between the language of the first paragraph and that in the second paragraph of Section 110 C. P. C. In the first the words used are "the amount or value of the subject-matter in dispute", whereas in the second we have "respecting property of like amount or value". Such "property" need not necessarily be the subject-matter in dispute in the suit. We are therefore of opinion that the defendants are entitled as of right to appeal to their Lordships of the Privy Council and at any rate the case involves a substantial and important question of law and in view of the conflict of opinion which has prevailed in India, it is also otherwise a fit case for appeal to His Majesty in Council under Section 109(*c*) of the Code of Civil Procedure. We accordingly order that a certificate be granted.

Certificate granted

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[1] 10 C. W. N. 564

[2] 6 Bom. L. J. R. 403

CIVIL

1932

April 22

PULLAN, J.
NIAMATULLAH, J.

SUKHNANDAN SINGH (*Decree-holder*)
versus
RAMDEYI KUNWAR AND OTHERS (*Judgment-debtors*)*

Limitation Act, Art. 182—"Where there has been an appeal"—Meaning of—Whether include an appeal from an order dismissing an application to set aside an ex parte *decree.*

> The words "Where there has been an 'appeal'," used in Art. 182 of the Limitation Act, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree passed *ex parte*. *Sheo Prasad* v. *Anrudh Singh*, I. L. R. 2 All. 273 *followed.*

EXECUTION SECOND APPEAL from a decree of BABU KRISHNA DAS, Subordinate Judge of Ghazipur, confirming a decree of BABU KANHAIYA LAL SRIVASTAVA, Munsif of Saidpur.

Ram Nama Prasad for the appellant.

S. N. Verma for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—The appellant is a decree-holder who obtained a final decree in a mortgage suit on March 5, 1926. He applied for execution of the decree on March 21, 1929 and his application has been dismissed as

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*E. S. A. 812 of 1930

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Pullan, J.

being barred by time. In appeal the decree-holder asks us to consider that his application should be held to be within time because after the final decree was passed *ex parte,* an application was made by the judgment-debtor for setting aside the *ex parte* decree, and this application was not rejected till March 30, 1926, by an order which was affirmed on appeal on May 14, 1926. It is suggested that the application for execution may be made within three years of the date of the dismissal of the application for setting aside the final decree in appeal. Art. 182 of the Limitation Act gives the period of three years for an application for the execution of a decree from

(1) the date of the decree or order;

(2) where there has been an appeal, the date of the final decree or order of the appellate court, or the withdrawal of the appeal; and

(3) where there has been a review of judgment, the date of the decision passed on the review.

In the present case there was no appeal against the final decree, and it has been ruled by this Court, as far back as the year 1879 in the case of *Sheo Prasad* v. *Anrudh Singh*[1], that the words, "where there has been an appeal", contemplate and mean an appeal from the decree; and no other appeal. This view has been confirmed by the decisions of numerous other High Courts. We need only give the following instances:—

Jivaji v. *Ramchandra*[2], *Rai Brijraj* v. *Nauratan Lal*[3] and *Fakirchand Mandal* v. *Daiba Charan Parni*[4]. We have been shown no ruling of the Allahabad High Court which dissents in any way from the views expressed by the judgment to which we have referred (2 All. 273), and we ourselves see no reason for taking a different view.

It has, however, been suggested that the proceedings taken for setting aside the *ex parte* decree should be held to be proceedings for a review of judgment, and the final date of the decision on those proceedings should be taken as the date from which limitation for execution of the decree began to run. But although there is an analogy between an application for setting aside an *ex parte* decree and an application for review, we are of opinion that in Art. 182 of the Limitation Act the words "review of judgment" must be applied strictly to a review of judgment, as the words are used in other portions of the same schedule. The Limitation Act is of the year 1908, the same year in which the Civil Procedure Code was amended, and there is no reason to suppose that the words "review of judgment" have a different significance in the Limitation Act from that which they bear in the Civil Procedure Code; and we find that Articles 161 and 162 provide for limitation for applying for a review of judgment, whereas Article 164 deals with an application for setting aside an *ex parte* decree. Moreover the clause on which the learned counsel relies does not refer to an "application" for review but to cases where there has been a review of judgment. It has also been suggested that the appellant might take advantage of S. 14 or S. 5 of the Limitation Act. As to S. 14 it cannot be said that the appellant in the present case was prosecuting another civil proceeding against the same party for the same relief in a court which from

[1] I. L. R. 2 All. 273

[2] I. L. R. 16 Bom. 123

[3] 3 Pat. L. J. 119

[4] I. L. R. 54 Cal. 1052

defect of jurisdiction or other causes of a like nature was unable to entertain it; and as to S. 5 we do not consider that this section can be invoked in the case of an application for execution of a decree.

The appeal accordingly fails, and is dismissed with costs.

Application dismissed

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1932
April 21
PULLAN, J.
NIAMAT-ULLAH, J.

ABDUL JALIL KHAN AND ANOTHER (*Defendants*)
versus
MOHAMMAD ABDUL SALAM KHAN AND OTHERS (Plaintiffs)*

Contract Act, Sec. 73, and Interest Act—Scope of—Suit by a co-sharer—For his share of profits—Whether plaintiff can be compensated for delay in payment by allowing an equitable rate of interest.

The observations of the Privy Council in *Kalyan Das* v. *Maqbul Ahmad*, I. L. R. 40 All. 497, do not give rise to the conclusion that interest can be allowed only under the provisions of the Interest Act or of Sec. 73, Illustration (*n*), of the Contract Act. There are circumstances in which interest can be allowed on general grounds of equity and Illustration (*n*) does not cover the whole of Sec. 73 of the Contract Act. *Hamira Bibi* v. *Zubaida Bibi*, I. L. R. 38 All. 581 *relied on; Jwala Prasad* v. *Hoti Lal*, I. L. R. 46 All. 625 *dissented from.*

In a suit for his share of rent of certain property against the defendant, who was a co-sharer with the plaintiff and collected rent on behalf of himself and the plaintiff, the plaintiff claimed an additional payment of interest as compensation for delay in making the payment of rent but there was no express contract to that effect; *held*, that the case fell under the third paragraph of Sec. 73, Contract Act, and the plaintiff was entitled to compensation on the basis of an equitable rate of interest.

FIRST APPEAL from a decree of MAULVI MUHAMMAD AHMAD ANSARI, Subordinate Judge of Dehra Dun.

K. N. Katju and *N. A. Sherwani* for the appellants.

A. M. Khwaja and *B. Malik* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This appeal arises from a suit brought by Mohammad Abdul Salam Khan for a one-third share in the annual rent of a property known as Glanville owned by him and his two brothers who are defendants 1 and 2 in the case and leased to Messrs. Evans Fraser and Co., who are defendant No. 4. The third defendant Mr. Lindsay Smith is the agent who receives rent from defendant No. 4 for the lessors. The plaintiff has already brought one suit against his brothers in the year 1925, and there is no question that since that time the plaintiff has been attempting to get from his brothers his share in the profits of the family property and that the profits have been withheld from him. The present suit has been decreed for a sum of Rs.18,159-5-9 together with proportionate costs against the first defendant only. This sum includes the plaintiff's one-third share in the rent of the property and also interest at the rate of 1 per cent per month. Three points are raised in appeal by the first defendant Abdul

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*F. A. 292 of 1928

Jalil Khan. He pleads in the first place that the claim for interest should have been disallowed; secondly, that the claim for the first six monthly instalment of the year 1925 falling due on March 1, 1925 cannot be granted as this was part of the subject-matter of the suit of 1925 and the decision in that suit must be held to operate as *res judicata;* and, thirdly, he claims credit for income-tax which has been paid by him on the total amount of rent collected for these premises. The second and third grounds of objection present no difficulty. We have read a copy of the plaint of the suit filed by the plaintiff in 1925. That suit referred to the period during which the present appellant was the agent of the plaintiff-respondent. That agency terminated in the year 1924, and there was no relief prayed in that suit for the rent accruing for Granville estate for the six months terminating in March 1925. Nothing therefore in the judgment of that suit can operate as *res judicata* in the present suit. As to the claim to credit for income-tax paid by the appellant on the profits of the Granville estate, we are of opinion that no such claim can be sustained by way of a set-off where it has not been specifically pleaded and a court-fee paid on the amount claimed. There remains the appellant's objection to the decree for interest. This is based mainly on the decision of a Bench of this Court reported in *Jwala Prasad* v. *Hoti Lal*[1]. The judgment in that suit which purports to follow a decision of their Lordships of the Privy Council in *Kalyan Das* v. *Maqbul Ahmad*[2] states that "the only grounds upon which interest can be claimed upon a sum of money when the liability for the sum is established are to be found either in Section 73 of the Contract Act, Illustration (*n*) or in the Interest Act No. XXXII of 1839". The learned Judges held that in the case before them interest was not recoverable on either ground. A similar view had already been expressed by another Bench of this Court in the case of *Lalman* v. *Chinta Mani*[3]. It must be noticed however that in both these cases reference is made to Illustration (*n*) of Section 73 of the Contract Act. The judgment of the Privy Council in the case of *Kalyan Das* v. *Maqbul Ahmad* does not refer to any section of the Contract Act. The dictum of their Lordships is in general terms. They say "interest depends on contract express or implied or on some rule of law allowing it" and as to the case before them they observed "there is no express contract for interest and none can be implied and no circumstances less capable of justifying the allowance of interest as a matter of law can be imagined". We do not consider that this observation of their Lordships gives rise to the conclusion that interest can be allowed only under the provisions of the Interest Act or of Section 73, Illustration (*n*) of the Contract Act. There are circumstances in which interest can be allowed on general grounds of equity and Illustration (*n*) does not cover the whole of Section 73 of the Contract Act. This has already been pointed out by a Bench of this Court in the case of *Anrudh Kumar* v. *Lachhmi Chand*[4], where the ruling referred to above in *Jwala Prasad* v. *Hoti Lal*[5], was considered. In the case of *Hamira Bibi* v. *Zubaida Bibi*[6] their Lordships of the Privy Council allowed a Mohammedan widow's claim to interest on her unpaid dower debt on the

[1] I. L. R. 46 All. 625
[2] I. L. R. 40 All. 497
[3] 17 A. L. J. 169
[4] 50 All. 818
[5] I. L. R. 46 All. 625
[6] I. L. R. 38 All. 581

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Abdul Jalil Khan v. Mohammad Abdul Salam Khan

Pullan, J.

ground that although there was no agreement that she should obtain any sum in excess of her actual dower, she was entitled on equitable considerations to some reasonable compensation "best calculated on the basis of an equitable rate of interest".

In the present case it is not necessary to rely merely on principles of equity. We consider that this is a case falling under the third clause of Section 73 of the Contract Act. The appellant was a co-sharer collecting rents on behalf of himself and the respondent. It was his duty to pay to the plaintiff his share of rent when that rent was collected, and although there was no express contract that he should compensate the plaintiff for delay in making the payment by an additional payment of interest, there was, in our opinion, "an obligation resembling those created by contract incurred by the appellant and not discharged by him to pay to the plaintiff his share of profit on due date", and the plaintiff being injured by the appellant's failure to discharge that obligation "is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract". Such injury can be compensated and in our opinion should be compensated by allowing an equitable rate of interest. The rate of interest allowed by the lower court is one per cent per mensem. We do not consider that that is an excessive rate. Thus the appeal fails on all grounds and is dismissed with costs.

Appeal dismissed

PRIVY COUNCIL

MAUNG SEIN DONE (*Plaintiff*)

versus

MA PAN NYUN AND OTHERS (*Defendants*)*

Civil

1932

April 12

Lord Russell of Killowen

Sir George Lowndes

Sir Dinshah Mulla

Civil Procedure Code, Sec. 11—Res judicata—*As between co-defendants—When—Dismissal of previous suit depended upon an adjudication of conflict between co-defendants—Decision operates as* res judicata *between co-defendants.*

A Burmese woman died leaving her surviving two sons and two daughters. The sons having entered into possession of the mother's property, one of the daughters instituted a suit claiming a 1|4th share alleging that the succession was regulated by Burmese Buddhist law under which the sons and daughters took equal shares. In this suit both the sons and the remaining daughter were made co-defendants. The relief claimed included administration of the estate of the deceased, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of the estate. The sons filed a joint written statement, pleading that the succession was governed by the Chinese Customary law under which daughters were excluded from inheritance. The daughter-defendant filed no written statement but gave evidence on behalf of the plaintiff in support of her claim. The suit was dismissed on the finding that the Chinese customary law governed the succession and that under that law the sons only inherited and not the daughters. Subsequently the present suit was instituted by the other daughter against her two brothers for her 1|4th share in her mother's estate. *Held,* that the suit was barred by the rule of *res judicata*

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*P. C. A. 7 of 1931

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MAUNG SEIN DONE *v.* MA PAN NYUN

as applied between co-defendants. This rule is applicable even if the previous suit was dismissed, provided such dismissal depended upon an adjudication of conflict between the co-defendants. *Munni Bibi* v. *Tirloki Nath,* 1931 A. L. J. 453=I. L. R. 53 All. 103 *followed.*

APPEAL from a decision of the High Court of Judicature at Rangoon.

A. M. Dunne, K.C. and *R. W. Leach* for the appellant.

A. Pennell for the respondents.

The following judgment was delivered by

Lord Russell of Killowen

LORD RUSSELL OF KILLOWEN—In this appeal their Lordships find it unnecessary to decide upon the merits of the case as in their opinion the plea of *res judicata* must prevail. In order, however, to explain how the plea arises, it is necessary to relate the facts in some detail.

The four parties to this appeal are two sons and two daughters of Chan Sit Shan and Ma Myit, his wife. Chan Sit Shan had three other children born of this wife, two of whom died before their father; the third died in 1903.

Chan Sit Shan was a Chinaman who was born in China and settled in Pyapon, Burma. There he married Ma Myit, a native of Pyapon, who before her marriage was a Burmese Buddhist. At some time, Chan Sit Shan went back to China and there married a second wife, a Chinawoman, named Ma Kee Ya. He returned to Burma with this second wife and a Chinese boy named Pwin Lit whom they had adopted. Subsequently his wife, Ma Kee Ya, bore him a daughter, who was named Ma Kyin Myaing.

Chan Sit Shan died in 1902 intestate. On his death, there was a division of property between his two families as a result of which no further claim has arisen from or on behalf of Ma Kee Ya, Pwin Lit, and Ma Kyin Myaing, or any of them.

When Chan Sit Shan died, the eldest of his five surviving children, offspring of Ma Myit, was only about 15 or 16 years old. Their mother took possession of and managed the property which had not, on the division, gone to the other family, and she seems to have remained in possession and management until her death, which took place on January 22, 1918.

She was survived by her two sons, the respondent Maung Sit Paung, and the appellant, Maung Sein Done, and her two daughters, the respondents, Ma Pan Nyun and Ma Sein. On her death her two sons took possession.

Thereupon one of the daughters instituted legal proceedings, the nature and course of which require consideration, inasmuch as these are the earlier proceedings upon which the defence to the present suit of *res judicata* is founded.

The suit was instituted in the District Court of Pyapon, the parties being Ma Sein, plaintiff, and her sister and two brothers defendants. The plaint is dated December 21, 1918. By it the plaintiff alleges that Ma Myit, a Burmese Buddhist, died intestate possessed of considerable movable and immovable properties, set out in an annexed schedule; that she left as her heirs and representatives under Burmese Buddhist law, her children, the plaintiff and the defendants; that the two sons had taken possession of her property without taking out letters of administration;

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MAUNG SEIN DONE
v.
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Lord Russell of Killowen

that the plaintiff, as a daughter, was entitled to an equal fourth share in the estate and effects of the deceased; and that Ma Pan Nyun was also an heir and was joined as a formal defendant. The relief claimed included administration of the estate of Ma Myit, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of her estate.

The two sons put in a joint written statement. By it they denied that Ma Myit left any property at her death, and alleged that the property in suit represented the natural growth and increase of Chan Sit Shan's property which, after his death, had been managed by Ma Myit. As to both Chan Sit Shan's property and the property (if any) owned by Ma Myit, the two sons by their written statement further alleged (1) that the succession thereto was governed by Chinese customary law and not by Burmese Buddhist law, because Chan Sit Shan was a Chinaman and Ma Myit had become a Chinawoman and had died a Chinese widow; and (2) that by Chinese customary law (females being excluded by that law in the presence of male issue), the plaintiff had no right to inherit from either parent, and that her suit was therefore not maintainable.

The daughter, Ma Pan Nyun, filed no written statement, but she gave evidence, at the hearing, on behalf of the plaintiff, and in support of her claim.

The suit was tried by a Burmese judge, the issues including (amongst others) the following:—

> 1. Was Ma Myit a Burman Buddhist at the time of her death?
>
> 4. Is the plaintiff entitled to inherit the estate of Ma Myit? If so, to what extent?
>
> 7. Are the parties legitimate children of Chan Sit Shan and Ma Myit and, if so, what law of succession should be applied?
>
> 8. What relief is the plaintiff entitled to?

The judge delivered judgment on February 18, 1921. After a detailed examination of the evidence he answered the first issue in the negative. He decided that she was a Chinese Buddhist at her death. The fourth issue he answered in the negative. His finding in regard to the seventh issue was that as both Chan Sit Shan and Ma Myit were Chinese Buddhists the Chinese customary law must be applied to them. Upon the eighth issue he said: "As I have held that Ma Myit was not a Burman Buddhist, the plaintiff is not entitled to a fourth share in her estate." He dismissed the suit with costs.

Ma Sein appealed to the High Court of Judicature at Rangoon upon the ground that Ma Myit was a Burmese Buddhist and that therefore Ma Sein was one of her heirs. The appeal was dismissed on January 21, 1924, upon the grounds (1) that upon the facts of the case Chinese customary law governed the succession to the property (if any) left by Ma Myit and (2) that under that law her sons and not her daughters would inherit.

Thus a suit to administer the estate of Ma Myit, to which Ma Pan Nyun was a necessary and proper party if she had any interest in her mother's estate, was dismissed upon the grounds that Chinese customary law applied to the succession to Ma Myit's property and that under that law no female could inherit in the presence of male issue.

The suit which has given rise to the present appeal was instituted on July 23, 1927, in the District Court of Pyapon. The plaintiff is the daughter Ma Pan Nyun; the defendants are the two sons and the other daughter who had been the plaintiff in the former suit. The plaint is, with the necessary alterations, substantially the same as the plaint in that suit. The relief sought is establishment of the plaintiff's right to a one-fourth share in Ma Myit's estate, and administration of that estate, the claim to that relief being based upon the allegation that Ma Myit died a Burman Buddhist leaving as her heirs her two sons and her two daughters. The defendant Maung Sein Done (who is the appellant before their Lordships' Board) filed a written statement in August, 1927, dealing briefly with the claim on the merits, but raising also the plea that the plaintiff's claim was "barred by *res judicata*" by reason of the previous litigation and the judgments and decrees therein. The other defendants did not defend.

A preliminary issue was tried, viz., "Is the suit barred by the doctrine of *res judicata*?" The District Judge delivered his judgment on November 24, 1927, answering the issue in the negative, and stating as his reason, without entering into particulars, that "all the conditions requisite for *res judicata* between parties who were co-defendants in a former suit, are not present in this case." He, however, dismissed the suit upon the ground that the High Court's ruling in the previous case was binding upon him, viz., that Ma Myit could have no share according to Chinese customary law in the estate of her deceased husband, and that since the plaintiff before him claimed through Ma Myit, she could have no better claim that Ma Myit. It seems to have been overlooked by the judge that Ma Pan Nyun's action related to her mother's estate and not to her father's estate. By his decree, dated November 24, 1927, it was ordered that the suit be dismissed with certain provisions as to costs.

Upon appeal (No. 9 of 1928) to the High Court the order of the District Judge was on June 7, 1928, set aside, and the case was returned to the District Court to be disposed of on the merits. The judges on appeal treated the judgment of the District Judge as founded on the view that the plaintiff could have no cause of action because a Bench of the High Court had ruled that her mother, Ma Myit, was a Chinese Buddhist and that ruling was binding upon him. If that was in truth the foundation of the decision it was obviously wrong; for unless the matter were *res judicata,* it would be open to the plaintiff upon sufficient evidence to obtain a different decision. Upon the question of *res judicata* the judges on appeal thought that the case did not fall within Section 11 of the Code of Civil Procedure, 1908, because there was in the former suit "no active contest as to rights and no decision thereon as between Ma Pan Nyun and her co-defendants." By their decree dated June 7, 1928, it was ordered that the decree of November 24, 1927, be set aside, that the case be returned to the District Court for disposal on the merits, and that the costs do follow the event.

The suit was ultimately tried on the merits, with the result that on December 10, 1928 a decree was made ordering accounts to be taken of Ma Myit's estate from the date of her death to the date of the decree.

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MAUNG SEIN DONE *v.* MA PAN NYUN

Lord Russell of Killowen

Upon appeal (No. 296 of 1928) to the High Court a decree (dated April 1, 1930) was made confirming the decree of December 10, 1928, and containing certain provisions as to costs.

If, however, the plea of *res judicata* affords a decisive answer to the claim of Ma Pan Nyun, the trial should not have proceeded. Their Lordships accordingly do not propose to examine the evidence which was adduced, but proceed at once to consider whether the plaintiff is bound by what was decided in the earlier litigation.

It is unnecessary to consider whether the present case falls within the actual wording of Section 11 of the Code. It is well settled that the statement of the doctrine of *res judicata* contained therein is not exhaustive, and that recourse may properly be had to decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine.

The well-known statement of Wigram, V.C. in *Cottingham* v. *Earl of Shrewsbury*[1] may, their Lordships think, properly be cited in reference to the present case, viz.: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as beeween each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

Further, in a recent case, Sir George Lowndes, in delivering the judgment of this Board, stated what was required in applying the rule of *res judicata* as between co-defendants in the following language:—"In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided." See *Munni Bibi* v. *Tirloki Nath*[2].

Their Lordships now turn to a consideration of the first litigation.

The suit brought by Ma Sein was an administration suit, the purpose and object of which was to have the mother's estate divided among her four children as her heirs. To that suit all the alleged heirs were necessary and proper parties, for every one entitled to a share would be entitled to be heard upon the question whether or not an order for administration should be made. Further, no person who was not entitled to a share would be entitled to bring such a suit, or to have any voice upon the question of administration. From the outset, it was clear what was the issue to be decided. The plaintiff's only title to sue depended upon the answer to the question whether all the four children were heirs of the mother or whether only the sons were entitled to succeed to her property, and this, in turn, depended upon the answer to the question whether the succession to the mother's property was governed by Chinese customary law or by Burmese Buddhist law. In a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical; they were either both of them co-heirs with their brothers or neither of them was entitled to any share.

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[1] 3 Hare at 638

[2] 58 I. A. 158 at 165

The matter which was adjudged was that the succession to Ma Myit's estate was governed by Chinese customary law, and that her daughters, therefore, were not entitled to any share therein. The language actually used in the Appellate Court was as follows:—"I would hold that the Chinese customary law should be applied to her estate. Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was rightly dismissed." That is, in terms, a finding that neither Ma Sein nor Ma Pan Nyun was entitled to any share in the estate of Ma Myit.

It was urged that the doctrine of *res judicata* could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention. In Ma Sein's suit there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed. It was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenour had been the other way.

The issues involved in the present suit of Ma Pan Nyun are identical with the issues in the earlier suit; and their Lordships are of opinion that in regard to those issues (1) there was in the earlier suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (viz., whether she was entitled to any share in her mother's estate) was finally decided.

It follows, therefore, that the plea of *res judicata* raised in the present litigation ought to have been successful and the suit of Ma Pan Nyun ought, on that ground, to have been dismissed.

For these reasons their Lordships are of opinion that this appeal should be allowed. The decrees of June 7, 1928, December 10, 1928, and April 1, 1930, should be set aside and the decree of November 24, 1927, restored. In regard to costs, the respondent Ma Pan Nyun should pay to the appellant (1) his costs of the appeal No. 9 of 1928; (2) his costs of the suit incurred subsequently to June 7, 1928; (3) his costs of the appeal No. 296 of 1928; and (4) his costs of the appeal before their Lordships' Board. Any costs already paid by the appellant under any former decree in this litigation, should be repaid to him by the person or persons to whom, under such decree, they were payable.

Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed

Cutler, Allingham and Ford—Solicitors for the appellant.

J. E. Lambert—Solicitor for the respondents.

Civil

1932

Feb. 29

Lord Russell of Killowen
Lord Salvesen
Sir Dinshah Mulla

PRAG NARAIN
versus
THE COLLECTOR OF AGRA*

Land Acquisition Act, Secs. 11 and 21—One piece of land (forming part of whole to be acquired)—More than one person interested—To be dealt with in one award—Award apportions compensation between owner and tenants—Tenants had by agreement accepted a lower sum—Whether owner entitled to the extra amount.

Sec. 11 of the Land Acquisition Act does not contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto. This does not mean that the whole of the land at any time to be acquired under the Act must necessarily be dealt with in one award; but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land.

Where the compensation for one piece of land (forming part of the whole to be acquired) which was "spotted over with the houses of permanent tenure holders", was apportioned in the award in the proportion of one-fourth to the owner and three-fourths to the tenants, and the tenants had by agreement accepted a lower sum; *held*, that no objection ever having been made to the award as to apportionment, there was no foundation for the owner's claim to be entitled to the extra amount which the tenants might have received if they had not by agreement accepted three-quarters of a lower valuation. All that the owner could claim was his awarded proportion. The gain was a gain of the municipality which acquired the land. *Rohan Lal* v. *The Collector of Etah,* I. L. R. 51 All. 765 *approved.*

Appeal from a decision of the High Court of Judicature at Allahabad.

Dunne, K.C. and *K. V. L. Narasimham* for the appellant.

De'Gruyther, K.C. and *Jardine* for the respondent.

The following judgment was delivered by

Lord Russell of Killowen

Lord Russell of Killowen—This appeal is brought from a judgment of the High Court of Judicature at Allahabad relating to the compensation payable to the appellant under or by virtue of the Land Acquisition Act (I of 1894), which will be referred to as the Act.

The facts require to be stated in some detail for the proper appreciation of the points which are involved.

On July 9, 1923, the land acquisition officer of Agra (called hereinafter the officer) issued a general notice under the Act for the acquisition of a block of land in the city for the purposes of a new police station. The block measured just over 1 acre, and included certain land and houses belonging to the appellant, which were known by the name Katra Nandram, and which amounted in area to some 4,109 sq. yards.

There were 18 claimants to compensation in respect of the entire block of lands, including the appellant and one Dau Dayal. The appellant's claim (as finally amended) was for Rs.3,34,598, made up of

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*P. C. A. 100 of 1930

Rs.2,46,780 for the land (i.e., at the rate of Rs.60 per sq. yard) and Rs.87,818 for the buildings.

The officer considered the cases of the 18 claimants and heard evidence, the hearing of which ended on December 23, 1923. As to the 16 claimants other than the appellant and Dau Dayal, an agreement was come to as to the amount of compensation payable to each for his interest; but for the purpose of acquiring a title under the Act the officer seems to have drawn up a formal award (dated December 31, 1923) relating to the compensation payable to those 16 applicants.

On January 10, 1924, he made his award, dealing with the claims of the appellant and Dau Dayal. In it he states that agreement had since the hearing been reached with the other claimants, that an award statement regarding them had been drawn up and the amounts paid, and that the present award related to the cases of the appellant and Dau Dayal only. By that award he divided the appellant's land into three zones, to which he attributed different figures, as follows:—1°. Four hundred square yards of land with a street frontage of 120 feet he put at Rs.13 per square yard. 2°. Four hundred and ninety-five square yards, "spotted over with the houses of permanent tenure holders," he put at Rs.6 per square yard; and 3°. the remaining 3,214 square yards, which consisted of the non-frontage land upon which there were no permanent tenure holders, he put at Rs.8 per square yard. These figures worked out at Rs.33,882 for land. For buildings he fixed a figure of Rs.34,537, making a total figure of Rs.68,419. To this sum had to be added the 15 per cent provided for by Section 23 (2) of the Act, so that the total compensation awarded by the officer to the appellant for his interest was Rs.78,682.

It would appear that, so far as concerned the 495 square yards, the sum to be paid to the appellant was reduced from Rs.8 per sq. yard (the full value of the non-frontage land) to Rs.6 per sq. yard owing to the interest therein of the permanent tenure holders.

Both the appellant and Dau Dayal were dissatisfied with the award and applied for a reference to the District Judge under Section 18 of the Act. In the case of the appellant the District Judge affirmed the award of the officer as to the buildings and allowed Rs.34,537. In regard to the land he allowed Rs.20 per sq. yard for all except the 495 sq. yards over which the permanent tenure holders had rights, making a further sum of Rs.72,280. As regards the 495 sq. yards, he only allowed Rs.220 as the capitalised value of the rents (Rs.5 or thereabouts) of which the appellant was in receipt. In addition, he allowed a sum of Rs.1,200 in respect of a claim for loss of rents, making a total sum of Rs.1,08,237 in respect of buildings and land, which with the 15 per cent above-mentioned, resulted in a total sum of Rs.1,24,292 fixed as compensation for the appellant.

From that decision the appellant appealed to the High Court at Allahabad, asking that the full amount of compensation claimed by him be allowed. The High Court allowed the appeal in part and modified the decree of the District Judge to the extent now to be mentioned. As regards the valuation of the land at Rs.20 per sq. yard, they agreed with the District Judge. As to his valuation of the buildings they increased the rate per 100 cubic feet allowed by him. As regards the 495 sq. yards, the High Court considered that the District Judge was not justified in assuming that the appellant's rights in this land were limited to the receipt of Rs.5 per annum. The learned Judges considered that since the appeal to the District Judge only related to amount and not to apportionment, he ought to have accepted the officer's rates of apportionment, viz., one-fourth to the tenants and three-fourths to the appellant. Applying these proportions to the 495 sq. yards, the result would be that the appellant would be entitled to Rs.15 per sq. yard in respect thereof. The appellant in the High Court claimed to be entitled to the whole Rs.20, less only the sums which by agreement had been paid to the tenants and accepted by them, but this contention was disallowed by the High Court. As a result it appeared that the judgment of the High Court involved an addition of Rs.11,231-15-0 to the amount allowed by the decree of the District Judge.

Encouraged no doubt by the knowledge that each of his previous applications has resulted in an increase in his compensation, the appellant has now appealed to His Majesty in Council.

In his case lodged here the only point taken was that the compensation awarded was too low, the valuations placed upon the land and buildings respectively being insufficient in amount. An appeal confined to these contentions had obviously small hope of success. It is well settled that this Board will not review the decree of an Indian Appellate Court merely upon questions of value; and in this connection it will be sufficient to cite the words used by Lord Buckmaster in delivering the judgment of the Board in the case of *Narsingh Das* v. *Secretary of State for India in Council*[1]:—

> it has been repeatedly laid down by the Board that in such cases they will not interfere with judgments of the Courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied.

Counsel for the appellant concentrated upon a different point. He contended that since the High Court had valued the 495 sq. yards at Rs.20 per sq. yard, the whole of the resultant sum of Rs.9,900 belonged to the appellant subject only to the payment thereout of what might be necessary to satisfy the claims of the tenants; and that since the tenants had by agreement accepted a sum amounting to Rs.990 (or Rs.2 per sq. yard), the appellant was entitled to the whole difference between these two sums (viz., Rs.8,910), and not merely to three-quarters of Rs.9,900.

Their Lordships are unable to take this view. Indeed, it appears to them that the possibility of raising such a contention has only arisen from a failure to observe strictly the provisions of the Act.

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[1] 52 Ind. App. at 135

As their Lordships read the Act, the duty of the Collector under Section 11 of the Act is to make an award in regard to three matters, viz., (1) the area of the land included in the award; (2) the total compensation to be allowed for that land, and (3) the apportionment of that compensation among all the persons interested in that land.

The Act does not appear to contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto.

Their Lordships do not by this mean that the whole of the land at any one time to be acquired under the Act must necessarily be dealt with in one award; but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land.

In the present case the difficulty has arisen from the fact that the officer has dealt with the land by two documents, and, so far as the 495 sq. yards are concerned, that particular parcel of land figures in both. Their Lordships, however, think that the two documents (the later of which specifically refers to the earlier) must be read together as constituting one award in relation to that parcel of land, by which the officer awards the compensation to be allowed for that land at a figure of Rs.8 per sq. yard and awards the apportionment of that compensation in the proportion of one-fourth to the appellant and three-fourth to the tenants.

The only objection ever taken by the appellant was to the amount awarded as compensation. No objection was ever made to the award as to apportionment; the apportionment accordingly stands and the appellant must be held bound thereby. There can therefore be no foundation for the appellant's claim to be entitled to the extra amount which the tenants might have received if they had not by agreement accepted three-quarters of a lower valuation. All that the appellant can claim is his awarded proportion of the Rs.20 per sq. yard. The gain is a gain of the Municipality which acquired the land, as it was held to be in the case of *Rohan Lal* v. *The Collector of Etah*[2].

The appellant further contended that he had been hardly dealt with in the Courts below as to costs, but their Lordships see no reason for suggesting any alteration of the decrees in this regard.

In the result this appeal fails and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed

Barrow, Rogers and Nevill—Solicitors for the appellant.

Solicitor, India Office—Solicitor for the respondent.

[2] 51 All. 765

HIGH COURT

SHANTILAL

versus

AGHA DOST MOHAMMAD AND OTHERS*

CIVIL

1932

June 22

BANERJI, J.
KING, J.
NIAMATULLAH, J.

Court Fees Act (VII of 1870), Sec. 13—High Court remands case to lower appellate court under Or. 41, R. 23 C. P. C.—Whether appellant entitled to a refund of court-fee paid.

Where a court of second appeal remands a case to the lower appellate court under Or. 41, R. 23 C. P. C., the appellant is entitled under Sec. 13 of the Court Fees Act to a refund of the court-fee paid on the memorandum of appeal.

ORDER on application of applicant.

The following is the Referring Order:—

SEN and NIAMATULLAH, JJ.—The point raised in this case is one of general importance. We do not know whether this point was ever raised in any case before this Court and what decision was arrived at; but the point may very frequently arise. We have not been referred to any decision of this Court. The only case that we have been referred to is a decision in re: *Nanak Chand Ram Lal* v. *Ahmad Din*, 1930 A. I. R. Lah. 440. We feel considerable difficulty in endorsing the reasoning in support of the judgment. Section 13 of the Court Fees Act provides for a case where a 'suit' is remanded and not an 'appeal'. It has been contended that the remand of an appeal is virtually the remand of the suit. The applicant invites the aid of Order XLII, and Order III, Rule 4(3) of the Code of Civil Procedure. It is questionable how far it is permissible to refer to these provisions in having to construe Section 13 of the Court Fees Act. Mr. Panna Lal argues that appeal is a proceeding in the suit and points out that a fiscal enactment should be generously construed. In view of the importance of the question, we would refer this case to a larger Bench.

Let the case be put up before the Hon'ble Chief Justice with the recommendation that he may constitute a larger Bench for the hearing of the question.

Panna Lal for the applicant.

U. S. Bajpai (Government Advocate) for the Crown.

The judgment of the Court was delivered by

King, J.

KING, J.—The question of law which has been referred to this Full Bench may be stated as follows:—

When a court of second appeal has remanded a case to the lower appellate court under Order 41, R. 23, Code of Civil Procedure, is the appellant entitled under S. 13 of the Court Fees Act to a refund of the court-fee paid on the memorandum of appeal?

For the purpose of this reference we assume that the remand does not merely purport to have been made under Order 41, R. 23, and that the remand was in fact made on any of the grounds mentioned in Order 41, R. 23.

On this assumption the appellant is clearly entitled to a refund if it is held that the "suit" has been remanded to the lower appellate court.

The word "suit" has not been defined for the purposes of the Court-Fees Act, nor is there any definition of that word in the Code of Civil

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*Application in S. A. 264 of 1929

Procedure. The argument of the stamp reporter implies that a "suit" terminates when the trial court passes a decree, and that further proceedings by way of appeal are not proceedings in the suit. On this view it is the appeal, and not the suit, which has been remanded to the lower appellate court and consequently S. 13 does not in terms apply. We think that this view gives too narrow a meaning to the word "suit" and that proceedings in appeal may be regarded as proceedings in the suit. When an appeal is admitted against the trial court's decree the suit becomes *sub-judice* again. The appellate court's decree does no doubt decide the appeal, but it also decides the suit. The appellate court frequently, in so many words, "decrees the suit" or "dismisses the suit" as the case may be. On this view the proceedings in first appeal and in second appeal are merely successive stages of the suit, and the suit does not terminate so long as any appeal is pending.

There are indications in the Court-Fees Act that the word "suit" has been given a wide meaning and that an appeal is treated as a proceeding in a suit.

In Schedule II, Articles 4, 5 and 17 we find the expression "memorandum of appeal in a suit". The appeal may of course be a second appeal. So even a second appeal is spoken of as an "appeal in a suit", implying that it is a proceeding in a suit.

Section 12 (*ii*) speaks of a suit coming before a court of appeal. This also indicates that in the contemplation of the legislature the appellate court deals with the suit, and that the appeal is only a proceeding in, or stage of, a suit. In *Dayal Singh* v. *Ram Rikha*[1] it was expressly held by a Full Bench of the Punjab Chief Court that in Sections 10 (*ii*) and 12 (*ii*) of the Court Fees Act the word "suit" includes an appeal, so that the appeal of a defaulting appellant must be dismissed on his failure to make up the deficiency in court-fees when called on to do so. Our own court has, by implication, taken a similar view in *Narain Singh* v. *Chaturbhuj Singh*[2] in which it was held that "if it were the appellant who was in fault and failed to pay the full court-fee due from him in the lower court, this Court certainly could stay the hearing of his appeal and, if the deficient fees were not paid, could dismiss his appeal, and no doubt would do so". This decision was approved and followed in the Full Bench ruling, *Mohan Lal* v. *Nand Kishore*[3]. There is therefore clear authority for the view that in the Court Fees Act the word "suit" can be given a wide meaning so as to include proceedings in appeal.

There is nothing in the subject or context of Section 13 showing that the word "suit" is to be understood in any specially restricted sense so as not to include a suit at the stage of first appeal. On the contrary it would be anomalous and unreasonable if the court-fee were refundable in the case of remand to the trial court, and not refundable in the case of remand to the lower appellate court assuming of course that the requirements of O. 41, R. 23 are strictly fulfilled in each case.

We hold that the "suit" has been remanded, within the meaning of S. 13 of the Court Fees Act, and the court-fee is refundable if the remand has been made upon the ground mentioned in O. 41, R. 23. Let this

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[1] 109 P. R. 1912 [2] I. L. R. 20 All. 362 [3] I. L. R. 28 All. 270

Civil — 1932 — Shantilal v. Agha Dost Mohammad — King, J.

answer be laid before the Hon'ble Judge who made the reference.

Reference answered

On return of the answer by the Full Bench the original referring judge, Niamatullah, J. delivered the following judgment:—

The question raised by the office report was whether court-fee paid in second appeal should be refunded where the "appeal" is remanded to the lower appellate court under Order XLI, Rule 23, Civil Procedure Code. The matter came before me sitting as a single Judge, and I referred the question to a Division Bench, which in its turn referred it to a Full Bench. It has now been authoritatively laid down by the Full Bench that the court-fee ought to be refunded if the remand is one under XLI, Rule 23 Civil Procedure Code.

The office report is based on the assumption that the remand was one under Order XLI, Rule 23, Civil Procedure Code. The decision of the Full Bench also proceeds on the same assumption. I have examined my order of remand, dated May 13, 1931, and find that though it purports to be one under Order XLI, Rule 23, Civil Procedure Code, it is in fact one under Section 107 or Section 151, Civil Procedure Code. It was not a case in which the lower appellate court had decided the appeal before it on a preliminary point and its decree on that point was reversed in second appeal. It had omitted to comply with the provisions of Order XLI, Rule 27, Civil Procedure Code, in receiving fresh evidence on appeal. The decree appealed from was reversed for that reason, and the appeal remanded to be heard afresh after due compliance with the provisions of Order XLI, Rule 27, in admitting or rejecting the fresh evidence which had been produced in the lower appellate court. Inadvertently I made reference to Order XLI, Rule 23, to distinguish it from a case in which issues for findings are remitted and the appeal is finally to be disposed of by this Court. In substance the order was, as already stated, under Section 107 or Section 151, Civil Procedure Code. In this view, Section 13 of the Court Fees Act is not applicable, though if the remand had been really one under Order XLI, Rule 23, Civil Procedure Code, the appellant would have been entitled to a refund of the court-fee in spite of the fact that the "appeal" as distinguished from "suit" in the narrower sense of the word was remanded. In these circumstances, the court-fee paid in second appeal shall not be refunded.

PRIVY COUNCIL

BRIJ INDAR KUAR (*Plaintiff*)

versus

JAI INDAR BAHADUR SINGH (*Defendant*)*

Civil — 1932 — May 9 — Lord Russell of Killowen, Sir George Lowndes, Sir Dinshah Mulla

Civil Procedure Code, Or. 40, R. 1—Decree for payment of annuities—Properties charged with payment—Receiver misappropriates money for payment of annuities—Whether annuitants can enforce charge—Or. 21, R. 1—Judgment-debtor makes payment to receiver—No order of court authorising payment—Payment to receiver at judgment-debtor's risk.

By his will the testator bequeathed the residence of his estate to the respondent, and by his codicil he left annuities to the appellant and other persons, and charged certain properties with the payment of the annuities. All the annuities fell into arrears, and the appellant brought a suit to recover the arrears of the annuity due to her, for the administration of the estate of the testator, and for the appointment of a receiver. The other annuitants were joined as defendants to the suit. A pleader was appointed receiver without security, and ultimately a decree was

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*P. C. A. 56 of 1930

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passed declaring the sums due to the appellant and other annuitants. The decree provided that the said sums were to be paid partly by sale of securities in deposit with a Bank and partly from money to be paid into court by the respondent. The decree also provided that all the annuitants were entitled to recover their annuities from the properties charged, and as regards future payments it was directed that they should be made every six months. Subsequently the receiver obtained possession of the securities from the bank and absconded. Having failed to recover the annuity due to her, the appellant presented an application for execution of the decree by sale of the properties charged. *Held,* (1) that the charge created by the codicil and affirmed by the decree was in no way affected or impaired by the embezzlement of the receiver, and the appellant was entitled to recover the annuity by sale of the properties charged. (2) that in the absence of any order of the court under which the respondent paid or even was authorised to pay the future annuities to the receiver, the respondent paid them to the receiver at his own risk, and the analogy of payment by a judgment-debtor to a bailiff charged with the execution of a warrant of arrest or attachment did not apply.

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

A. M. Dunne, K.C. and *Amiend C. D. Jackson* for the appellant.

L. De’Gruyther, K.C. and *W. Wallach* for the respondent.

The following judgment was delivered by

Sir Dinshah Mulla

SIR DINSHAH MULLA—Thakur Rajindra Bahadur Singh died on October 18, 1912, leaving a will dated June 14, 1907, and a codicil dated October 4, 1912. By his will he bequeathed the residue of his estate to his nephew, who is the respondent before this Board. By his codicil he left a monthly sum of Rs.200 to the appellant, Rs.500 to his widow, Rs.300 to another daughter and Rs.30 to a female servant, and charged certain properties with the payment of the annuities.

All the annuities fell into arrears, and on January 30, 1920, the appellant, who was then a minor, brought the suit out of which the present appeal arises against the respondent to recover the arrears of the annuity due to her, for the administration of the estate of the testator, and for the appointment of a receiver. The other annuitants were joined as defendants to the suit.

Two other suits were also filed, one by the appellant's sister and the other by the servant, to recover the arrears of the annuities due to them.

All three suits were heard by the District Judge of Lucknow, and on October 14, 1922, a preliminary decree was passed for the administration of the estate. Babu Brijmohan Dayal, a pleader of the Court, was appointed receiver without security, with power to sell the properties, and a scheme was framed for the payment of past as well as future annuities to all the four annuitants. A schedule of the properties charged with the payment of the annuities was appended to the decree.

Against this decree the respondent appealed to the Court of the Judicial Commissioner of Oudh, proposing an alternative scheme for the payment of the arrears, which up to October 18, 1923, had amounted to Rs.73,950-8-0, and for the payment of future annuities. The Judicial Commissioner considered that the scheme was reasonable, and passed a

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decree on December 13, 1923, declaring that the appellant was entitled to Rs.26,400 for arrears up to October 18, 1923, and to a further payment of Rs.200 per month for her life, and providing for the payment of the Rs.73,950-8-0 out of two sums, one of Rs.47,668-15-6, being the aggregate of four of the items specified in the schedule to the decree, and the other of Rs.26,281-8-6 which the respondent was ordered to pay into Court to make up the Rs.73,950-8-0. The four items referred to above were:—

Rs. 3,493 0 0	Estimated value of cattle in the possession of the receiver.
Rs. 27,929 4 7	Represented by War Bonds purchased out of Rs.20,000 paid into Court by the Court of Wards under a decree for Rs.1,00,000, and deposited for safe custody with the Allahabad Bank, Lucknow.
Rs. 1,746 10 11	Price of cattle sold by receiver.
Rs. 14,500 0 0	Government promissory notes also deposited with the Allahabad Bank.
Rs. 47,668 15 6	

It would appear that the respondent was restrained by an injunction from realising the decree for Rs.1,00,000 against the Court of Wards. It was directed by the decree that if the respondent paid into Court Rs.26,281-8-6 and executed certain hypothecation deeds on or before March 12, 1924, the injunction should be dissolved, otherwise the appeal should be dismissed. The decree also contained a clause providing that "all the annuitants shall be entitled to recover their annuities from the properties" specified in the decree. As regards future payments, it was directed that they should be made every six months instead of every month.

The respondent paid the Rs.26,281-8-6 into Court, and filed the hypothecation deeds within the time fixed by the Court, and the injunction was removed by an order made on March 18, 1924.

Subsequently the receiver complained to the Court that no cattle had come into his possession, nor had any been received by him, and that the value of the War Bonds and the Notes had been over-estimated. Thereupon the respondent undertook to pay into Court the two cattle items and the deficiency, if any, that might arise on a sale of the securities.

In July, 1924, the receiver obtained possession of the securities from the Allahabad Bank, and he absconded in September, 1925. It is not known what he did with the securities, nor is it known how much he paid to the other annuitants.

After several fruitless attempts to recover the annuity due to her, the appellant presented an application to the District Judge on April 5, 1928, for execution of the decree by sale of the properties charged with the payment of the annuities under the decree. She stated that, in addition to the Rs.26,400 awarded to her by the decree, a further sum of Rs.3,600 had become due to her from October 19, 1923, up to April 18, 1925, and that nothing had been paid to her. She also complained that the respondent had failed to pay into Court the several sums which he had undertaken to pay.

To this the respondent filed a reply raising various contentions as regards his undertaking. He also alleged that he had paid to the receiver three six-monthly instalments of Rs.6,180, Rs.6,000 and Rs.6,180 on account of annuities due from October 19, 1923, to April 18, 1925, and contended that if the receiver misappropriated the money and the securities, the loss should be borne by the appellant and the other annuitants.

The District Judge found against the respondent on all points, and by his order dated July 4, 1928, he directed execution to issue.

Against this order the respondent appealed to the Chief Court of Oudh. The learned Judge agreed with the District Judge that the respondent had failed to carry out his undertaking, but they held, differing from him, that the payment by the respondent of the three sums to the receiver was proved. The question as to who should suffer for the receiver's defalcations was, they thought, one of great importance, and they referred the following question to a Full Bench:—

> Where the judgment-debtor is proved to have paid money, due from him under a decree passed by the Court, to the Receiver appointed by the Court for realising certain sums of money and making payments to the decree-holder or decree-holders, or other money or property is proved to have come to his hands and the Receiver is found to have misappropriated the money and the property, on whom should the loss fall? Should the loss fall on the judgment-debtor or on the judgment-creditor?

The answer given by the Full Bench was that the loss should be borne by the judgment creditor, that is, the appellant.

After receipt of the opinion the learned Judges delivered their judgment. They held that, having regard to the opinion of the Full Bench, the only liability of the respondent was to pay what he had undertaken to pay into Court, which they fixed at Rs.13,621-14-10. Accordingly, they passed a decree on March 1, 1929, declaring that the respondent was liable to pay Rs.13,621-14-10, out of which the appellant was entitled to only a proportionate share, based apparently on the supposition that the other annuitants were in like case with the appellant, as to which there was no evidence. They also directed that unless the respondent paid the amount into Court on or before June 1, 1929, a sufficient portion of the properties should be attached and sold, but they seem to have given no direction as to the disposal of the sale proceeds in that event. From this decree the appellant has brought the present appeal to His Majesty in Council.

It was urged before their Lordships on behalf of the appellant that the charge created by the decree was not affected by the defalcations of the receiver, and that no payment having been made to her, she was entitled to be paid the full amount claimed by her out of the properties charged with the payment of the annuities. On the other hand, the respondent contended that except in respect of Rs.13,621-14-10, which the Appellate Court had ordered him to pay, the charge had been satisfied and the properties freed from all liability to the appellant except for future instalments of her annuity. Their Lordships are unable to accede to this contention. In their opinion, the charge created by the codicil and affirmed by the decree was in no way affected or impaired by the embezzlement of the receiver. The decree provides in express terms that all the annuitants are entitled to recover their annuities from the properties charged. The appellant has admittedly received no part of the annuity due to her. She is, therefore, entitled to recover it by sale of the properties, and that is all she has asked. She makes no claim against the respondent personally.

As regards the three half-yearly instalments, their Lordships think that it is clear that the respondent paid them to the receiver at his own-risk. Counsel for the respondent have been unable to point to any order of the Court under which the respondent paid or even was authorised to pay these sums to the receiver, and it would be impossible to hold that he was the agent of the appellant with authority to receive payment on her behalf.

The analogy relied on by the Full Bench of payment by a judgment-debtor to a bailiff charged with the execution of a warrant of arrest or attachment is fallacious, as every such warrant empowers the bailiff in express terms to receive payment from the judgment-debtor.

Their Lordships cannot conclude this judgment without referring to what seems to have been a grave dereliction of duty on the part of the Court which appointed the receiver in this case. It may be that under the Civil Procedure Code the Court has discretion to appoint a receiver without security, but it should obviously be done only in the most exceptional circumstances. In the present case all the parties to the suit, except the respondent, were females, and the appellant was until recently a minor. Under such circumstances their Lordships are unable to understand upon what ground the receiver could have been appointed without giving adequate security, and have been allowed to have the apparently unfettered control of money and securities to a large amount. Their Lordships think that the matter should be taken into consideration by the Chief Court and some very definite means devised whereby the recurrence of such a blot on the administration of justice may be avoided.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Chief Court dated March 1, 1929, should be set aside, and the order of the District Judge dated July 4, 1928, restored, subject to the variation that the properties should not be sold if the respondent pays Rs.30,000 into the Chief Court within eight weeks from the date of the service upon him of a copy of the Order in Council. The respondent must pay the costs of the appellant in the Chief Court and before this Board.

Their Lordships granted a petition of the appellant for the admission of further documents. The respondent must also pay the appellant's costs of this petition and the supplemental record.

Appeal allowed

James, Gray and Son—Solicitors for the appellant.
T. L. Wilson and Co.—Solicitors for the respondent.

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June 15

MUKERJI, J.
BENNET, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*)

versus

BHAGWAN PRASAD (*Plaintiff*)*

Land Acquisition Act (I of 1894), Secs. 19 and 18—Application under Sec. 18 barred by time—Collector makes reference to civil court—Whether civil court can entertain plea of limitation—Board Circulars I—VIII, Para 28, Note 2.

Where a 'person interested' who has not accepted the award, makes a time-barred application to the Collector under Sec. 18, Land Acquisition Act, that the matter be referred to the civil court, and the Collector makes the reference; *held*, on objection by the Secretary of State, that the civil court had no power to entertain the plea of limitation. The principle laid down by Board Circulars I—VIII, Para 28, Note 2, that the collector cannot refuse to make a reference, even if it is time-barred and that his duty is to bring the matter to the notice of the civil court is founded on a misconception of law. *Secretary of State for India* v. *Bhagwan Prashad*, [1929] A. L. J. 1186 *followed. Ahmad Ali Khan* v. *Secretary of State*, A. I. R. [1932] Oudh 180 *not followed.*

FIRST APPEAL from a decree of MAULVI MUHAMMAD TAQI KHAN, Subordinate Judge of Mirzapur.

U. S. Bajpai for the appellant.

N. Upadhiya for the respondent.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a first appeal by the Secretary of State for India against an order of the learned Subordinate Judge of Mirzapur under the Land Acquisition Act awarding a certain sum as further compensation to the applicant. The point which has been urged before us is "that the suit as brought by the plaintiff-respondent is barred by six months' limitation as provided in Section 18(2) of the Land Acquisition Act" and, secondly, "that the appellant is not estopped from pleading limitation even after the reference made by the Collector to the civil court for adjudication". The language quoted is that of the appellant, but it is obvious that the matter was not a suit but an application.

The facts of the present case are that the Land Acquisition Officer made an award on June 14, 1923. The applicant was absent and was not represented at the time. Accordingly, under S. 18(2)(*b*) of the Land Acquisition Act, the application should have been made "within six weeks of the receipt of the notice from the Collector under Section 12, Sub-section (2) or within six months from the date of the Collector's award, whichever period shall first expire". Notice was served on the applicant on January 18, 1924 and his objection was filed on February 12, 1924. He therefore complied with the term of six weeks from receipt of the notice, but he did not comply with the term of six months from the date of the Collector's award. The application therefore was barred by limitation under the proviso quoted. The Land Acquisition officer did not notice this point and he forwarded the reference to the civil court in the

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*F. A. 397 of 1928 (Connected with 398 of 1928)

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SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BHAGWAN PRASAD

Bennet, J.

ordinary way. When the reference came before the civil court, on behalf of Government, the point was taken that the application was barred under S. 18 (2) of the Land Acquisition Act. The Court dismissed this objection. It is again taken in appeal. As far as this Court is concerned, the matter has been decided by a Bench in *The Secretary of State for India in Council* v. *Bhagwan Prasad*[1], in which it was held by a Bench of which one of us was a member that when a reference had been made under the Land Acquisition Act, it was not open to the Collector or the Secretary of State to say that the reference was wrongly made although the ground for saying so may be that the application by the owner was belated. The "Court" does not sit on appeal over the Collector and the Act does not give any authority to the "court", either in express terms or by implication, to go behind the reference and to see whether the Collector acted rightly or wrongly. It is the province of the Collector alone to decide for himself whether he should make the reference or refuse to do so.

Various rulings on the subject had been considered in that case and there is no need for us to consider them again. We are in agreement with the principles of law laid down in that case. The only new case that has been brought to our notice is the one of the Oudh Chief Court in *Ahmad Ali Khan Alawi* v. *The Secretary of State*[2] in which it has been held that the land acquisition officer cannot refuse to make a reference, even if it is time-barred and that his duty is to bring the matter to the notice of the court. We note that that is the principle which is laid down by Board Circulars I—VIII, Para 28, Note 2. In our opinion, this direction of the Board Circulars is founded on a misconception of law. We also note that the ruling of 27 A. L. J. 1186 was not mentioned in the recent case in the Oudh Chief Court. We dismiss this appeal with costs.

Appeal dismissed

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[1] 27 A. L. J. 1186

[2] A. I. R. 1932 Oudh 180

RAM RATAN AND NANHWAN

versus

KING-EMPEROR*

CRIMINAL

1932

June 10

BANERJI, J.
KING, J.

Criminal Procedure Code, Sec. 366—Judgment—Delivered after vacating office of Sessions Judge—Conviction bad.

Where the Sessions Judge, delivered judgment in a criminal case a few hours after he had made over charge of his office to his successor, *held*, that he had no jurisdiction to deliver judgment and therefore the conviction was bad, and the case should be re-tried.

CRIMINAL APPEAL from an order of PANDIT KANHAIYA LAL NAGAR, Sessions Judge of Banda.

Krishna Murari Lal for the appellants.

U. S. Bajpai (Government Advocate) for the Crown.

The judgment of the Court was delivered by

King, J.

KING, J.—A preliminary point has been raised that Mr. Kanhaiya Lal Nagar, at the time of delivering judgment, had no jurisdiction as Sessions

*Cr. A. 206 of 1932

Judge and therefore the convictions and sentences are illegal. We have called for a report from Mr. Kanhaiya Lal Nagar. He states that he made over charge of the office of the Sessions and Subordinate Judge, Banda on the forenoon of February 25, 1932 and he delivered judgment in this case on the forenoon of the same day, so far as he recollects. He states that when he signed the charge-sheet the judgment was ready and only a fair copy was being typed. He delivered the judgment as soon as it was ready, after the charge-sheet had been signed.

We also have an affidavit sworn by Mr. Kutbuddin Ahmad, a pleader of Banda, who was engaged by the Crown to represent the two accused persons in the Sessions trial. He positively asserts that judgment in this case was delivered by Mr. Kanhaiya Lal Nagar between 1 and 2 P.M. on February 25, 1932. He gives further details which show that he has a distinct memory of the occurrences of that day. Mr. Kidwai, I. C. S. took over charge of the office of the Sessions and Subordinate Judge, Banda, on the forenoon of that date between 10 A.M. and 11 A.M. and actually heard some appeals on the bench between 11 A.M. and 1 P.M. It was after Mr. Kidwai rose for lunch at 1 P.M. that Mr. Kanhaiya Lal Nagar occupied the seat vacated by Mr. Kidwai and delivered judgment in this case. We must take it that this represents what actually took place and that the judgment was in fact delivered after 1 P.M. on February 25. It follows that Mr. Kanhaiya Lal Nagar had vacated the office of Sessions and Subordinate Judge, Banda before the time when he delivered judgment in the case. In our opinion, therefore, he had no jurisdiction to deliver judgment and the convictions and sentences are bad.

It seems clearly necessary that there should be a re-trial as the case is a very important one and clearly there must be a *prima facie* case against the accused persons. We therefore set aside the convictions and sentences and order that the case be re-tried by the Sessions Judge of Banda. The accused shall remain in custody pending the trial.

Conviction quashed
Retrial ordered

CRIMINAL
1932
June 2
KING, J.

KING-EMPEROR
versus
RAJA RAM AND ANOTHER*

Criminal Procedure Code, Sec. 337, Sub-sec. (2A)—Interpretation of—Whether approver must be committed to session.

Sec. 337, Sub-sec. (2A) of the Criminal Procedure Code means that where a pardon has been granted to one accused who has been examined as a witness, then the case against the other accused must be committed to session if a *prima facie* case against the latter is established and not tried by the magistrate himself. The Sub-section cannot be reasonably interpreted to mean that the approver must be committed for trial to the court of session.

Bhagwan v. *Emperor*, A. I. R. 1929 (Oudh) 190 *followed.*

CRIMINAL REFERENCE made by R. DAYAL ESQ., Sessions Judge of Mirzapur.

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*Cr. Ref. 391 of 1932

CRIMINAL

1932

KING-EMPEROR *v.* RAJA RAM

King, J.

M. Waliullah (Assistant Government Advocate) for the Crown.

The opposite parties were not represented.

The following judgment was delivered by

KING, J.—This is a reference by the learned Sessions Judge of Mirzapur recommending that the commitment of two persons for trial under Section 395 I. P. C. be quashed.

It appears that Poghai and others were charged with dacoity under Section 395 I. P. C. and the District Magistrate tendered a pardon to two of the accused, namely, Raja Ram and Tulshi under Section 337 of the Code of Criminal Procedure. They were examined as witnesses in the court of the committing magistrate. The committing magistrate has committed not merely the accused persons to the court of session but has also committed the two approvers Raja Ram and Tulshi after framing charges against them. The committing magistrate was clearly under a misapprehension regarding the meaning of Sub-section 2A of Section 337. The magistrate interpreted Sub-section 2A to mean that he must commit the approvers for trial to the court of session as well as the other persons who are accused in the case. The language of this Sub-section has given rise to some misunderstanding, but its meaning has been explained in the case of *Bhagwan v. Emperor*[1] in which it was held that the meaning of Section 337, Sub-section (2A) is simply that where a pardon has been granted to one accused who has been examined as a witness, then the case against the other accused must be committed to session if a *prima facie* case against the latter is established, and not tried by the magistrate himself. I have no doubt that this interpretation is correct. The Sub-section cannot be reasonably interpreted to mean that the *approver* must be committed for trial to the court of session. The language of the Proviso to Section 339, Sub-section (1) confirms this view.

I accordingly accept the reference, set aside the commitment of Raja Ram and Tulshi and set aside the charges which have been framed against them.

Reference accepted

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[1] A. I. R. 1929 (Oudh) 190

CIVIL

1932

June 10

YOUNG, J.

EDNA MAY OLIVIA HARDLESS (*Petitioner*)

versus

HAROLD RICHARD HARDLESS (*Respondent*)*

Legal Practitioner—When cannot appear for the other party—Definite retainer with a fee paid or relevant confidential information conveyed.

In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party.

Where in a suit by the wife for dissolution of marriage on the ground of adultery, the husband put in a petition praying that an order should be made prohibiting one C, a Barrister-at-Law, from appearing for the wife on the ground that he had conveyed confidential information to him in a

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*Matrimonial suit 1 of 1932

CIVIL

1932

EDNA MAY OLIVIA HARDLESS *v.* HAROLD RICHARD HARDLESS

letter; and the letter merely referred to complaints that he had against his wife and he desired to take action so that he might obtain custody of the children but he did not definitely engage counsel's services, *held*, that there was nothing in the letter which would prejudice the husband if counsel appeared for the wife.

ORDER on application of Harold Richard Hardless.

K. O. Carleton and *O. M. Chiene* for the petitioner.

Saila Nath Mukerji and *N. C. Ganguli* for the respondent.

The following judgment was delivered by

Young, J.

YOUNG, J.—This is a petition by the respondent alleging that on December 24, 1931 he wrote a letter to Capt. Carleton, Barrister-at-Law, who now appears for the petitioner, engaging him in the case and giving him confidential information which might prejudice the respondent if Capt. Carleton continued to act for the petitioner. He asks that an order should be made prohibiting Capt. Carleton from appearing in the case. I have read the letter of December 24, and there is nothing whatever in the letter which would prejudice the respondent if Capt. Carleton appears for the petitioner. The petition is for dissolution of marriage on the ground of adultery. There is nothing in the letter alluding to the respondent's defence upon this charge. He merely refers to complaints that he has against his wife and he desired to take action so that he might obtain custody of the children. The letter did not definitely engage counsel's services. Capt. Carleton offered a consultation to the respondent in reply to this letter, but he thereafter sent a telegram cancelling the appointment and suggesting the next day instead, that is, January 3. The respondent did not answer the telegram or keep the appointment. He, thereafter, in the month of March, engaged a pleader of Chunar to act for him in the matter of the custody of his children. Capt. Carleton was thereupon engaged by the petitioner for the divorce suit.

This is an absurd petition. A great deal has to take place before counsel can be said to be engaged by a party to a suit, so that it would be unprofessional for him to appear on the other side. In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party. Nothing of this sort has occurred here. There is nothing of a confidential nature in the letter of December 24 which would prejudice the respondent if Capt. Carleton appears for the petitioner. If this sort of letter acted as a bar to counsel appearing for the opposite party, nothing would be simpler for a prospective litigant than to write to all the leading counsel in the court a letter such as this. He need not have the slightest intention of engaging any of them. The petition is rejected.

Petition rejected

CIVIL

1932

June 1

SULAIMAN, C. J.
BANERJI, J.

SAGHIR FATMA BIBI AND ANOTHER (*Defendants*)
versus
BRIJ RAJ SINGH AND ANOTHER (*Plaintiffs*)*

Pre-emption Act, Sec. 22—Property jointly purchased by two defendants—Right of pre-emption against one only—Pre-emption suit—Defendants cannot go behind sale-deed and set up a secret arrangement defining their shares—Suit to be decreed as against both.

Where property is jointly purchased by two persons against one of whom only there is a right of pre-emption and the sale deed does not specify their shares, they cannot go behind the sale deed and set up a secret arrangement defining their shares, and the right of pre-emption can be claimed as against both.

Sheopujan v. *Bishnath*, 1930 A. L. J. 842 *distinguished.*

SECOND APPEAL from a decree of R. K. AGHA ESQ., District Judge of Allahabad, confirming a decree of BABU HARDEO SINGH, Munsif of East Allahabad.

Zafar Mehdi and *Hyder Mehdi* for the appellants.

P. L. Banerji and *N. Upadhiya* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a defendants' appeal arising out of a suit for pre-emption. The sale deed was taken by the two defendants jointly and there was no specification of any share in the document itself. One of them is supposed by the lower appellate court to be a co-sharer and the other is a stranger. In fact the former is an exproprietary tenant. They led oral evidence to show that under a secret arrangement between themselves they had taken the property in equal shares and accordingly pleaded that the suit should not be decreed against both the purchasers.

A second appeal has been preferred not by the tenant purchaser but by them jointly. He has again associated with him a stranger to the mahal and has made common cause with her. Strong reliance is based on behalf of the appellants on the case of *Sheopujan* v. *Bishnath*[1]. That was quite a different case. There an ostensible vendee, after taking the sale-deed, disclosed in the revenue court that he had associated with him three other persons who had paid the consideration and who had purchased the property to the extent of one-fourth share each. When the suit was brought by the plaintiff against all the four persons, Sheopujan acquired a small share by way of gift and claimed that the whole suit should fail. The plaintiff was allowed by the court to set up the admission of the defendant himself that he had joined with him other strangers to the mahal and that accordingly the whole claim could not be dismissed on account of the gift but that the plaintiff could only be compelled to give up his one-fourth share only. It was pointed out by the Bench that the plaintiff not being a party to the sale-deed, there was nothing to prevent him from establishing a fraud committed by Sheopujan who took the sale-deed in his own name, although there had been a secret arrangement between him and

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*S. A. 1437 of 1930

[1] [1930] A. L. J. 842

Civil

1932

Saghir Fatma Bibi *v.* Brij Raj Singh

Sulaiman, C. J.

three other associates to purchase the property together and to pay the price thereof in proportion of their respective shares. That principle would not apply to the converse case where, although the plaintiff is suing to pre-empt the entire property, the defendants set up a secret arrangement by which they allege that there was an understanding that their shares would be specified. We think that they cannot be allowed to go behind the sale-deed which shows that the property was jointly acquired. Under Section 22 of the Agra Pre-emption Act where property is jointly purchased or forclosed by two persons against one of whom only there is a right of pre-emption, such right may be claimed as against both. The explanation added to that Section says that this Section does not apply where such purchaser acquires a defined interest. The defendants cannot be allowed to set up a specific share when it does not find a place in the sale-deed. The appeal is accordingly dismissed with costs.

Appeal dismissed

Civil

1932

May 20

Sulaiman, C. J.
Mukerji, J.

MAHADEO PRASAD AND ANOTHER (*Defendants*)
versus
SARJU PRASAD AND OTHERS (*Plaintiffs*)*

Damages—Defendant digs trench near foundation of kutcha *house of plaintiff—Rain water accumulates in trench and percolates into plaintiff's ground—Damage caused to plaintiff's wall—Whether plaintiff entitled to recover damages.*

Where the defendant digs a trench on his own land but adjoining the wall of the plaintiff's *kutcha* house, and by failing properly to cover it, permits rain water to accumulate in the trench in such quantities that it naturally percolates through the soil into the plaintiff's ground, so that damage is caused to the plaintiff's wall, the plaintiff is entitled to recover damages from the defendant.

Mohanlal Maganlal Sha v. *Bai Jivkore*, I. L. R. 28 Bom. 472 *dissented from; Broder* v. *Saillard*, [1876] 2 Ch. D. 692 and *Whalley* v. *The Lancashire and Yorkshire Ry. Co.*, [1884] 13 Q. B. D. 131 *relied on.*

APPEAL under Section 10 of the Letters Patent, from a judgment of the HON'BLE MR. JUSTICE YOUNG.

N. P. Asthana and *Shabd Saran* for the appellants.

Shiva Prasad Sinha for the respondents.

The following judgment was delivered by

Young, J

YOUNG, J.—This is a second appeal from the court of the Additional Subordinate Judge of Allahabad. The plaintiff brought the suit for damages.

They alleged that the defendants had dug a trench on their own land, but adjoining the wall of the plaintiffs, so that the foundations of the plaintiffs' house were uncovered, and it being the rainy season, rain had accumulated in the trench and had percolated into and under the foundations of the plaintiffs' house, so that damage had been caused to the walls and floors of their house. The lower appellate court came to a conclusion in law that the defendants were not liable; but failed to come to a conclusion on the facts of the case. The plaintiffs have appealed. I remanded the case to the lower appellate court for findings on the questions of fact which arose in the case. Those findings have now been returned. The lower appellate court has found in fact that damage to the extent of Rs.200 was caused to the plaintiffs by the accumulation of rain water in the trench dug by the defendants, that the trench had been dug to the depth of from 4 to 6 feet and was in some places deeper than the foundations of the plaintiffs' wall, and that no proper precautions had been taken by the defendants to prevent rain water from accumulating in the trench. No question arises in this case as regards the removal of the lateral support to the plaintiffs' land.

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*L. P. A. 38 of 1931

On the findings of fact, which are binding upon this Court, the question arises as to the legal liability of the defendants. This raises an interesting question of law.

There does not appear to be any authority on this point in this High Court. The Bombay High Court, however, on precisely similar facts, has come to the conclusion that the defendant would not be liable. See *Mohanlal Maganlal Sha* v. *Bai Jivkore*[1]. However, the Madras High Court has doubted the decision in the Bombay case, and for reason which I shall hereafter give, I am, with great respect, of the opinion that that case was wrongly decided.

It is contended on behalf of the defendants that a man may do anything he likes with his own land so long as he is using the land for a proper purpose, and if in that user of his land he does anything which occasions damages to the proprietor of neighbouring land, he is not liable; that is, taking the facts of this case, that any owner of land may dig a trench which may entirely uncover the foundations of his neighbour's house, leave that trench unguarded so that in the rainy season the trench may become filled with water to such an extent that his neighbour's house may be completely destroyed and yet he would be under no liability for the damage thus caused. This seems to me to be an extraordinary proposition, which I could only support on the clearest possible authority. The defendants' contention is based upon the distinction drawn in the well known case of *Rylands and Fletcher* between the natural and non-natural user of property. It is said that *Rylands and Fletcher* lays down that so long as there is a natural user of property the owner of that property may do anything he likes on that property, even although his act occasions damage to his neighbour. However, it has never yet been defined in any case of which I have knowledge what is a natural and what is not a natural user of land. Is it a natural use of land to build a house upon it? In one sense it undoubtedly would be. But equally there could be no more natural use of land than putting cattle to graze upon it; yet it has been held that if cattle so placed upon land stray, and do damage to neighbouring property the owner of the land is responsible. In my opinion, from a consideration of the authorities, a natural user of land in the rule in *Rylands and Fletcher* is confined to the use of the land in its natural condition with the exception perhaps of those cases which deal with mining operations, to which different considerations apply. Where any alteration is made from the normal in land, in my opinion, the owner of that land is liable for any damage which may accrue to his neighbour, if there has been want of care by the land-owner in making the alteration. In my opinion, the rule in *Rylands and Fletcher* has really no application in a case of this sort. The ordinary rule of law "sic utere tuo ut alienum non laedas" applies to and governs this case. This principle has been applied in England in two cases which were decided after *Rylands and Fletcher*. They are *Broder* v. *Saillard*[2] and *Hurdman* v. *The North Eastern Railway Co.*[3]. In the former case there was some made earth, that is, a heap of earth not naturally there, but which had been placed there by the defendants or their predecessors-in-title near to the plaintiff's house. That earth collected water, which in due course caused dampness in the plaintiff's house. The Master of Rolls in his judgment came to the conclusion that the plaintiff must succeed. He says at page 700:—"But however it comes, (i.e., water), if it comes through an artificial work which collects it, in the nature of a large artificial sponge, which absorbs it and keeps it together until it oozes out by reason of the nature of the sponge, it appears to me, I have to say, that an artificial work, a work made by men, is a work which if it causes a nuisance is a thing for which the owner of the land is responsible". It might have been argued in that case, that the defendants had made a perfectly natural use of their own land; but apparently it was not thought useful to advance any such argument. In the second case alluded to above the facts were that the surface of the defendant's land had been artificially raised by earth placed upon it, that rain had fallen and been absorbed by the earth and that because of that the rain water had percolated through the wall of the plaintiff's house and caused damage. The Court of Appeal decided in that case that an action would lie. Lord Justice Cotton in his judgment approved of the decision in *Broder* v. *Saillard* and laid it down: that "If any one by artificial erection on his land causes water, even though arising from natural rainfall only, to pass into his neighbour's land and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured". The learned Lord Justice distinguishes this case from those cases dealing with mines. It might be suggested that there is a further distinction in the mine cases, namely, that the plaintiff in those cases had altered the natural condition of the land himself by excavating the minerals, and therefore that he might be said to have brought the damage upon his own head. A mine owner might guard himself against percolation of water from a neighbouring mine by leaving sufficient barriers of coal between the two mines. If he likes, on the other hand, to take away in the course of his mining operations all the coal in seams, he cannot complain if his neighbour does the same. Lord Justice Cotton in this case laid it down that if a person by artificial means allowed things in themselves inoffensive to pass into a neighbour's property to the prejudice of his enjoyment thereof, then he would be liable for the damage occasioned. The digging of a trench, as in the case under discussion, is undoubtedly artificial. There is no difference in principle between an artificial erection and an artificial excavation. In both instances the legal maxim alluded

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[1] I. L. R. 28 Bom. 472

[2] [1876] 2 Ch. D. 692

[3] [1878] 3 C. P. D. 168

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1932
MAHADEO PRASAD
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Young, J.

to above would apply. See also *Whalley* v. *The Lancashire and Yorkshire Railway Co.*[4]. My opinion, therefore, is that if a land-owner digs a trench, and by failing properly to cover it, permits water to accumulate in the trench in such quantities that it naturally percolates through the soil into his neighbour's ground and damage is caused thereby, he is responsible for all the damage so caused. There can be no doubt in this case that the defendants were negligent in not taking care in a period such as the rains in India to cover up their trench and that the defendants' negligence was the occasion of the damage to the plaintiffs' house. The defendants could have prevented the damage and they owed a duty to the plaintiffs to take care. Under the ordinary law of tort the plaintiffs are entitled to recover from the defendants the damage so caused. The appeal is allowed and judgment will be entered for the plaintiffs for the sum of Rs.200 with costs.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This is an appeal against the judgment of a learned single Judge of this Court. It was held by the learned Judge that where a neighbour digs a trench in the rainy season near the foundation of a *kutcha* house owned by the plaintiff, and rain water accumulates in the trench, with the result that the foundation of the plaintiff's *kutcha* wall collapses, the plaintiff is entitled to recover damages from the defendant. We are of opinion that the decision is very sound, and we have nothing to add to the judgment of the learned single Judge. The use of the land by the defendant was not ordinary use. He might have dug the trench, but it was his duty to prevent the rain water from accumulating in the trench. His failure to do so was negligence for which he must be held responsible, and this has been found as a fact. We dismiss the appeal with costs.

Appeal dismissed

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[4] [1884] 13 Q. B. D. 131

MAHABALI PRASAD (*Applicant*)

versus

H. N. PALMER (*Opposite party*)[*]

CIVIL
1932
April 1
BOYS, J.
YOUNG, J.

Hire-purchase—Contract of hire with option of purchase on payment of instalments in full—Hirer has no option to terminate contract—Whether agreement amounts to 'hire-purchase'—Test.

An agreement whereby the plaintiff agrees to hire to the defendant certain goods at a certain rate with a condition that if so many months instalments are paid the property in the goods passes to the hirer and nowhere in the agreement is the defendant given the option to terminate the hiring, and the agreement further provides that if the defendant fails to pay hire in any one month in advance the whole transaction will be treated purely on the 'hire system'. *Held,* that the whole tenor of the agreement is that of a 'purchase' and not 'hire-purchase' and the plaintiff is entitled only to that part of the purchase price which has not been paid.

The distinguishing mark of a true hire-purchase agreement, as distinguished from a sale, is that the hirer should have a right to terminate the

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[*] Civ. Rev. 442 of 1931

CIVIL

1932

MAHABALI PRASAD *v.* H. N. PALMER

agreement at his pleasure; and the distinguishing mark of an agreement which is a sale and not a hire-purchase agreement, is that the 'hirer' should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement. In each case, the substance of the transaction or agreement must be looked at and not mere words. *Lee* v. *Butler*, [1893] 2 Q. B. D. 318, *Helby* v. *Mathews*, [1895] A. C. 471 and *Bhimji N. Dalal* v. *The Bombay Trust Corporation Ltd.*, 54 Bom. 381 *relied on.*

CIVIL REVISION from an order of J. K. DAR ESQ., Judge of Small Cause Court, Allahabad.

I. B. Banerji for the applicant.

Jawahar Lal for the opposite party.

The judgment of the Court was delivered by

Young, J.

YOUNG, J.—This is an application in revision from the judgment of the Small Cause Court Judge of Allahabad. The plaintiff brought a suit for the recovery of money due under what he alleged to be a hire agreement, whereby the defendant agreed to hire certain coir matting. He claimed Rs.150 as hire. An agreement was entered into between the plaintiffs on September 30, 1928, in the following terms:—

> Received from Mahabalee and Son the undermentioned articles on hire valued at Rs.92-8-0 (Ninety two annas eight) only, and I do hereby agree to pay to Mahabalee and Son at their business premises at Allahabad the sum of Rs.9-4-0 (nine annas four) only as monthly hire of the articles month by month in advance (part of a month charged for entire month) on the following terms:—
>
> (1) To have the articles in my custody, and not to remove, sell, pawn or mortgage them without the proprietor's previous consent in writing and to keep them in good order (fair wear and tear will only be accepted, and damage by fire or any other cause and breakage will be at the hirer's risk) and at any time to allow an employee of the said firm to inspect the articles.
>
> (2) That if I pay ten (10) months hire regularly in advance at Rs.9-4-0 (nine annas four) only per month, I shall become the purchaser of the articles (i.e., the articles will be my own property) without further payment and the full amount will be credited on the *purchase system.* (3) That if I fail to pay hire in any one month in advance, the owner may cancel the transaction and terminate the hiring, and I shall immediately return the articles and if I do not do so Mahabalee and Son may take proceedings in Court for the balance of hire due, at the above rate of Rs.9-4-0 per month with all attendant costs and damages. (4) Mahabalee and Son will not be bound to send monthly bill.
>
> (5) If I fail to pay hire in any one month in advance the whole transaction will be treated purely on the Hire System.
>
> (6) Unless and until such purchase be effected, articles will be considered the property of the owner and I shall remain bailee of the same.
>
> Received the articles.
>
> Fifty four yards coir matting.

It is to be noted that the agreement is headed by the value of the coir matting, viz., Rs.92-8-0, and that the defendant bound himself to pay to the plaintiff the sum of Rs.9-4-0 as monthly hire of the articles month by month in advance. It was further agreed that if he paid 10 months hire regularly on the due date, he should become the purchaser of the coir matting without further payment. If on the other hand he failed to pay regularly, the plaintiff had the option to cancel the transaction and terminate the hiring. It is important to note that nowhere in the agreement was the defendant given the option to terminate the hiring. In fact it appears to us that the effect of the agreement was that the defendant was bound to pay the full amount of the consideration, i.e., Rs.92-8-0 by monthly instalments and that the only way he could terminate the agreement was to take advantage of Clause (2) and pay 10 instalments regularly in advance on the due date. Under these circumstances the question that we have to decide is whether this is a hire purchase agreement or a sale of goods. There is no difficulty in construing a simple agreement of hire or an agreement for the sale of goods by instalments; the difficulty arises over agreements, whereby one party agrees to hire to the other party certain goods at a certain rate with a condition that if so many months instalments are paid the property in the goods passes to the hirer. This latter agreement is called a hire-purchase agreement.

In England, the question of hire-purchase agreements has been frequently considered by the courts. The leading cases are *Lee* v. *Butler*[1] and *Helby* v. *Mathews*[2]. On a consideration of these and other authorities, it appears to us that the distinguishing mark of a true hire-purchase agreement—as distinguished from a sale—is that the hirer should have a right to terminate the agreement at his pleasure, and that the distinguishing mark of an agreement which is a sale and not a hire-purchase agreement, is that the "hirer" should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement, if he so wished, before the full value of the goods is paid. These are the two criteria upon which all the decisions in England have turned. Lord Shand in *Helby* v. *Mathews* said:

> It is true that by that agreement Brewster undertook to pay to the appellant not only a first instalment of 10s. 6d. described as a "rent or hire instalment", but to pay the same amount on the 23rd of each succeeding month and that it was provided that on the payment of thirty six monthly instalments the piano should become his property. If these stipulations had been unqualified there could have been an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instalments were described as for rent or hire, and the case of *Lee* v. *Butler*, [1893] 2 Q. B. 318, would have directly applied. But the whole obligations by Brewster were qualified by the stipulation: 'That the hirer may terminate the hiring by delivering up to the owner the said instrument. This provision appears to me to make it clear that there was no purchase and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired; and he need not allow the transaction to become one of purchase unless he desired to do so.

The matter has been summed up in Volume I of Halsbury's Laws of England at page 554 in the following words:

> The difference between a contract of sale at a price payable by instalments and a contract of hire purchase is that in the former the purchaser has no option to terminate the contract and return the chattel, whereas, in the latter the hirer has. In the former there is an agreement to purchase,

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[1] [1893] 2 Q. B. D. 318

[2] [1895] A. C. 471

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whereas, in the latter there is none. In each case, the substance of the transaction or the agreement must be looked at and not mere words.

See also *Bhimji N. Dalal* v. *The Bombay Trust Corporation Ltd.*[8].

Applying therefore the principles laid down above, we find in the agreement in this revision, that the defendant had no option of terminating the contract and returning the chattel. We find, too, that the whole price or value of the goods was to be paid by the defendant by instalments. We therefore think it clear in law that the agreement in question is clearly an agreement for the sale of the coir matting and not a hire-purchase agreement.

Counsel for the applicant has argued strenuously that the English cases can be distinguished, in that there is in this agreement Clause (5), viz., "If I fail to pay hire in any one month in advance the whole transaction will be treated purely on the Hire System". We do not think that this clause in any way distinguishes this case. The mere fact that the words used are "the hire system" does not make it in law a hire system. There still would be no right in the "hirer" to terminate the contract. The whole tenor of the agreement according to the decided cases is that of a "purchase" and not "hire-purchase". That being so, the plaintiff is entitled only to that part of the purchase price which has not been paid. The learned Judge of the Small Cause Court has not come to a finding upon this. We have ourselves looked at the evidence and we find that the defendant has sworn that he has paid nine instalments. The plaintiff on the other hand admits the payment of eight. The defendant says he paid one instalment on the signing of the agreement to the plaintiff's son, who is now dead. We are of opinion that an instalment certainly would have been paid upon the signing of the agreement, and therefore we believe the defendant's version. There has therefore been nine instalments paid and there is due to the plaintiff one instalment. The decree of the court below will be varied and there will be a decree for the plaintiff for Rs.9-4-0 with interest at six per cent. The application in revision therefore is dismissed with costs in both courts.

Application dismissed

[8] 54 Bom. 381

CIVIL
1932
April 29
SULAIMAN, C. J.
MUKERJI, J.

In re RASHID AHMAD*

Legal Practitioner—Counsel files application for leave to appeal to Privy Council —Deposit under Or. 45, R. 7 C. P. C.—Appeal succeeds—Whether counsel can claim lien on the deposit for the outstanding fees.

A counsel, who files an application for leave to appeal to Privy Council, is not entitled to claim a lien for the outstanding fees on the amount deposited by the appellant under Or. 45, R. 7 C. P. C. as security, in the event of the appeal succeeding, as this deposit was never the subject-matter of dispute and was not the fruit of the action. *Ross* v. *Buxton,* (1889) 42 Ch. D. 190 *referred to.*

Shiva Prasad Sinha for Dr. M. H. Faruqi.

The judgment of the Court was delivered by

*Mis. Case 853 of 1931

Sulaiman, C. J.—On an oral application made by Dr. Faruqi, notice was issued to the appellant to show cause why Rs.440 out of Rs.4,000 lying in deposit as security in this Court should not be paid over to Dr. Faruqi towards the payments of fees due to him.

It appears that Dr. Faruqi along with another counsel filed an application for leave to appeal to their Lordships of the Privy Council, though he had not appeared in the First Appeal itself. The appeal was admitted and was sent to the office of the Privy Council. Dr. Faruqi appears to have looked after the interests of the appellant and instructed the Solicitors in England. According to him the bulk of Rs.440 is the aggregate amount of the fees due to him for various works done. The appellant succeeded and the amount of security deposited by him for the cost of the respondents is now available to him for being returned.

The question is whether Dr. Faruqi is entitled to claim a lien for the outstanding fees on this amount.

It was held by a Full Bench of this Court in *C. Ross Alston* v. *Pitambar Das*[1] that a member of the English Bar, in accordance with the laws of England and the rules of the legal profession to which he belongs, renders and professes to render services of a purely honorary character and that in his professional capacity as an English Barrister he can neither sue nor be sued for his honoraria. Mr. Shiva Prasad Sinha contends before us that since the passing of the Bar Councils Act the status of a Barrister of England is identical with an ordinary Advocate, inasmuch as, according to the practice prevailing in this province, he combines in himself the functions of a Barrister as well as of a Solicitor. It is therefore urged that he is entitled to claim the same lien which an ordinary Solicitor would be entitled to in England. We think that it is unnecessary to decide this wider question in this case.

The amount of Rs.4,000 which was deposited by the appellants or by one of them as a security belonged to the person or persons depositing the amount and the proprietary interest in it never passed to the respondents. In case of the dismissal of the Privy Council Appeal it would have been open to the respondents to realise their costs out of this security. The appeal having succeeded, the liability of the appellant to make good the costs of the respondents out of this amount never arose. But this amount was not the subject-matter of the litigation and can in no sense be regarded as the fruits of the action earned by the counsel for his client. Mr. Sinha has strongly relied on the case of *Ross* v. *Buxton*[2] where the principle laid down by Stirling, J. was approved and it was stated that a party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits were obtained. In that case a sum of money was deposited into court under a compromise between the parties for the satisfaction of all claims for damages. The amount so deposited was obviously a compensation to the plaintiffs and was therefore the fruit of the action, and the plaintiffs' solicitor was held entitled to claim a lien on this amount.

The present case is entirely different. As pointed out above the sum of Rs.4,000 which had been deposited by the appellant to be available

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[1] I. L. R. 25 All. 509

[2] 42 Chancery Division, 190 [1889]

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Rashid Ahmad *In re*

Sulaiman, C. J.

for the payment of the costs of the respondents in case their Lordships of the Privy Council ordered such costs to be paid, was never the subject-matter of dispute and is not the fruit of the action. We are therefore of opinion that no lien can be claimed on this amount.

The last point urged is that the order dated December 23, 1931, passed by a Bench of this Court on this application, has finally decided that the lien can be claimed. We are of opinion that it is not so. That was an order passed *ex parte* at the time of the issue of notice to Dr. Faruqi's clients, and the expression of opinion therein contained was obviously provisional and subject to any reasons to the contrary being shown by the appellant. As we are now asked to order the atual payment of the money to Dr. Faruqi, we cannot be bound by any expression of opinion which was made *ex parte*. We accordingly disallow the prayer of Dr. Faruqi. We make no order as to costs.

Application disallowed

Criminal

1932

May 11

Banerji, J.

SHARDA PRASAD

versus

KING-EMPEROR THROUGH PIARI*

Criminal Procedure Code, Secs. 488 and 489(2)—Civil suit for restitution of conjugal rights—Within a month wife takes proceedings under Sec. 488 Cr. P. C.—Civil suit decreed ex parte—*Proceedings under Sec. 488 not* bona fide—*Whether criminal court should pass orders under Sec. 488 ignoring civil court decree.*

A civil suit was instituted by the husband against his wife for restitution of conjugal rights. Within a month of the filing of the civil suit the wife took proceedings under Chapter XXXVI Criminal Procedure Code (Of the Maintenance of Wives) and the husband denied that he had ever ill-treated her and no specific questions were put to him to prove ill-treatment. The civil suit was decreed *ex parte*. *Held*, that the proceedings under Chapter XXXVI were not *bona fide* and were taken for the purpose of ignoring any decree that the civil court may pass, and the fact that the civil court decree was passed *ex parte* or after contest was immaterial, and this was not a case in which any order under Sec. 488 Cr. P. C. should be passed.

Rajpatti v. *Emperor*, 22 A. L. J. 806 *distinguished*.

Criminal Revision from an order of P. C. Plowden Esq., Sessions Judge of Bareilly.

Hari Pal Varshni for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Banerji, J.

Banerji, J.—This is an application in revision by one Sarda Prasad against an order of a magistrate directing payment of Rs.8 per month as maintenance to the opposite party, Mst. Piari. This order was confirmed by the learned Sessions Judge.

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*Cr. Rev. 148 of 1932

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v.
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Banerji, J.

Although the order of the Special Magistrate 1st class directed the petitioner to pay Rs.8 per month to the applicant, it seems that the learned Sessions Judge in revision considered that that order was an order that the amount should be sent to the City Magistrate of Bareilly by money order. Why, I am unable to understand. The fact that the woman's father is the servant of the City Magistrate is no reason for considering that any order for payment of maintenance must mean that the amount should be sent through the City Magistrate.

It seems to me perfectly clear that the proceedings that were taken in the criminal courts at Bareilly were *mala fide* proceedings, taken for the purpose of nullifying any order that a civil court may pass in a pending suit in the Allahabad civil courts. On June 12, 1931 a civil suit was instituted by Sarda against his wife, Mst. Piari, for restitution of conjugal rights. This lady never took the trouble of defending the suit, but instead of defending the suit took proceedings on July 6, 1931 under Chapter XXXVI of the Code of Criminal Procedure. The application was originally filed in the court of the city magistrate, who is the employer of the petitioner's father, but the city magistrate very properly transferred it to a Special Magistrate of the 1st class.

I have read the judgment of the learned Special Magistrate. It seems to me that elaborate arguments were addressed to him. English cases were cited and the learned magistrate took great pains in deciding the first issue, which he has decided correctly, that he has jurisdiction to try the case. As regards the second point whether the civil court decree had any bearing or not it seems to me that the learned magistrate has gone wrong. The civil court decree, although *ex parte,* cannot be ignored by the criminal court. The ruling of Mr. Justice Boys, *Rajpatti* v. *Emperor*[1], referred to by the learned magistrate clearly has no application whatsoever to the facts of this case. In that case a civil court decree for restitution of conjugal rights had been passed and the wife had obeyed the decree and 13 months afterwards by reason of the husband's ill-treatment had left the husband's house and under those circumstances it was not considered incompetent for the criminal court to take action and pass orders under Sec. 488 Cr. P. C.

In this case it seems to me that this application of Mst. Piari was put in deliberately for the purpose of ignoring any decree that the civil court may pass. It is clear to me that under the Code of Criminal Procedure it was not the intention of the legislature that parties who wanted relief under Chap. XXXVI should ignore all decrees that may be passed by a civil court. In fact the 2nd clause of Sec. 489 makes it clear that if in consequence of any decision of a competent civil court any order under Sec. 488 requires to be amended, the court was to amend it or cancel the order. This, to my mind, shows clearly that the legislature never contemplated that a criminal court should ignore a civil court decree.

It is immaterial whether a civil court decree was passed *ex parte* or after contest. It may be that a party may consider that his or her statement is so ridiculous that no civil court will pay any attention. There are

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[1] 22 A. L. J. 806

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Banerji, J.

well known rules which prevent a civil court from ordering restitution of conjugal rights against a wife where the wife can show reasons that such a decree should not be passed. In this case it seems to me that the proceedings that were taken were not *bona fide* and after examining the record I am of opinion that the finding of the learned Special Magistrate is in fact wrong. He has misread the two letters which he has referred to. I have had the letters read and my opinion is that those letters do not indicate anything of what the learned magistrate says they do.

Sarda has been examined in the case as a witness for his wife and he has denied that he had ever ill-treated his wife. If it had really been a fact that he had ill-treated his wife I have no doubt whatsoever that specific questions would have been put to him to prove the ill-treatment. I am not satisfied that this is a case in which any order under Section 488 Cr. P. C. should have been passed. I set aside the order of the Special Magistrate 1st class dated June 16, 1931 directing payment of a sum of Rs. 8 per month to the complainant Mst. Piari. I make no order as to costs.

Order set aside

CIVIL

1932

June 28

SULAIMAN, C. J.
MUKERJI, J
KING, J.

BHAJANI LAL AND OTHERS (*Applicants*)
versus
THE SECRETARY OF STATE (*Opposite party*)*

Land Acquisition Act, Sec. 18 and Civil Procedure Code, Sec. 115—Order passed by Collector under Sec. 18 refusing to make reference to the District Judge—Whether High Court has jurisdiction to revise the order.

The Collector, when acting under Sec. 18 of the Land Acquisition Act, is acting administratively and not judicially, and not as a 'court', and he could not in any case be acting as a court "subordinate to the High Court", and no revision therefore lies to the High Court under Sec. 115 C. P. C. from an order passed by the Collector under Sec. 18 refusing to make a reference to the Court of the District Judge.

Case law discussed.

CIVIL REVISION from an order of BABU SHAM CHANDRA, Land Acquisition Officer, L. S. Z. Railway, Jaunpur.

Kedar Nath Sinha for the applicants.

U. S. Bajpai for the opposite party.

The judgment of the Court was delivered by

King, J.

KING, J.—This reference arises from an application under Section 115 of the Code of Civil Procedure for the revision of an order passed by a Collector under S. 18 of the Land Acquisition Act, 1894, refusing to make a reference to the court of the District Judge.

A preliminary objection was raised that the High Court has no jurisdiction to revise the order as it is not an order passed by a court subordinate to the High Court. The division bench before which the application was heard was of the opinion that the case raised a substantial question of law requiring an authoritative pronouncement and accordingly directed the case to be laid before the Hon'ble Chief Justice for the constitution of a larger Bench.

Some land belonging to the applicant was acquired under the Land Acquisition Act. The Collector made an award. The applicant refused to accept the award on the ground that the compensation offered was quite inadequate and sent an application to the Collector requiring him to refer the matter under S. 18 to the civil court for determination.

The Collector passed the following order dated October 17, 1930:

> This application was received by post in contravention of Rule 2 Board Circulars II-6 and is unstamped. No action can therefore be taken upon it. Rejected and filed. Inform applicant.

The question is whether the High Court can interfere with this order in exercise of its revisional powers under S. 115 C. P. C.

There is much conflict of judicial authority on this point. The rulings which have been cited before us show that the High Courts at Madras, Bombay and Lahore take the view that no revision lies, whereas the High Courts at Calcutta and Patna and the Chief Court of Oudh are of the contrary opinion.

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*Civ. Rev. 359 of 1931

The first question is whether the Collector, in refusing to make a reference under S. 18, is acting "judicially".

When we speak of the "Collector" we mean the Collector as defined for the purposes of the Land Acquisition Act. It has been authoritatively ruled by their Lordships of the Privy Council in *Ezra* v. *The Secretary of State for India*[1] that the proceedings of the Collector, resulting in the award, are administrative and not judicial. Their Lordships were only dealing with the award and the proceedings leading up to the award, and it has been held by certain learned Judges that a distinction should be drawn between the functions exercised by a Collector under Part II of the Land Acquisition Act (relating to the proceedings resulting in the award) and the functions exercised by him in Part III of the Act, which relates to the judicial determination of claims made by persons interested who have not accepted the award. For instance, it has been held in *Administrator-General of Bengal* v. *The Land Acquisition Collector*[2] that Part III of the Act relates to proceedings in court and that the Collector in rejecting the application under Section 18 was a "court" and was acting judicially, and therefore it was held that his order was subject to revision by the High Court. In *Sarswati* v. *The Land Acquisition Deputy Collector, Champaran*[3] the learned Judges held that under the statute the first step in the judicial proceeding was a reference by the Collector, and the first step in a judicial proceeding must be held to be a "judicial step". With due respect to the learned Judges, we are unable to agree to this view. We are bound to hold, on the authority of *Ezra's* case, that the Collector throughout the proceedings resulting in the award was acting as an administrative officer and not as a judicial officer. It seems to us very difficult to hold that the Collector, in making or refusing to make a reference under S. 18, has suddenly changed his official position and is acting judicially and not administratively. There must be a presumption of continuity. It is true that the Collector, when an application is made to him under S. 18, has to see whether the application is within time, and is otherwise in order, but we are not prepared to hold that merely because he has to consider certain points before making the reference, he therefore must be deemed to be acting judicially and not as an administrative officer. The functions which he performs under Part II of the Act are very similar to judicial functions. He even has the power of compelling the attendance of witnesses, as if he were a civil court and he certainly has to determine to the best of his judgment the proper compensation which should be given to the persons interested in the land. If the Collector in making such decisions is not acting judicially, we fail to see why he should be deemed to be acting judicially when making a reference under S. 18. Although *Ezra's* case does not directly decide whether the Collector is acting as an administrative officer or as a judicial officer when making a reference under S. 18, their Lordships expressly refer to S. 18 as one of the sections from which it could be inferred that the Collector is not acting as a judicial officer. Moreover, their Lordships approve the reasoning in the judgment of the Calcutta High Court which was under appeal, and in that judgment the High

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[1] I. L. R. 32 Cal. 605 at 629

[2] 12 C. W. N. 241

[3] 2 Patna L. J. 204

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King, J.

Court had clearly taken the view that the Collector is in no sense of the term a judicial officer, nor is the proceeding before him a judicial proceeding. They also refer (at p. 619) to S. 18 as showing that the Collector is not a court. In our opinion, the Collector is not suddenly converted from an administrative officer into a judicial for the purpose of making or refusing to make a reference under S. 18, and he continues to act as an agent of Government, in an administrative capacity, throughout.

If it be conceded for the sake of argument that the Collector in refusing to make a reference under S. 18 is acting "judicially", then the question arises, whether he should be deemed to be a civil court. The word "court" is not defined for the purpose of S. 115 of the Code of Civil Procedure, but we think it must be an essential characteristic of a "court" that it should have power to determine questions in dispute, between litigants, upon the merits. The Collector has no power to determine upon the merits the questions raised by the application submitted to him under S. 18. He is merely required to refer the question for determination to the court of the District Judge. The only question that he himself is called upon to examine is whether the application is in conformity with the requirements of S. 18. Even if it be held that he decides that question judicially, it does not necessarily follow that he is a "court". A registration officer in deciding that a document should not be admitted to registration might be held to decide the question "judicially" but in our opinion the registration officer does not, for that reason, become a "court".

The argument advanced before us that the Collector must be considered a "component part" of the District Judge's court, because he initiates or refused to initiate judicial proceedings in that court, seems to us too far-fetched and unconvincing to merit discussion. We may add that the word "require" which is used in S. 18 with reference to the Collector seems more appropriate to an administrative officer than to a court. For these reasons we hold that the Collector is not a "Court".

Finally, if it be admitted for the sake of argument that the Collector is a "court", we think that he certainly is not a court subordinate to the High Court. The High Court has no appellate jurisdiction over the Collector and for that reason it is difficult to hold that the Collector is a court subordinate to the High Court, even if he is a "court" in any sense of the word. Section 55 of the Land Acquisition Act gives power to the Local Government to make rules for the guidance of officers in all matters connected with the enforcement of the Act. This would, in our opinion, include power to make a rule for the guidance of a Collector when receiving an application under S. 18. No authority is given to the High Court to make rules for the guidance of the Collector and for this reason also we think that the Collector cannot be held to be subordinate to the High Court.

As the Collector is an officer of the revenue department he would presumably be sitting as a revenue court, if he were sitting as a court of any description. In the present case, it is perfectly clear that the Collector believed himself to be acting as a revenue court, because he refused to accept the application on the strength of a rule made by the Board of Revenue for the guidance of revenue courts. The Board of Revenue are also clearly of opinion that a Collector acts under S. 18 either as a revenue officer or as a revenue court, because they have made rules (Board Circulars I—VIII, Rules 28 and 29) for his guidance. In our opinion he is acting as an administrative officer of the Revenue Department but not as a revenue court. In any case he is not subordinate to the High Court.

As we hold that the Collector was not acting judicially, and not acting as a "court", and that he could not in any case be acting as a court "subordinate to the High Court", we think it is clear that no revision lies under S. 115 C. P. C.

We agree generally to the views expressed by the Full Bench of the Madras High Court in *Abdul Sattar* v. *Special Deputy Collector, Vizagapatam Harbour*[4] but we would go further in holding that the Collector was not even acting "judicially".

The Bombay High Court in *Balkrishna* v. *The Collector of Bombay Suburban*[5] hold that no revision lies in such a case, but they were doubtful whether the Collector should be considered to be a "court" when acting under S. 18.

Our view is also supported by the Lahore High Court in *Mushtaq Ali* v. *The Secretary of State*[6].

We may also refer to a decision of our own High Court in the *Secretary of State for India in Council* v. *Bhagwan Prasad*[7]. In that case the question for decision was different, but the learned Judges clearly stated their opinion that the Collector when acting under S. 18 of the Land Acquisition Act, was acting in administrative capacity and not in a judicial capacity.

The Oudh Chief Court took a contrary view in *Ahmad Ali Khan Alawai* v. *The Secretary of State for India*[8]. They were of the opinion that as the proceedings in Part III of the Act are judicial, the reference by the Collector under S. 18 which starts the proceedings, should be treated as a judicial order. They seem to have assumed that if the Collector was acting judicially, he must be a "court" and must further be a "court subordinate to the High Court". With due deference, we cannot agree to this view and we note that the learned Judges relied upon the cases *Secretary of State* v. *Jiwan Baksh*[9] and *T. K. Parmeshwara* v. *The Land Acquisition Collector, Palghat*[10]. Apparently, it was not brought to their notice that both these cases had been overruled by subsequent decisions of the same High Courts.

It is objected that if the Collector's order refusing to make the reference is not open to revision by the High Court, then the applicant has no remedy. It would no doubt be open to the applicant to petition the commissioner or the Local Government to direct the Collector to make a reference. If any further remedy is considered necessary, then we think it is for the legislature to provide some appropriate remedy.

[4] I. L. R. 47 Mad. 357

[5] I. L. R. 47 Bom. 699

[6] A. I. R. 1930 Lah. 242

[7] 1929 A. L. J. 1186

[8] A. I. R. 1932 Oudh 180

[9] 67 P. R. 1916

[10] I. L. R. 42 Mad. 231

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As we hold that we have no power of interference, it is unnecessary to express any opinion upon the merits of the Collector's order. We can only suggest that the Local Government should make it clear by statutory rules or departmental instructions, what procedure should be adopted by a Collector when receiving an application by post. It may be pointed out that in *Shiva Sundari Dasi* v. *The Collector of Cawnpore*[11] a Collector did receive such an application by post and raised no objection. The question of a court-fee upon the application might also be made clear. Under S. 19(22) of the Court Fees Act, an "application for compensation" under the Land Acquisition Act is expressly exempted from being chargeable with a court-fee. In the present case, the application is not for payment of compensation but it is for determination of compensation and the Collector might be in doubt whether any court-fee is chargeable on such an application.

As we have no power to interfere under S. 115, we dismiss the application with costs.

Application dismissed

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[11] 2 A. L. J. 784

AN ADVOCATE OF BENARES—In the matter of*

Civil
1932
May 26
Young, J.
Pullan, J.
Niamatullah, J.

Legal Practitioner—Advocate made deliberately false imputations upon fairness of judicial officers—In proceedings connected with a case to which he was himself a party—Whether advocate can be punished by suspension or removal from practice.

Where an advocate deliberately made false allegations involving imputations upon the fairness and impartiality of two judicial officers in proceedings connected with an execution case *to which he was himself a party; held,* that it was not competent for the High Court to punish the advocate on the disciplinary side under the Indian Bar Council Act and to suspend or remove him from practice. All that the court could do was to punish him for contempt of court.

In the matter of Thomas James Wallace, L. R. Privy Council, Vol. I at 283 *followed. Shashi Bhushan* v. *Sarbadhicari,* I. L. R. 29 All. 95 *distinguished.*

Hasan Imam, A. Sanyal and *Kumuda Prasad* for the applicant.

U. S. Bajpai for the Crown.

The judgment of the Court was delivered by

Young, J.

Young, J.—Complaint having been made by one Suraj Prasad Dube on November 26, 1929 against Mr. Bahadur Lal, an advocate enrolled in this Court, this Court under the Bar Council Act, Section 10, referred the matter to the Bar Council for enquiry and report. In due course the Bar Council nominated a Tribunal for the above purpose. Several charges had been formulated against the advocate. Three charges were withdrawn by permission of the Tribunal and they also found as regards those charges that they were not proved. The charges which were pressed against the advocate were (1) that he deliberately made false allegations involving imputations upon the fairness and impartiality of two judicial officers in pro-

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*Mis. Case 645 of 1931

CIVIL

1932

AN ADVOCATE OF BENARES *In re*

Young, J.

ceedings connected with an execution case to which he was himself a party, (2) that he made contradictory statements in two proceedings arising out of suit No. 236 of 1921 in the court of the Subordinate Judge of Benares, with the object of supporting the claim of his brother, Jawahir Lal in suit No. 60 of 1928, and (3) that he filed an objection in execution case No. 61 of 1928 in the court of the Additional Subordinate Judge of Benares, in which he set up a false settlement.

With regard to the first charge the Tribunal found that the judicial officers themselves accepted an apology from the advocate, that that amounted to a composition of the offence, that the composition amounted to an acquittal and that therefore the advocate must be deemed to have been acquitted of this charge. The Tribunal submitted on this that if they were right as to the effect of the apology, their finding would be that the charge was not proved, but that if their view was erroneous then their finding would be that the charge was proved. With regard to the second charge, the Tribunal found the charge proved, and with regard to the third charge, they found it also proved.

Notices have been served upon the advocate and the Government Advocate. The advocate is represented by Mr. Hasan Imam of the Patna Bar, and the Government Advocate represents the Crown.

With regard to the first charge, it is unnecessary for us to come to a conclusion as to whether the view of the Tribunal is correct in law or not. There is no doubt that the advocate committed a gross contempt of court in his allegations in the applications filed by him, against the judicial officers. He has admitted that the allegations were unfounded, and it is obvious to us that there was no foundation whatever for the gross attacks made upon the judicial officers. The question which we have to decide is whether it is possible for this Court to punish the advocate on the disciplinary side under the Indian Bar Council Act and to suspend or remove him from practice. We have been referred to a decision of their Lordships of the Privy Council *in the matter of Thomas James Wallace*[1]. In that case a barrister of the supreme court of Nova Scotia committed a gross contempt of court in his capacity as a private suitor and not in his capacity as an officer of the court. The court suspended the barrister from practising, and he appealed to the Privy Council. The Privy Council held that it was not competent for the court to punish him by suspension for the contempt. All that the court could do was to punish him for contempt of court. Their Lordships of the Privy Council said that it was an offence

> committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character or anything done by him professionally, either as an advocate or an attorney. It was a contempt of court committed by an individual in his personal capacity only.

Their Lordships further found that there was no element of moral delinquency in the charge against the barrister, and that the offence might adequately be punished in the ordinary way as contempt of court. It would appear from this decision that this Court cannot deal with the advocate

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[1] Vol. 1, L. R. Privy Council at 283

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AN ADVOCATE OF BENARES *In re*

Young, J.

in this case for professional misconduct. The learned Government Advocate relied upon the case of *Shashi Bhushan Sarbadhicari*[2]. In our view, that case is clearly distinguishable. The advocate concerned had been engaged as counsel in a case before the High Court. He was reprimanded by the court, and he thereafter in his capacity of editor of a newspaper published an article which amounted to a contempt of court. In that case the High Court suspended the advocate for four years, and he appealed to the Privy Council. Their Lordships of the Privy Council in their judgment distinguished this case from the case in *re. Wallace* on the ground that the matter arose through the conduct of the advocate in conducting a case in his professional capacity before the court, and the contempt which he committed was in order to vindicate his professional conduct as an advocate. We consider that in the case before us we are bound by the decision *in re Wallace,* and therefore cannot pass an order against him under the Bar Council Act on this charge.

[Their Lordships then discussed the evidence and held the second charge not proved and third charge proved, and continued as follows:—]

There only now remains the question of what sentence the court should pass. It is clear that the advocate has been guilty of misconduct involving moral turpitude. He has falsely verified an application and he has endeavoured to deceive the court and to deprive the decree-holder of money due to him. While we must look upon the misconduct of the advocate as serious, we have been impressed by the appeal of his counsel Mr. Hasan Imam in mitigation of sentence. We agree with the finding of the Bar Tribunal that the complainant did not file his complaint out of any high sense of public duty and that Raja Sir Motichand who has been engaged in litigation with the advocate in his personal capacity, is behind the application and has paid the expenses of the applicant. The application has been made out of a desire further to harass the advocate. The advocate himself has been engaged for some years in private litigation of an onerous nature. As regards the particular charge of which he has been guilty, it must have been extremely irritating to him to find the assignee of the debt purchasing it for such a small sum. There must have been great temptation, after having paid the sum of Rs.1,100 to the decree-holder, who had only paid Rs.125 for the debt to endeavour to avoid payment of the balance. Further the whole amount of the balance has since been made good to the decree-holder. We take also into consideration that the advocate was not acting for a client in this matter, but was engaged in his own litigation, and that in the end no one has suffered by his action. He has further been subjected to heavy expenses in defending himself upon all these charges, some of them, at any rate, being without any substance. On the whole we think that justice will be satisfied in this case by an order suspending the advocate from practice for the term of three calendar months, and we order accordingly.

Suspension ordered

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[2] I. L. R. 29 All. 95

CIVIL

1932

Feb. 22

PULLAN, J.

KING-EMPEROR

versus

ABDUL *alias* ABDUL KARIM AND ABDUL HASAN*

Penal Code, Sec. 366—Offence under—When made out—Kidnapping or abduction from lawful guardianship—Necessary ingredient.

In order to prove an offence under Sec. 366 Penal Code, it is necessary to show that the girl or woman had been kidnapped or abducted from lawful guardianship.

A man who commits sexual intercourse with a girl in a field near her own home without having any intention of taking her away with him is not guilty of an offence under Sec. 366 Penal Code; but a man who has intercourse with a minor girl even with her consent is guilty of the offence of rape.

CRIMINAL APPEAL from an order of BABU RAM UGRAH LAL SRIVASTAVA, Sessions Judge of Bijnor.

K. O. Carleton for the appellants.

Sankar Saran (Government Pleader) for the Crown.

The following judgment was delivered by

Pullan, J.

PULLAN, J.—Musammat Buddo, a Chamar girl, who is said to be between 14 and 16 years of age, went to a police station on January 19, 1931 and made a report which is taken to be one under Section 354 I. P. C. against four persons, two of whom, Abdul Karim and Abdul Hasan, are now appellants in this Court. There is very little in the report and the girl's father Jagna was not satisfied with the fact that no investigation was made. He made a further complaint to the Superintendent of Police and investigation followed in which the following facts came to be known. The girl used to go to the house of these Mohammedans to do work. She knew them well and was on friendly terms with them. One day they called her into a sugar cane field and had sexual intercourse with her. They also dressed her up in some Mohammedan clothes which they subsequently removed. She never left the village and she was found shortly afterwards by her father on whose instigation she seems to have made the report on the following day. An attempt was made to show that these Mohammedans and others were in a conspiracy to abduct this girl to Simla for immoral purposes, but no such case is established by the evidence. It is, however, proved that the girl was seen with these men, that she went into a sugar cane field with them, and that she exchanged her clothes for Mohammedan clothes. Medical examination disclosed the fact that she was not a virgin, but no question was asked to the doctor as to whether she had been recently deflowered or was habituated to sexual intercourse. As she has never suggested that any violence was used to her, it is probable that she had submitted to these men on previous occasions. Both the appellants have been convicted of an offence under Section 366 I. P. C. In order that this offence may be proved, it is necessary to show that the girl or woman has been kidnapped or abducted from lawful guardianship. This girl was in the guardianship of her father as her *gauna* ceremony had

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*Cr. A. 1013 of 1931

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King-Emperor v. Abdul

Pullan, J.

not been performed, but I am unable to hold that she has ever left the guardianship of her father. She never appears to have gone more than a very short distance from her own home and there is nothing to suggest to my mind that the accused had any intention of taking her away. No doubt they amused themselves with her and dressed her up in some fine clothes in order to please her but this does not prove that they intended to take her away from home or to do anything more than have sexual intercourse with her. A man who commits sexual intercourse with a girl in a field near her own home without having any intention of taking her away with him is not guilty of an offence under Section 366 I. P. C. but a man who has intercourse with a minor girl even with her consent is guilty of the offence of rape. In the present case the accused were not separately charged with rape but they were both asked whether they had intercourse with the girl and they both said that they had not. Sexual intercourse in fact forms the principal part of the allegations made by the girl and there is no doubt that technical rape was committed. Although no specific charge of this offence was made, a conviction for rape may be passed by this Court under the provisions of Section 237 Cr. P. C. In my opinion the offence is not one which calls for heavy punishment. Already the accused have been put to considerable expense and they have spent some days in jail. I consider that they have been sufficiently punished. I alter the conviction from one under Section 366 to one under Section 376 I. P. C. and sentence them to so much rigorous imprisonment as they have already undergone and I maintain the order of fine. If the fine has already been paid they need not surrender to their bail. I confirm the order by which the amount of fine was paid to the girl by way of compensation.

Conviction altered

PARSOTTAMANAND GIRI (*Plaintiff*)
versus
MAYANAND GIRI AND OTHERS (*Defendants*)*

Civil

1932

May 2

King, J.

*Court-fees Act, Sec. 7, Cl. (v)—Suit for possession as Mahanth of properties attached to math—*Ad valorem *court-fee payable—"Possession"—Interpretation of.*

Sec. 7 (*v*) of Court Fees Act is applicable to suits for possession of immovable property and no distinction is made between a suit for possession as a beneficial owner, and a suit for possession as a trustee or as the manager of a religious endowment.

Where the plaintiff alleged that the defendant who was a mahant of a *math* had lost his title to mahantship owing to his marriage, illegal transfers of properties and other wrongful acts, and that the plaintiff had been duly elected as mahant in his place, and the plaintiff sued for possession as mahant of the properties attached to the *math*, including the properties which had been unlawfully transferred; *held*, that the court-fee was payable *ad valorem* under Sec. 7 (*v*) upon the value of the properties of the *math* and in calculating the value of such properties the temple itself should be left out of consideration as having no market value.

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*F. A. (not yet numbered) of 1930 (connected with F. A. 557 of 1930)

Case-law discussed.

REFERENCE under Section 5 of the Court Fees Act.

A. Sanyal for the appellant.

Gadadhar Prasad for the respondents.

The following judgment was delivered by

KING, J.—This is a reference under Section 5 of the Court Fees Act. The plaintiff alleged that defendant No. 1 who was a Mahant of a Math, had lost his title to Mahantship owing to his marriage, illegal transfers of properties and other wrongful acts, and that the plaintiff had been duly elected as Mahant in his place. The plaintiff sued for possession as Mahant of the properties attached to the Math, including the properties which had been unlawfully transferred. The suit was valued for the purposes of jurisdiction at Rs.2,30,242 and for the purposes of the court-fee at Rs.1,59,842 on which a court-fee for Rs.1,750 was paid. The plaintiff paid a further court-fee of Rs.525 under a subsequent order of the Court. The suit was partially dismissed and the plaintiff appeals. He has valued his appeal at Rs.1,59,842 and has paid a court-fee of Rs.10 only. He contends that it was by mistake that an *ad valorem* court-fee had been paid in the trial court and the proper court-fee would have been Rs.10 in the trial court and the same in the appellate court. The appellant's argument is that he is not claiming the property as a proprietor but is only seeking possession as manager or Mahant. He is only asking for such possession as pertains to the office of a Mahant, and the subject-matter in dispute is not capable of valuation, so a court-fee of Rs.10 only is payable under Article 17, Clause (*vi*) of Schedule II.

Apart from authority it would seem that the suit is for possession of immovable property and that the court-fee should be governed by Section 7, Clause (*v*). This clause is applicable to suits for possession of immovable property and no distinction is made between a suit for possession as a beneficial owner, and a suit for possession as a trustee or as the manager of a religious endowment.

The appellant has cited several rulings but none of them are directly applicable to the facts of this case.

In *Thakuri* v. *Bramha Narain*[1] the suit was under Section 539 of the old Code of Civil Procedure, which corresponds to Section 92 of the Code of 1908. The plaintiff sued for a declaration that certain property was endowed property and for the appointment of himself as superintendent of the endowment and for an injunction forbidding the defendant to interfere with his management. It was held that the relief regarding the appointment of the plaintiff as superintendent of the religious endowment was governed by Section 17, Clause (*vi*) as it was not capable of valuation. This case is distinguishable because the plaintiff did not seek possession of the property. On the other hand, he did not claim to be appointed as superintendent whereas the plaintiff in this case alleges that he has already been appointed as Mahant and seeks possession of the property.

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[1] I. L. R. 19 All. 60

The case of *Girdhari Lal* v. *Ram Lal*[2] was also a suit under Section 539. The plaintiffs claimed that new superintendents should be appointed for the management of the endowed property and that the property should be taken from the defendant and placed in the possession of the new superintendents. Here, again, it was held that the court-fee was governed by Section 17, Clause (*vi*) but the case is distinguishable because the plaintiffs claimed nothing for themselves personally: they only asked that the trust property should be placed in the possession of the new superintendents whoever they might be. It was not contended that it was a suit for possession of trust property.

In *Rajagopala Naidu* v. *Ramasubramania Ayyar*[3] the plaintiff prayed for a declaration that he was entitled to manage a temple and to appoint and remove the trustees and prayed for possession of the temple and the properties attached thereto. It was held that the temple had no market value so the suit, in so far as it was a suit for the possession of the temple, was governed by Article 17, Clause (*vi*). It appears that the other properties which were attached to the temple, had been valued in the plaint and an *ad valorem* court-fee had been paid. This case therefore cannot be said to be any authority in favour of the appellant. The suit was held to be a suit for possession of immovable property and an *ad valorem* court-fee was paid on the value of the property attached to the temple but it was held that the temple itself had no market value. The question referred to the Full Bench "whether on a claim by a trustee for possession of trust properties for the purpose of proper administration of that trust he will have to pay court-fee on the value of the trust property, or whether in that case he is only bound to pay the nominal amount of Rs.10 or Rs.15" was left undecided.

In *U. Pyinnya* v. *U. Dipa*[4] the suit was by trustees for the possession of a Phongyi Kyanng which is a building for the residence of monks. The court held that such a building (Like a Hindu temple) had no market-value and Article 17, Clause (*vi*) was applicable to the suit for possession of such a building. The ruling in *Rajagopala Naidu* v. *Ramasubramania Ayyar*[5] was followed. In the present suit it is admitted that the properties attached to the Math have a market-value. The value of the temple itself should be excluded, on the strength of the rulings cited, but the properties attached to the temple have a market-value, and the Madras ruling is an authority for holding that a court-fee should be paid on the valuation of such properties.

Several rulings have also been cited by the stamp reporter in support of the contention that a court-fee should be paid *ad valorem* on the valuation of the property in suit.

In *Basawa Singh* v. *Sardarni Bhagwan*[6] the suit was for the removal of the manager of a religious institution. It was held by the Punjab Chief Court that this was "practically a suit for possession" of the endowed property and that a court-fee should be paid by *ad valorem* upon the value of the property. This ruling certainly supports the stamp reporter's contention.

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[2] I. L. R. 21 All. 200

[3] I. L. R. 46 Mad. 782

[4] A. I. R., 1929, Rang. 134

[5] I. L. R. 46 Mad. 782

[6] 17 I. C. 270

In *Sonachala* v. *Manika*[7] the suit was for the removal of the manager of a charitable endowment and for the appointment of the plaintiff as manager. The plaintiff did not claim possession of the property but it was held that the plaintiff was bound to ask for possession and that a suit for possession of trust property falls under Section 7.

Manni Lal v. *Radhe Gopalji*[8] and *Raghunath Ganesh* v. *Gangadhar Vikaji*[9] have also been cited but they are not directly in point. They were both suits for a declaration that the plaintiff is the lawful manager of a religious endowment and for an injunction restraining the defendant from interfering with the plaintiff's management. It was held that a court-fee was governed by Section 7, Clause 4, Sub-clause (*c*) as the suit was for a declaration where consequential relief is prayed. Possession was not prayed for in either of these suits, so the rulings have no direct bearing upon the point under consideration.

In the case of *Syed Mohammad Gouse*[10] the facts were very similar to those of the case now in question. The suit was for a declaration that the plaintiff is the Sajjada Nishin of a Dargah and for possession of its properties. It was argued in that case also that the subject-matter in dispute was the right of management of a religious endowment and that such subject-matter is incapable of valuation. It was also argued that as the plaintiff was only suing for trusteeship and had no beneficial or personal interest in the properties, no *ad valorem* court-fee should be paid. Both these contentions were repelled and it was held that the court-fee was payable under Section 7, Clause (*v*). I agree with the learned Judge who decided that case that the question whether the plaintiff has or has not any beneficial interest in the properties does not make any difference as regards the court-fee payable by him. The Legislature lays down certain rules governing the court-fees payable on suits for possession of immovable properties and I see no justification for interpreting "possession" as meaning "possession as beneficial owner".

I hold that the court-fee is payable *ad valorem* under Section 7, Clause (*v*) upon the value of the properties of the Math. In calculating the value of such properties the temple itself should be left out of consideration as having no market value.

[7] I L R 8 Mad. 516

[8] I. L. R. 47 All. 502

[9] I L. R. 10 Bom. 60

[10] 83 I. C. 209

Civil

1932

April 20

Sulaiman, C. J.
Iqbal Ahmad, J.

QASIM HUSAIN BEG (*Defendant*)
versus
KANIZ SAKINA (*Plaintiff*)*

Majority Act, Sec. 2(a)—'To act in the matter of dower'—Meaning of—Mohammedan woman—Major by her personal law but minor under Majority Act—Whether capable of relinquishing her dower—Mohammedan Law—Dower—Relinquishment as consideration for obtaining khula—*Right to reclaim dower cannot be exercised after expiry of period of* iddat.

A Mohammedan woman who is a major by her personal law but a minor under the Indian Majority Act is capable of relinquishing her dower as consideration for obtaining *Khula*—a form of divorce recognised by the Mohammedan Law, inasmuch as to relinquish dower is 'to act in the matter of dower' within the meaning of Sec. 2(*a*) of the Indian Majority Act. *Mozharul Islam* v. *Abdul Gani Ala,* 80 I. C. 914 *relied on. Ali Dhunimsa Bibi* v. *Mahammad Fathi Uddin,* 41 Mad. 1026 *dissented from.*

Where a Mohammedan woman relinquishes her dower as consideration for obtaining *Khula,* it is open to her to reclaim her dower at any time during the *'iddat'* and she cannot exercise the option after the expiry of the period of *'iddat',* when the husband's right to revoke the divorce is automatically put an end to.

Second Appeal from a decree of J. Allsop Esq., District Judge of Aligarh, modifying a decree of Maulvi Sirajuddin, Munsif of Koil.

Zafar Mehdi and *Hyder Mehdi* for the appellant.

A. M. Khwaja and *M. I. Khwaja* for the respondent.

The judgment of the Court was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—This is a defendant's appeal arising out of a suit for recovery of half the dower debt on the ground that the defendant has divorced the plaintiff and that there had been no consummation of marriage. The plaintiff's case was that the defendant without the knowledge or consent of the plaintiff and without any relinquishment of the dower debt pronounced divorce which put an end to the first marriage. The claim was resisted by the defendant on the ground that at the time of the marriage, fraud and misrepresentation were practised by the plaintiff's guardian, viz., her father, and the marriage was voidable and therefore no claim for dower could be maintained. It was further pleaded that owing to the fact that the plaintiff's maternal aunt was a woman of low caste, the defendant wanted to repudiate the marriage and then it was agreed that there could be a *Khula* in consideration for the relinquishment of the dower, and that the *Khula* was ultimately gone through by the plaintiff through the medium of her father in the presence of maulvies.

Both parties produced oral evidence. On behalf of the plaintiff, she herself, her father and other witnesses were produced who denied that there had been any relinquishment of the dower either by her or by her father and asserted that it was a simple case of divorce. They also tried to make out that there had been no disagreement on the ground of a subsequent discovery of the low parentage of the plaintiff. On the other hand, the defendant went into the witness-box and told a story that when he discovered the fraud and misrepresentation, he insisted on a separation and that it was agreed between the parties that a *Khula* should be obtained; that he actually went to the house of the plaintiff and at first the plaintiff relinquished her dower in order to obtain the *Khula,* that then the plaintiff's father and the defendant along with witnesses went to maulvies and in their presence the father stated that she had relinquished her dower and that he as her guardian also relinquished the dower and it was in consideration of such relinquishment that *Khula* was obtained and Talaq was pronounced by the defendant.

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*S. A. 1049 of 1929

The learned District Judge has come to the conclusion that the defendant's part of the story is correct-and it appears that it was sometime afterwards when the defendant discovered that the plaintiff's grand-mother on her mother's side was a sweeper woman, he no longer desired to have anything to do with his wife: that the parties had never lived together and ultimately Qasim Husain and the plaintiff's father came to an arrangement. The learned Judge has mentioned that they went to a maulvi in whose presence the divorce was pronounced in the *Khula* form together with the *Talaq* form, and that it was agreed that the woman would give up her dower. To this extent the plaintiff's case that there had been no relinquishment of the dower was found to be untrue. The learned Judge has further found that she had attained the age of puberty being about 16 or 17 years of age at the time, but that she had not attained the age of 18 years so as to be a major under the Indian Majority Act. His conclusion is that the Indian Majority Act applied to her and that she was not competent to relinquish her dower and it was open to her to go back upon such relinquishment and reclaim the dower. He has however considered that it was never the case of either party that the marriage was still existing. Such a case was undoubtedly set up in the written statement, but does not appear to have been pressed before the learned Judge.

The learned Judge has not recorded a clear finding as regards the case, that the plaintiff herself had agreed to relinquish her dower debt. On that point the evidence of the parties was conflicting.

We have accordingly got the oral evidence read out to us and in particular we have had the statement of the plaintiff, her father, and the defendant read out to us. It seems to us impossible to believe that when the plaintiff was 16 or 17 years of age, her father would have agreed to go through the form of *Khula* on her behalf and relinquished her dower debt without consulting her in the first instance. We find it most difficult to conclude that he would have acted in such a manner without having previously obtained her consent and authority. It is quite obvious that he was confronted with the disclosure of the parentage of the plaintiff which had not been made known to the defendant at the time of the marriage and instead of creating a scandal he agreed to obtain *Khula* from the husband. The denial of the plaintiff and her father that there was never a relinquishment of the dower has been found to be untrue, and we have no hesitation in accepting the defendant's version, which is consistent with the probabilities of the case that the *Khula* form had been obtained with the approval and authority of the plaintiff.

It now remains to consider the questions of law which arise in this case. The Madras High Court in the case of *Abi Dhunimsa Bibi* v. *Muhammad Fathi Uddin*[1] expressed the view that

> a relinquishment of her right to dower by a Mohammedan woman, who is a minor under the Indian Majority Act, is invalid under the Contract Act, inasmuch as to relinquish dower is not 'to act in the matter of dower' within the meaning of Section 2 of the Indian Majority Act.

This view has not been followed by a Bench of the Calcutta High Court in the case of *Mozharul Islam* v. *Abdul Gani Ala*[2] where it has been held that

> if a Mohammedan minor who is a major by his personal law but a minor under the Indian Majority Act enters into a marriage, as he is capable of doing, he must himself enter into a contract for payment of dower.

We agree with the opinion expressed by the Calcutta High Court, that the settlement of dower or its relinquishment would come within the exceptions contained in Section 2 of the Indian Majority Act. That section provides that nothing contained in the Act "shall affect the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption". The agreement to pay a certain amount of dower is a part of the contract of marriage, and there is no reason to suppose that although a person, who is a minor under the Indian Majority Act, but a major under the Mohammedan Law, is capable of entering into a contract of marriage, he is incapable of fixing the amount of the dower. We think that on the same ground an individual who is a major under the personal law is capable of relinquishing the dower as consideration for obtaining *Khula*. *Khula* is a form of divorce recognized by the Mohammedan Law and comes within the exception.

If the Indian Majority Act had applied and the girl would have been a minor incapable of relinquishing her dower, then, as pointed out by the learned Judge who has referred this case to a higher Bench, the father as her guardian would have been competent to relinquish her dower debt on her behalf, as a consideration for the *Khula*. But when the Indian Majority Act does not apply, the father could not by his own relinquishment have bound her unless she had agreed to such relinquishment. We have found that her consent must have been obtained in this case. Indeed the plaintiff in the witness-box admitted that she came to know of this divorce about a month after it took place. There is no suggestion that she asserted any right to re-claim her dower debt. As a matter of fact she could not put forward such a case when the position taken up by her was that there had been no relinquishment of the dower. The suit was undoubtedly instituted more than three years after the *Khula* and the plaintiff has now admittedly married a second husband.

Mr. Tyabji in his Principles of Mohammedan Law, 2nd Edition, page 236, Section 165 (3), in stating the Shiah Isma'ili Law on this point has remarked as follows:—

[1] 41 Mad. 1026

[2] 80 I. C. 914

CIVIL

1932

QASIM HUSAIN BEG *v.* KANIZ SAKINA

Sulaiman, C. J.

The Shiah 'Ithna' Ashari authorities are agreed that the wife may re-claim the consideration paid by her for a 'khul' at any time during her *'iddat'*, and if she does so, the husband may revoke the 'khul' at his option.

The text of the Sharaya-ul Islam quoted by Mr. Shama Churun Sircar (Tagore Law Lectures, 1874) on Mohammedan Law, at page 412 is as follows:—

> When a woman's father says to her husband—"Divorce her, and thou art free from her dower", and he does divorce her, the divorce is valid re-*vocably,* and she is neither obliged to discharge her husband from the payment of the dower, nor is her father responsible.

There is another text:—

> If a stranger obtained *Khula* for a woman from her husband, it is valid, provided it was with her consent and authority, because the man acted only as her vakil, or agent.

As the husband cannot revoke the *Khula* after the expiry of the period of 'iddat', an irrevocable obligation is cast upon the wife to re-claim the consideration open to her *within the same period* so that the husband may have an equal option to put an end to the contract. Had there been no such irrevocable obligation it would have been grossly unfair to the husband that the *Khula* should stand as against him after the expiry of the period of 'iddat' and nevertheless the consideration for the *Khula* should be re-claimed by the wife after such an expiry. Surrender of the dower is a part of the contract of *Khula* and in the event of the consideration failing, there would be an option to revoke the *Khula.* It was open to the plaintiff to re-claim her dower, but she could not exercise the option after the expiry of the period which would automatically put an end to the husband's right to revoke the divorce.

There is no suggestion in this case that any such claim was put forward within the period of 'iddat' and as pointed out above the suit was not instituted till several years afterwards. We think that after the expiry of the period of 'iddat' the plaintiff's right to re-claim the dower which had been relinquished by her to her husband could not be exercised.

We accordingly allow the appeal, set aside the decree of the lower appellate court, and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed

CIVIL

1932

April 19

KING, J.
THOM, J.

AZIZ ULLAH KHAN AND OTHERS (*Applicants*)

versus

THE COURT OF WARDS, SHAHJEHANPUR (*Opposite party*)*

Civil Procedure Code, Secs. 151, 152 and 153—Property mortgaged—Misdescribed in mortgage deed, plaint, decree, sale certificate and dakhalnama *owing to accidental slip—Court empowered to make corrections necessary for ends of justice.*

The language of Sec. 152 C. P. C. is wide enough to cover the correction of mistakes made by the parties themselves. The power of the court to make corrections necessary for the ends of justice is not confined only to powers exercisable under Sec. 152. Extensive powers may also be exercised under Secs. 151 and 153.

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*Civ. Rev. 379 of 1931

CIVIL

1932

AZIZ ULLAH KHAN *v.* THE COURT OF WARDS, SHAHJEHANPUR

Where by an accidental slip the property mortgaged in village "Nawadiya Zamania Nagla" was described in the deed as "Nagla Zamania Nawadiya", but this misdescription was discovered only when the mortgagee, who in his suit upon the mortgage had purchased the property, obtained sale certificate and formal delivery of possession, applied for mutation, *held,* that this was eminently a case in which the accidental slip in the plaint, decree, sale certificate and *dakhalnama* should be corrected as the correction was necessary for the ends of justice. *Sheo Balak Pathak* v. *Sukhdei,* 12 A. L. J. 185 *followed. Ram Chander Sarup* v. *Munshi Mazhar Husain,* 51 I. C 55 *distinguished.*

CIVIL REVISION from an order of BABU LAKSHMI NARAIN TANDON, District Judge of Shahjehanpur.

Krishna Murari Lal for the applicants.

U. S. Bajpai for the opposite party.

The judgment of the Court was delivered by

King, J.

KING, J.—This is an application in revision against an order passed by the District Judge to the effect that a mortgage decree and certain connected documents be amended.

The applicant before us mortgaged certain zemindari property in a village called "Nawadiya Zamania Nagla", but by an accidental slip the property was described in the mortgage-deed as being situated in the village "Nagla Zamania Nawadiya". The words are the same, but the order has been inverted by an accidental slip. It is admitted that there is no village bearing the latter name or, at least, that there is no village of that name in which the mortgagor has or ever had any interest. There was never any doubt as to the identity of the mortgaged property.

The mortgagee brought a suit upon the basis of the mortgage, obtained a preliminary decree, which was upheld by the appellate court, obtained a final decree and brought the property to sale. The mortgagee himself purchased the property at the auction sale, obtained a sale certificate and obtained formal delivery of possession. Throughout all these proceedings the property was described erroneously as being situated in "Nagla Zamania Nawadiya" in accordance with the wording of the mortgage deed. It was not until the mortgagee, as auction-purchaser, applied to the revenue court to have his name mutated as purchaser of the share that the mistake came to light. The revenue court refused the application for mutation on the ground that the auction-purchaser, according to the sale certificate, had not purchased the property in Nawadiya Zamania Nagla.

The mortgagee then applied to the trial Judge asking him under Section 152 to amend the decree. The Subordinate Judge rejected the application on the ground that his decree had become merged in that of the District Judge and he had no jurisdiction to amend the decree. The mortgagee then applied to the District Judge for amendment of the decree and the connected proceedings, but the District Judge also held that he had no jurisdiction to decide the application as the applicant should have appealed from the order of the Subordinate Judge. The mortgagee then went up to the High Court in revision. A Bench of this Court decided that the District Judge had jurisdiction to hear and decide the application and

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returned the application to him for disposal. The District Judge having taken evidence to satisfy himself that there was, in fact, a misdescription of the property, granted the application for amendment.

It has been argued before us, firstly, that the court below purports to take action under Section 152 of the Civil Procedure Code and that that section applies only to mistakes made by the court or by its ministerial officers and not to mistakes made by the parties to the suit. The language of that section is, in our opinion, wide enough to cover the correction of mistakes made by the parties themselves. The applicant has relied upon a decision of this Court: *L. Ram Chander Sarup* v. *Munshi Mazhar Husain*[1]. In the judgment of that case their Lordships remarked:

> Section 152 deals with amendments of clerical errors in orders or decrees of the court itself which are drawn up not properly representing what the court decides.

In our opinion, this decision can be distinguished upon the facts. The correction, which the applicant in that case desired, was not the correction of a mere misdescription of property but a very substantial amendment. The applicant had, as a creditor, filed a claim for Rs.3,418 against the insolvent and had supported his claim by an affidavit. His claim was allowed to that extent. About two years later, he applied to the Insolvency Court stating that the real amount of his debt was about Rs.6,000 and by mistake he had stated that it was only Rs.3,418. The Insolvency Court decided that there had been no mistake and that the debt should remain entered in the schedule at the amount claimed by the applicant himself. Subsequently the applicant made a second application for correction to the same Court. The Insolvency Court rejected the application and it was held in revision by a Bench of this Court that Section 152 did not apply so as to enable the Insolvency Court, in the circumstances of that case, to make the amendment desired. The amendment in that case was, as we have already noted, of a very different nature from the amendment now in question. It was a very substantial and important amendment which would involve taking further evidence to ascertain the correct amount of the debt. This ruling moreover cannot be taken as a clear authority for the proposition that the Court is unable to correct a mistake made by the parties themselves. In an earlier portion of the judgment, the Court observed:

> No doubt the Insolvency Court has the same jurisdiction that the ordinary courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk *or of the parties themselves* upon a question of fact, when a mistake is established.

This ruling therefore is no clear authority against the action taken by the court below in making the amendment.

Another ruling, *Bala Prasad* v. *Kanoo*[2] has been cited to support the applicant's contention. In that case a certain field was mortgaged and in the mortgage deed the field was described by a wrong number. The error was not noticed by the parties throughout the proceedings in the subsequent mortgage suit and a decree was given for sale of the mortgaged property described by the wrong number. When the error was discovered in

[1] 51 I. C. 55

[2] 14 I. C. 407

the course of the execution proceedings the decree-holder instituted a suit for amendment of the decree. It was held by a single Judge of the Judicial Commissioner's Court of Nagpur that the suit was maintainable. Incidentally the question was discussed whether the plaintiff had a remedy under Section 152 of the Civil Procedure Code. The learned Judge expressed a very hesitating opinion on that point:

> I am inclined to think that Section 152 applies to mistakes which had an origin not anterior to the filing of the suit.

With due deference to the learned Judge we see no reason why the plain and literal meaning of the words should be restricted in the manner suggested.

For the opposite party we have been referred to a ruling of this Court in *Sheo Balak Pathak* v. *Sukhdei*[3] in which the Court ordered the amendment of the proceedings starting from the plaint right down to the decree. We have also been referred to an unreported decision of a Bench of this Court (of which one of us was a member) in *Rai Bahadur Doctor Sarju Kumar Mukerji* v. *Sheikh Enayat Husain* (Civil Revision No. 148 of 1929, decided on July 11, 1930). The facts of that case were very similar to the facts of the case before us and the Court ordered the correction of the documents in question, namely, the plaint, the decree and other documents. We see no reason why these decisions of this Court should not be followed as they are in accordance with the ordinary meaning of the language in Section 152.

It has been further argued that the court below purports to act under Section 152 C. P. C. only and that that section can only apply in terms to the amendment of the decrees and not to the amendment of the plaint, sale certificate and *dakhalnama*. This contention, no doubt, is correct, but the power of the court to make corrections necessary for the ends of justice is not confined only to powers exercisable under Section 152. Extensive powers may be exercised also under Sections 151 and 153. We consider that this is eminently a case which the accidental slip should be corrected as the correction is necessary for the ends of justice.

A further objection raised on behalf of the applicant is that the District Judge had no jurisdiction to amend the final decree which was passed by the Subordinate Judge and was not appealed against. In answer to this, we think, it is enough to say that it has been decided between the parties by the order of the High Court that the District Judge had jurisdiction to dispose of this application upon the merits and this point cannot be raised at this stage.

The learned advocate for the applicant has also submitted that the District Judge had no jurisdiction to call for evidence to satisfy himself whether there had, in fact, been a misdescription of the property in the mortgage-deed. In our opinion, this contention has no force as under Section 95 of the Evidence Act the court had jurisdiction to call evidence for the purpose of showing that the mortgage-deed did, in fact, relate to the property in Nawadiya Zamania Nagla.

[3] 12 A. L. J. 185

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This is a clear case of an accidental slip in the description of property. The misdescription was not even noticed by the parties throughout the whole course of the proceedings in the mortgage suit. There was never any doubt as to the identity of the property. In the circumstances we think this is clearly a case in which the court should exercise its inherent power of making such corrections as are necessary for the ends of justice. It would be a blot upon the judicial administration if the courts were powerless to do justice in a case of this sort, where corrections are necessary in order to give effect to the intentions of the parties themselves and to the true meaning of the mortgage decrees.

We dismiss the application with costs.

Application dismissed

Civil
1932
April 28
Iqbal Ahmad, J.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE AGENT, E. I. RAILWAY, CALCUTTA (*Petitioner*)

versus

KESHO PRASAD SHEO PRASAD, BELANGANJ, AGRA, THROUGH KESHO PRASAD (*Opposite party*)*

Railway Act (IX of 1890), Sec. 72—Goods despatched under Risk Note forms A and B—Diversion of route—Delay in delivery and shortage in weight—Damages—Whether loss occurred at particular time—Burden of proof on bailee.

The exemption from liability afforded to the railway administration by the risk note forms A and B is operative and available to the railway administration only during the transit on the ordinary route and once the goods are diverted from that route the protection afforded by these risk notes ends.

Where, owing to the mistake of the Railway Co., certain goods despatched under Risk Note Forms A and B were diverted from the ordinary route for a short distance with the result that their delivery was delayed at the destination and there was a shortage in weight, *held*, that the consignor was entitled to damages for the shortage, and the railway administration could not invoke to its aid the benefits of Forms A and B, and its responsibility must be judged by reference to the provisions of Sec. 72 of the Railway Act untrammelled by the stipulations contained in the forms. *G. I. P. Ry. Co.* v. *Jugul Kishore Mukat Lal*, 1930 A. L. J. 297 *relied on.*

When the goods are solely under the control of the bailee, the fact as to when loss, destination or deterioration occurred, is a matter especially within his knowledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must, in view of the provisions of Sec. 106 of the Evidence Act, be on him; and in the present case the railway administration did not prove that the loss occurred prior to the commencement of default on its part, viz., the diversion of goods from the ordinary route.

CIVIL REVISION from an order of MAULVI S. M. SAIDUDDIN, Judge of Small Cause Court of Agra.

U. S. Bajpai for the applicant.

B. Malik for the opposite party.

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*Civ. Rev. 599 of 1931

The following judgment was delivered by

IQBAL AHMAD, J.—This is a defendant's application in revision, from a decree of the court of small causes, and arises out of a suit brought by the plaintiff for damages for shortage in the goods consigned by him.

There is no controversy about the facts. On September 30, 1929, 160 bags of sugar weighing about 420 maunds were despatched under risk note forms A and B from Kantapokar to Agra city. The usual time taken for the goods to arrive from Kantapokar to Agra city, if transmitted across the ordinary route, is 5 or 6 days. The wagon containing the goods was taken on the ordinary route up to Tundla, but, owing to a mistake, instead of being sent from there to Agra city it was sent to Aligarh. The wagon remained at Aligarh for some time and then the goods were unloaded and were ultimately despatched to Agra on October 31, 1929, where delivery under protest was taken by the plaintiff. The consignment, when delivered to the plaintiff, was about 30 maunds short in weight and the plaintiff claimed damages with respect to the same.

The defendant contested the suit *inter alia* on the ground that the loss did not arise from any misconduct on the part of the railway administration and that the loss was due to the fact that the bags in which the sugar was consigned were insecure, and that the railway administration was protected by risk note forms A and B.

The learned Judge of the court below overruled the pleas in defence and passed a decree in the plaintiff's favour.

The learned counsel for the applicant contends that, notwithstanding the diversion of the goods from the ordinary route for a short distance, the railway administration is protected by risk notes forms A and B, and, that even if it is not open to the railway administration to take protection under either of the risk notes forms A and B, the burden lay on the plaintiff to prove that the loss was due to the goods being diverted from the ordinary route and that the shortage in weight had not occurred up to Tundla and, as the plaintiff had failed to prove that fact, the suit should have been dismissed.

I am unable to agree with the contention of the learned counsel for the applicant. Risk Note form A is used when the consignment tendered for carriage is either in bad condition or is defectively packed and is consequently liable to damage, leakage or wastage in transit. In the present case the consignment was in single gunny bags hook marked and weak at seams, liable to tear or burst and to sweat in transit from inherent moisture and, by signing form A, the consignor undertook to hold the railway administration.

> harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants.

The consignor, further, in consideration of the consignment being charged at a special reduced rate instead of at the ordinary tariff rate, agreed, by signing form B, to hold the railway administration

> free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants.

It appears to me that the exemption from liability afforded to the railway administration by the risk note forms A and B is operative and available to the railway administration only during the transit on the ordinary route and once the goods are diverted from that route the protection afforded by these risk notes ends. In the absence of a clear and unambiguous stipulation to the contrary the presumption is that the consignor, at the time of consigning his goods, contemplates that the goods would be transmitted across the ordinary route within a reasonable time and the railway administration must, in such cases, always be deemed to have accepted the goods for despatch by the ordinary route. The contract evidenced by risk note forms A and B does not contemplate the carrying of the goods otherwise than by the ordinary route, and if there is a diversion from the ordinary route, it does not matter for what distance, the railway administration cannot invoke to its aid the benefits of the said forms. The decision of this Court in *G. I. P. Railway Company* v. *Jugul Kishore Mukat Lal*[1] is direct authority for the proposition that, where owing to a mistake or negligence on the part of the railway company's servants, the goods are diverted from the ordinary route, with the result that considerable delay takes place in the arrival of the goods at their destination thereby causing loss to the consignor, the protection given to the railway company by the risk note B ceases to be operative as soon as the goods are taken out of their ordinary route. But it is argued that notwithstanding the diversion of the goods, the railway company is entitled to invoke to its aid the benefit of form A. This argument is untenable. Neither in risk note form B nor in risk note form A there is any exemption from liability given to the railway administration for any loss arising from the delay in the delivery of the goods at its destination owing to the goods not being taken on the ordinary route, and it seems to me that the reasons assigned in the case noted above for depriving the railway administration of the benefits of form B apply with equal force to the case of form A. In short, I hold that the moment the consignment was despatched from Tundla to Aligarh the protection afforded to the defendant by forms A and B ended, and the responsibility of the defendant must be judged by reference to the provisions of Section 72 of the Railway Act untrammelled by the stipulations contained in the said forms.

By Section 72 the responsibility of the railway administration is, subject to the provisions of the Railway Act, that of a bailee under Sections 152 and 161 of the Indian Contract Act, 1872. Section 161 of the Contract Act imposes on the bailee the duty of delivering the goods to the bailor at the proper time and, if owing to the default of the bailee, the goods are not so delivered, he is responsible to the bailor for any loss, destruction or deterioration of the goods from the time that they ought to have been delivered. In the present case the fact that the goods were not, by default of the railway administration, delivered at the proper time at their destination is undisputed. It is also a fact that the goods were short in weight at the time of delivery. The shortage in weight must have occurred either during the transit of the goods up to Tundla or when they were despatched from Tundla to Aligarh and were lying there, or partly up to Tundla and partly after the despatch from Tundla. It is argued that as the goods were insecurely packed and were liable to leakage and wastage in transit, the plaintiff is not entitled to hold the defendant liable for the shortage in weight, unless and until he proves that there was no shortage in weight till the goods reached Tundla. In other words, it is contended that the default of the bailee commenced only from the time that the goods, instead of being sent to Agra city direct from Tundla, were despatched to Aligarh and not before, and that the plaintiff must, as a condition precedent to a decree in his favour, affirmatively prove that the loss arose subsequent to the commencement of the default by the bailee. The argument, though ingenious is without substance. From the time that the goods were delivered to the defendant for carriage they were in his custody and control. The plaintiff had no means of access to them, nor had any means of discovering the exact quantity of leakage or wastage as the goods passed over every mile of the railway line from the station that they were despatched. To call upon the plaintiff to prove that no shortage in weight occurred up to Tundla would be tantamount to ask the plaintiff to do something which is impossible, and would be to reduce the statutory liability of a bailee, as provided for by Section 162 of the Indian Contract Act, to an absolute farce. In my judgment the moment the default of a bailee, in circumstances like those of the present case, is established and his responsibility falls to be determined by Section 161 of the Indian Contract Act, the burden shifts on to him to prove that the loss, for which he is sought to be made responsible by the bailor, occurred prior to the commencement of the default on his part. When the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred, is a matter specially within his knowledge and, therefore, the burden of proving that the loss occurred at a particular time and not subsequently must, in view of the provisions of Section 106 of the Indian Evidence Act, be on him.

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[1] 1930 A. L. J. 297

In the present case there was no evidence called by the defendant to prove that the shortage in weight occurred before the goods arrived at Tundla and, therefore, the plaintiff was in law entitled to a decree for damages for the shortage in goods. I hold that the defendant was liable to answer the plaintiff's claim and the suit was rightly decreed. I dismiss this application with costs.

Application dismissed

CIVIL

1931

Dec. 18

SULAIMAN, J.
YOUNG, J.

LACHHMI NARAIN GIRDHARI LAL THROUGH LACHHMI NARAIN (*Applicant*)

versus

MANSA RAM MURLIDHAR THROUGH RAM SARAN (*minor*) UNDER THE GUARDIANSHIP OF SATLA PRASAD AND ANOTHER (*Opposite party*)*

Civil Procedure Code, Or. 21, R. 53(6) and Sec. 64—Decree-holder seeks to execute decree by attachment of another decree—Judgment-debtor of attached decree, who had applied for leave to appeal to Privy Council, compromises with his decree-holder, who accepts a reduced amount—Application for leave to appeal dismissed—Whether attaching creditor is bound by compromise.

A simple money decree-holder sought to execute his decree by the attachment of another decree for the payment of money, which his judgment-debtor had obtained against a third person. When these execution proceedings were taken, an application for leave to appeal to the Privy Council by the judgment-debtor bound by the decree attached was pending in the High Court, and he entered into a compromise with his decree-holder under which the decree-holder agreed to give up a portion of the decretal amount, and this compromise was filed in the High Court, and the reduced decretal amount having been paid, the High Court dismissed the application for leave to appeal to Privy Council.

Held, that the compromise, which was not invalid by virtue of the provisions of Sec. 64 C. P. C., was in the nature of an adjustment of the attached decree and came within the purview of Or. 21, R. 53(6) C. P. C., and no adjustment of the attached decree with notice or knowledge of such attachment can have any effect as against the attaching creditors.

EXECUTION FIRST APPEAL from a decree of BABU KAULESHAR NATH RAI, Judge of Small Cause Court, Cawnpore.

P. L. Banerji and *S. N. Verma* for the appellant.

U. S. Bajpai, S. N. Seth and *Benod Behari Lal* for the respondents.

The judgment of the Court was delivered by

Sulaiman, J.

SULAIMAN, J.—This is an appeal by certain attaching creditors. It appears that the appellants Lachhmi Narain Girdhari Lal held a money decree of the year 1925 against Ram Din Hazari Lal respondent No. 2 who had obtained another decree from the High Court in 1929 for Rs.11,750 against Mansa Ram Murli Dhar respondent No. 1. The High Court had varied the decree of the first court and an application for leave to appeal to their Lordships of the Privy Council was filed by Mansa Ram Murli Dhar in October 1929. While that application was pending, the appellants executed their own decree and got the decree of Ram Din Hazari Lal against Mansa Ram Murli Dhar attached by the execution court on March 29, 1930. The findings of the court below do not make it clear whether Mansa Ram Murli Dhar received notice or had knowledge of this attachment before May 23, 1930. On April 12, 1930 Lachhmi Narain Girdhari Lal who had attached the decree of Ram Din Hazari Lal applied for the execution of the latter's decree. While these execution proceedings were pending a written compromise was filed in the High Court on May 23, 1930 entered into between Ram Din Hazari Lal and Mansa Ram Murli Dhar upon which the decree-holders agreed to reduce the amount of the decree from Rs.11,750 to Rs.3,000 in full satisfaction of their claim. There were certain conditions put down in the compromise as regards the payment of the amount up to the time of the verification of the compromise in the court below. On June 28, 1930 Rs.3,000 were deposited in court by means of an application which stated that there were a number of attaching creditors including the present appellant. On a report from the court below having been received the High Court passed the following order:

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*E. F. A. 442 of 1930

> Let the application in P. C. A. No. 41 of 1929 be dismissed without costs, the appellant having fulfilled the terms of the compromise which has been entered into between the parties and which has been duly verified. The result is that the decree against the applicant has been fully satisfied.

In the course of the execution proceedings the attaching creditors took up the position that the compromise entered into between Ram Din Hazari Lal the decree-holders and Mansa Ram Murli Dhar the judgment-debtors, was in no way binding upon the attaching creditors as the decree had been attached. The court below has overruled this contention and has come to the conclusion that the deposit having been made for payment to the attaching creditors with the consent of the High Court and there being nothing to show that the compromise was collusive, the decree must be deemed to have been fully satisfied.

The attaching creditors have appealed and it is urged on their behalf that the compromise does not in any way affect their right.

The agreement between the decree-holders and the judgment-debtors to reduce the amount decreed by the High Court was in the nature of an adjustment of their claim because the application for leave to appeal to their Lordships of the Privy Council was pending and in that sense the High Court's decree had not become absolutely final. The case therefore does not strictly speaking fall within the scope of Section 64 C. P. C.; for in this case there was neither any private transfer nor delivery of the property attached nor of any interest therein or any payment to the judgment-debtor of any debt or money etc. It was on the face of it a compromise of a doubtful claim in order to put a stop to further litigation. The agreement of May 23, 1930 would therefore not be invalid by virtue of the provisions of Section 64 C. P. C.

Order 21, Rule 53 prescribes the method in which a decree of another court can be attached. The attachment is made by the issue to such court of a notice by the court which passed the decree requesting such court to stay the execution of its decree unless the notice be cancelled, or the holder of the decree sought to be executed applies to the court receiving such notice to execute its own decree. Sub-rule (6) provides that on the application for attachment having been given the court shall give notice of such order to the judgment-debtor bound by the decree attached and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice or of knowledge

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thereof, either through the court or otherwise shall be recognised by any court so long as the attachment remains in force.

It is therefore clear that no payment or adjustment of the attached decree with notice or knowledge of such attachment can have any effect as against the attaching creditors.

Order 22, Rule 10 provides that in other cases of an assignment, creation or devolution of any interest the proceeding in a suit may be continued by or against the person to or upon whom such interest has come or devolved. Sub-rule (2) provides that

> the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of Sub-rule (1).

It follows that if leave for appeal to their Lordships of the Privy Council had been granted, the attaching creditors might have applied to be impleaded as a party to the appeal. Ram Din Hazari Lal's decree having been attached, they were no longer free to deal with the subject-matter of the litigation and agree to give up a portion of the decretal amount to the prejudice of the attaching creditors without their consent and behind their back. There is no doubt that the compromise was in the nature of an adjustment of the attached decree and came within the purview of Order 21, Rule 53(6) C. P. C.

There is also no doubt that the adjustment was made on May 23, 1930 when the written application was filed and it cannot be deemed to have been kept in abeyance till the payment was made in pursuance of it.

A somewhat similar case came up for consideration before a bench of the Lahore High Court in *Rattan Lal Sultan Singh* v. *Bishan Sahai Bhagwan Das*[1] where also a compromise had been effected agreeing to receive a certain sum from the judgment-debtors in full satisfaction of the decree. The attaching creditors had however been impleaded in the suit and were no parties to the compromise. The bench held that in view of the provisions of Order 21, Rule 53(6) C. P. C. the alleged settlement cannot bind the attaching creditors as the attachment was still in force and the attaching creditors were not aware of the proceedings to get the satisfaction of the decree recorded by the court. In the present case the attaching creditors had not been impleaded at all. But that in our opinion does not make any difference. As a matter of fact it is startling circumstance that in the High Court notice was specifically drawn by counsel to the matter that the decree had been previously attached by the other creditors.

After the passing of the decree the High Court became *functus officio* and could not modify the decree or pass an order superseding it. If after payment of the appeal had been allowed by their Lordships of the Privy Council and the decree varied, the order would undoubtedly have been binding on the attaching creditors. But no order was passed by any competent court superseding the previous decree and the mere fact that the application for leave to appeal to their Lordships of the Privy Council was dismissed on the ground that a certain compromise had been entered into is not tantamount to a fresh order superseding the decree and passing a

[1] I. L. R. 10 Lah. 143

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fresh decree in terms of the compromise. Such an order was not and could not have been passed. The parties before the High Court were agreed that the matter had been compromised and the terms of the compromise had been carried out. The High Court accordingly dismissed the application for leave to appeal summarily. The compromise was at best in the nature of a private agreement between the parties out of court and cannot have any higher effect. For the purposes of execution it was an adjustment of the attached decree which without notice or knowledge of the attachment could not in any way effect the rights of the attaching creditors, and could not be recognised by the execution court at all so long as the attachment remained in force.

As pointed out above there is no clear finding that the original judgment-debtors Mansa Ram Murli Dhar had notice or knowledge of the attachment of the decree of Ram Din Hazari Lal which had been passed against them, before they entered into the compromise of May 23, 1930. In order that Order 21, Rule 53 (6) may apply it is necessary to have a clear finding that they had such notice or knowledge of the attachment. We accordingly send down the following issue to the court below for determination:

1. Did the judgment-debtor of the attached decree, namely, the proprietor of Mansa Ram Murli Dhar have notice or knowledge through the court or otherwise, of the attachment by Lachhmi Narain Girdhari Lal of the decree of Ram Din Hazari Lal against the firm, on or before May 23, 1930?

As this is a fresh issue which is being sent down for determination, the parties will be at liberty to adduce fresh evidence. The findings should be returned within two months from this date if practicable. On receipt of the finding the usual ten days will be allowed for objections.

Issue remitted

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1932
June 22
MUKERJI, J.
BENNETT, J.

KISHUN PIYARI AND ANOTHER (*Defendants*)
versus
GOPAL NARAIN (*Plaintiff*)*

Hindu Law—Widow—Right of residence in husband's house—Ancestral house mortgaged by son—Suit for sale on mortgage—Widow entitled to claim, as against auction-purchaser, a right to reside in a suitable portion of house.

A Hindu after mortgaging the ancestral house, made a gift of the house in favour of his mother. Later he along with his mother executed a second mortgage over the property. On a suit for sale of the house on the basis of the mortgages, the lower court made a decree jointly on the two mortgages and stated that the question of the right of residence of the mother did not arise at that stage of the proceedings. *Held,* that the mortgage decree as given by the court below should be split up and the two amounts separately payable under each decree should be shown. It would be open to the parties to the second mortgage to pay it off, and leave the plaintiff to bring the property to sale on the first mortgage. If this happens the mother would be entitled to claim, as against the auction-purchaser, a right to reside in a suitable portion of the house, having regard to the nature of the property and her requirements. The question as to what portion of the house, the right of residence of the mother should be confined, will be determined by the court executing the decree, after the sale has taken place.

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*F. A. 138 of 1930

FIRST APPEAL from a decree of BABU MAHESHWAR PRASAD, Subordinate Judge of Allahabad.

N. U. A. Siddiqi for the appellants.

U. S. Bajpai and *Ram Nama Prasad* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—The appeal was originally filed by two ladies Kishun Piari and Sundar. Kishun Piari has died, and nobody has been brought on the record in her place. So the appeal has abated to that extent. The other appellant is Mst. Sundar, and her contention is that she has a right of residence in the property ordered to be sold, and we have to consider how far this contention is correct.

The facts appear to be these. Bishun Lal, the defendant No. 1, is related to the other defendants in this way. His wife was Ramdebi by whom Bishun Lal has a daughter Mst. Kamla, defendant No. 2. Mst. Kishun Piari, the deceased appellant and the defendant No. 3, was the sister of Bishun Lal. Defendant No. 4, Mst. Sunder, is the mother of Bishun Lal.

Bishun Lal mortgaged the house in question for a sum of Rs.5,000 in favour of the plaintiff by the mortgage of March 2, 1929. Then he made a gift of the house in favour of his wife, his sister and mother. Thereafter, concealing the fact that he had made a gift of the property, Bishun Lal borrowed further money on promissory notes from the plaintiff. It was eventually agreed that for the further advance of Rs.1,400 Bishun Lal, his mother, his sister and his wife should give a second mortgage over the property, and this mortgage was executed on April 19, 1926. Ramdebi being dead, her daughter Mst. Kamla has been brought on the record.

The plaintiff claimed two sums of money, namely, Rs.7,059-12-3 on the first mortgage and Rs.1,949-5-0 on the second mortgage. The two mortgages being distinct and the executants not being the same it was not quite correct on the part of the plaintiff to ask for a joint decree in respect of the joint sum of Rs.9,009-1-3.

Several defences were raised to the suit by Mst. Kishun Piari and Mst. Sundar. They having failed, the learned Subordinate Judge made a decree jointly on the two mortgages for a sum of Rs.10,000 and odd which includes interests and costs.

Mst. Kishun Piari and Mst. Sundar appealed against the whole decree, but they failed to pay the court-fee due on the amount decreed. The appeal was accordingly confined to the right of residence, if any, of Mst. Sundar. We have, therefore, to take it that the two mortgages have been proved to have been made for consideration and are binding on the mortgagors and their representatives.

The argument before us is that Mst. Sundar has a right of residence in her husband's house and that right cannot be taken away by her son executing a mortgage. The right of residence that does exist in Mst. Sundar was recognised by the court below, but the learned Judge stated that the question did not arise at that stage of the proceedings.

The fact that Mst. Sundar took a gift for her son cannot impair her right of residence. If the second mortgage be paid off, Mst. Sundar's right of residence in the house would remain unaffected by the earlier mortgage of March 2, 1926.

We are of opinion that the mortgage decree as given by the court below should be split up and the two amounts separately payable under each decree should be shown. It would be open to the parties to the second mortgage to pay it off if they be so advised and leave the plaintiff to bring the property to sale on the first mortgage. If this happens, the mother, Mst. Sundar, would be entitled to claim, as against the auction-purchaser, a right to reside in a suitable portion of the house, having regard to the nature of the property and her requirements. In view of these considerations, we modify the decree of the court below as follows:—

A fresh decree will be prepared in this Court which will state separately the amount due on each of the mortgages up to six months from this date which we fix for payment. Each mortgage will carry interest at the stipulated rate up to the said six months and thereafter at 6 per cent per annum. A decree will be framed under Order 34, Rule 4 C. P. C. costs being calculated proportionately to each item decreed. Thus the amount which would be proportionate to the larger amount of the decree will be added to that amount and the smaller portion of the costs to the smaller amount. If Mst. Sundar or any of the other defendants pay off the mortgage, Mst. Sundar will have a right of residence in the house or such portion of it as may be suitable. The question as to what portion of the house, the right of Mst. Sundar's residence should be confined, will be determined by the court executing the decree, after the sale has taken place. If the second mortgage is paid off, the property will be sold in execution of the first mortgage alone. Having regard to the facts of this case, we direct that the parties will pay their own costs of this appeal and the order as to costs in the court below will stand subject to the modification indicated above.

Decree modified

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April 13
PULLAN, J.
NIAMAT-ULLAH, J

SHIYAM DEI (*Plaintiff*)

versus

BANKEY LAL AND OTHERS (*Defendants*)*

Civil Procedure Code, Sec. 80—Insolvent—Receiver—District Judge, on being moved by creditors, orders receiver to attach property alleged to be insolvent's —Receiver attaches property—Plaintiff sues for a declaration that property belongs to him—Whether notice to receiver necessary.

Where, in the first instance, plaintiff sued for a declaration that a deed of gift executed by her be set aside as it was obtained from her by fraud; but finding that the property in respect of which the gift had been executed, had been attached by the official receiver of an insolvent's estate under order of the District Judge, who was moved by the creditors, as the property of the insolvent, the plaintiff claimed a second declaration that the property gifted belonged to her and could not be attached, and she made the donees, the receiver and the creditors parties to the suit, *held*:—

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*F. A. 333 of 1928

Per Pullan, J.—that the cause of action arose from the execution of the deed of gift and in the first instance the plaintiff sought relief against the donees who had defrauded her, and as the receiver was impleaded in order that the plaintiff may obtain an ancillary relief, no notice to the receiver under Sec. 80 C. P. C. was necessary.

Per Niamatullah, J.—that the first relief claimed by the plaintiff was clearly one which had no reference to any act done by the receiver; and as regards the second relief, the suit cannot be considered to be one in respect of any act done by the receiver, the material portion of the plaintiff's cause of action having arisen from the act done by the creditors in successfully moving the District Judge to treat the property as the property of the insolvent, and notice to the receiver under Sec. 80 C. P. C. was therefore not necessary.

Skippers and Co., Ltd. v. *E. V. David,* I. L. R. 48 All. 821 *relied on.*

First Appeal from a decree of Maulvi S. Iftikhar Husain, Subordinate Judge of Pilibhit.

B. Malik for the appellant.

P. L. Banerji, S. Majid Ali, S. N. Seth and *Ram Narain Verma* for the respondents.

The following judgments were delivered:—

Pullan, J.

Pullan, J.—The plaintiff-appellant Musammat Shiyam Dei filed this suit on July 31, 1927, praying for a declaration that a deed of gift executed by her in favour of two persons Bankey Lal and Bishunath on June 10, 1926, had been obtained by fraud and should be cancelled, and she also sought as an ancillary relief for a declaration that the house purporting to be transferred by her in that deed of gift was her own property and could not be attached or sold in satisfaction of a decree or in satisfaction of any debt due by Nanhoon Mal insolvent who was the father of the alleged donees. The plaintiff impleaded the donees, the official receiver of Nanhoon Mal's estate and two creditors of Nanhoon Mal, on whose application he had been declared an insolvent and who had applied for the attachment of the house in suit by their application dated February 18, 1927.

The plaintiff's suit has been dismissed by the Subordinate Judge on his finding that the suit is barred as against the official receiver by Section 80 of the Code of Civil Procedure. It does not appear to me that this finding would necessarily bring the suit to an end for the main question raised by the plaintiff was her right to have the deed of gift executed by herself in favour of defendants 1 and 2 set aside and clearly she might be entitled to a decree as against them even if she failed to establish her case that the property could not be attached and sold in respect of a debt due by the insolvent Nanhoon Mal. But I am not of opinion that Section 80 of the Code of Civil Procedure should be applied to this suit. Section 80 lays down that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months after notice in writing has been given. I do not consider that this is a suit instituted against a public officer

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Pullan, J.

in respect of an act purporting to be done by him in his official capacity. The suit is not one of the same nature as that to which the learned Subordinate Judge has referred and which is reported in *Murari Lal* v. *E. V. David*[1]. In that case the brothers of an insolvent brought a suit against the official receiver who had taken charge of the estate, claiming a two-thirds share of the house which was alleged by the official receiver to be part of the estate of the insolvent. This was clearly a case brought against the official receiver in respect of an act done by him in his official capacity. The present suit might have been brought even though the official receiver had taken no action whatever in respect of the property. The cause of action arose from the execution of a deed of gift which the plaintiff alleged to have been obtained from her by fraud, and in the first instance she sought relief against the donees who had defrauded her. The second portion of the relief claimed is no doubt directed in a manner against the official receiver as the plaintiff found that the property had been placed under attachment. But I am not prepared to find that every suit in which an official receiver is impleaded in order that the plaintiff may obtain an ancillary relief can be set aside on the ground that notice has not been given to the official receiver under Section 80 of the Code of Civil Procedure. Our attention has been drawn to a case reported in *Skippers & Company Ltd.* v. *E. V. David*[2], in which it was held

> that Section 80 C. P. C. would not apply to a suit against an official receiver, where the suit was really a suit to establish and realize a charge over property, and the official receiver was impleaded not on account of any specific action taken by him in respect of the property concerned but merely because he was for the time being in charge of it.

It may be that in the present case the plaintiff was induced to file a suit because it came to her notice that the property was in danger owing to the action of the official receiver, but her cause of action was not what the official receiver had done but what she herself had been induced to do by the other defendants.

In my opinion this case should be sent back to the lower court for a decision on the other issues.

Niamat-ullah, J.

NIAMATULLAH, J.—I entirely agree and would add a few words of my own in support of the conclusions arrived at by my learned brother.

The appeal has to be decided on the allegations to be found in the plaint as the suit has been dismissed on the preliminary ground, namely, that the notice under Section 80 C. P. C. was not given to the third defendant, the receiver of the estate of the insolvent Nanhoon Mal. It is alleged in the plaint that the plaintiff is the widow of the insolvent's brother's son who was separate from the insolvent, a partition having taken place in the family long before the present controversy arose and that the property in dispute belonged exclusively to her husband on whose death it devolved upon her as his widow. As regards the deed of gift, the plaintiff's case is that it was obtained from her by practice of fraud, and that she became aware of the deed on March 9, 1927. The plaint proceeds to mention that defendants 4 and 5, the creditors of the insolvent, applied to the District Judge for attachment and sale of the property to which the deed of gift relates alleging that the same belonged to the insolvent. The application was granted by the District Judge under whose order the third defendant, the receiver, attached the property as belonging to the insolvent. On these allegations the plaintiff seeks two reliefs (1) a declaration that the deed of gift dated June 10, 1926, in favour of defendants 1 and 2 is void having been obtained by practice of fraud and by concealment of its real nature from the plaintiff, and (2) that the property to which the deed of gift relates is not liable to be attached and sold for satisfaction of the debts due to defendants 4 and 5.

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[1] 22 A. L. J. 1116

[2] I. L. R. 48 All. 821

It should be observed that beyond a reference to the fact that the receiver attached the property on the application of defendants 4 and 5, no action of his is referred to or impugned in the plaint.

Section 80 of the Code of Civil Procedure, which requires two months' notice to be given in certain cases, can apply if the suit is "against a public officer in respect of any act purporting to be done by such public officer in his official capacity". It is clear to me that notice required by this Section is not necessary in every case in which a public officer is impleaded as a defendant. The suit must be against him in respect of any act purporting to be done by him in his official capacity which, in my opinion, implies that the plaintiff's cause of action is essentially based on some act attributable to the public officer. If the act of the public officer is not an essential part of the cause of action disclosed by the plaint, though having regard to his position in relation to the subject-matter of the suit, he is a necessary party, no notice is necessary. *Skippers & Company Ltd.* v. *E. V. David*[8], affords a clear instance in which the receiver was a necessary party and yet no notice under Section 80 C. P. C. was held to be necessary.

The present suit is of a declaratory character and is clearly based on Section 42 of the Specific Relief Act which provides that "any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right." For the reasons given by my learned brother, the first relief claimed by the plaintiff is clearly one which has no reference to any act done by the receiver. As regards the second relief, I am of opinion that the application of defendants 4 and 5 to the District Judge alleging that the property in question belonged to the insolvent Nanhoon Mal, which implies a denial of the plaintiff's right, if read with the order of the District Judge granting it, afforded a good cause of action to the plaintiff for the declaration claimed by her. To a suit of this kind the insolvent is a necessary party, but as the insolvent's estate is vested in the receiver, the latter had to be impleaded. The attachment made by the receiver under the orders of the District Judge passed on the application of the creditors is merely the result of the successful denial by defendants 4 and 5 of the title of the plaintiff. In substance the suit is like an action contemplated by Order XXI, Rule 63 C. P. C. The only difference is that the debtor in this case is an insolvent and has to be represented by the official receiver whereas in a suit under Order XXI, Rule 63 the debtor

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[8] I. L. R. 48 All. 821

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can himself be impleaded as a party to defend his title as against the rival claimant. A suit brought in the circumstances stated above cannot be considered to be one in respect of any act done by the receiver, the material part of the plaintiff's cause of action having arisen from the act done by the creditors in successfully moving the District Judge to treat it as the property of the insolvent.

Murari Lal v. *E. V. David*[4] was a case in which the suit was necessitated by the act of the receiver and it was his act which was alleged to afford a cause of action to the plaintiff. The only defendant was the receiver.

In *DeSilva* v. *Govind Balwant*[5] the only point decided was that a receiver appointed in an insolvency proceeding is a public officer within the meaning of Section 80 C. P. C. No question was raised as to whether the suit was in respect of an act purporting to have been done by a public servant in his official capacity. It was apparently common ground that if the receiver was a public officer within the meaning of Section 80 C. P. C. notice was necessary. It should be noticed that in this case also the only defendant was the receiver.

For the reasons stated above, I concur with my learned colleague in the order which he proposes to pass.

BY THE COURT—The appeal is allowed. The order of the lower court dismissing the suit on a preliminary issue is set aside. The case is sent back to the lower court for retrial on the main issues under Order XLI, Rule 23 C. P. C. Costs will abide the event. The appellant is entitled to a refund of court-fee under Section 13 of the Court Fees Act.

Appeal allowed
Case remanded

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[4] 22 A. L. J. 1116

[5] I. L. R. 44 Bom. 895

CRIMINAL
1932
April 13
KENDALL, J.

KING-EMPEROR

versus

SOHAN AND OTHERS*

Criminal Procedure Code, Sec. 236, and Penal Code, Secs. 302 and 201—Persons charged with offence of murder—Evidence insufficient to prove participation in murder—Whether can be charged and convicted of an offence under Sec. 201.

Where a number of people are charged with carrying out a massacre in the course of a riot, and not with any individual act, or with throwing live persons into a river in the course of a transaction which otherwise amounted to an offence under Sec. 201 I. P. C., and the evidence was insufficient to prove their participation in the murder, they could be charged and convicted of the offence under Sec. 201 I. P. C.

Begu and others v. *King-Emperor*, 23 A. L. J. 636 *relied on.*

CRIMINAL APPEAL from an order of H. J. COLLISTER ESQ., Sessions Judge of Cawnpore.

A. Hoon, Saila Nath Mukerji and *Basudeva Mukerji* for the appellants.

Sankar Saran (Government Pleader) for the Crown.

*Cr. A. 908 of 1931

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v.
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Kendall, J.

These appeals arose from a case in which thirty persons were charged under Sec. 302|149 I. P. C. and other sections with perpetrating a series of massacres. The portion of the judgment dealing with the question of law raised in the appeal is reproduced below.

KENDALL, J.—Mr. Mukerji for the defence has addressed to me a legal argument on this part of the case, to the effect that persons who are charged with the principal offence of murder cannot also be charged and convicted of the offence of causing evidence of the murder to disappear and in this contention he has quoted the cases of *Empress of India* v. *Kishna and another*[1], *Queen-Empress* v. *Lalli*[2], *Queen-Empress* v. *Dungar*[3] and *Torap Ali* v. *Queen-Empress*[4]. Of these cases the most important is *Queen-Empress* v. *Lalli,* as that is a Bench decision of this Court in which the finding was that

> The person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime.

Whether these decisions would apply in a case like the present, where a number of people are charged with carrying out a massacre in the course of a riot, and not with any individual act, or with throwing live persons into a river in the course of a transaction which otherwise amounted to an offence under Section 201, appears to me to be a matter of grave doubt. In a more recent decision of the Calcutta High Court, *Teprinessa* v. *Emperor*[5] it has been held by a Bench of two Judges that where, notwithstanding circumstances of grave suspicion, it is impossible on the record, as it stands, to hold that a person is the murderer or one of the murderers, his conviction under Sections 201 and 203 of the Indian Penal Code is not vitiated by the existence of such circumstances. That is precisely the case here. Still more important, however, is a recent decision of their Lordships of the Privy Council which has been referred to by the learned Sessions Judge. In the case of *Begu* v. *King-Emperor*[6] at a trial of five accused persons on a charge of murder, the High Court of Lahore had held that two of the accused intended to kill the deceased and were guilty of murder, and as to the remaining three the evidence was insufficient to prove their participation in the murder, but they had removed the body, and the court convicted them of that offence. That again is a case the facts of which appear to be closely analogous to those of the present one, and their Lordships held that the convictions were legal. It is true that the matter for decision was whether the accused could be convicted of the offence of removing the body although there had been no separate charge in respect of that offence. Their Lordships however referred to Sections 236 and 237 of the Criminal Procedure Code and held that the procedure of the courts in India had been a proper procedure. I have therefore no doubt whatever that the convictions under Section 201 of the Indian Penal Code are not bad in law.

[1] I. L. R 2 All. 713

[2] I. L. R. 7 All. 749

[3] I. L. R 8 All 252

[4] I. L. R 22 Cal 633

[5] I. L. R. 46 Cal. 427

[6] 23 A L. J. 636

Civil

1932

April 14

Boys, J.
Niamatullah, J.

THE DISTRICT BOARD OF FARRUKHABAD AND OTHERS (*Applicants*) *versus* IKHLAQUE HUSAIN (*Plaintiff*)*

Civil Procedure Code, Sec. 115 (c)—Interpretation of—When High Court can interfere.

Per Boys, J.—Under Sec. 115, Clause (*c*) C. P. C. any illegality or material irregularity may be a basis for revising the order of the lower court, and it is left entirely to the Revision Court, to determine whether there has been such illegality or material irregularity as will dispose it to interfere. If a question of jurisdiction is involved, the Court may act under Clause (*a*) or (*b*).

Per Niamatullah, J.—In view of authoritative judicial pronouncements the words of Sec. 115 (*c*) must be interpreted as implying that a mere error of law in deciding a case cannot be said to be an illegal or irregular exercise of jurisdiction. *Raja Amir Hasan Khan* v. *Sheo Baksh Singh,* 11 I. A. 237 and *Yad Ram* v. *Sardar Singh,* I. L. R. 45 All. 425.

Civil Revision from an order of Maulvi Syed Iftikhar Husain, District Judge of Farrukhabad.

U. S. Bajpai and *G. S. Pathak* for the applicants.

K. Verma, Mansur Alam and *Krishna Murari Lal* for the opposite party.

The following judgments were delivered:—

Boys, J.

Boys, J.—This matter came before me first of all sitting alone, and I referred it to a Bench of two judges, principally with the view to get a more binding interpretation, than would be the case when I sit alone, of Clause (*c*) of Section 115 of the Code of Civil Procedure.

It is a defendant's application in revision arising out of a suit by a plaintiff (*a*) for a declaration that the plaintiff was secretary of the District Board, and (*b*) for an injunction restraining the Board from interfering with the exercise by him of the duties of secretary.

The plaintiff eventually withdrew his prayer for a declaration on an objection being taken that he had given no notice to the Secretary of State. The Munsif refused to grant a temporary injunction for which the plaintiff also asked. On appeal to the District Judge, that court eventually gave the plaintiff a temporary injunction, and hence the defendant's present application in revision. The grounds are two-fold: first, that no appeal lay to the District Judge; secondly, that no temporary injunction should be given except in accordance with certain principles which were in effect stated to be capable of description as the principles applying to the grant of a perpetual injunction.

A third ground was pressed, largely no doubt in consequence of a suggestion made from the Bench, that there were some grounds for thinking that the learned Judge had not approached the case exercising a judicial discretion.

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*Civ. Rev. 558 of 1931

As to the first ground that no appeal lies, the plaintiff's counsel in support of his right to file an appeal to the District Judge relies upon Order XXXIX, Rule 2, Order XLIII, Rule 1, Sub-section (*r*), and *Lachhmi Narain* v. *Ram Charan Das*[1]. I am satisfied that an appeal did lie.

As to the second and third points, a preliminary objection was of course raised that no revision lies. I say "of course raised" because it is raised in perhaps three out of four of the cases before this Court on the Revisional Side, and it was agreed before me by counsel on both sides, and has been agreed in numerous other cases before me, that it is utterly impossible to reconcile the various rulings, even by this Court, on the subject.

In considering the scope of Section 115, I think it is important to appreciate the meaning of the word "jurisdiction" for it is very frequently used as if it and the word "power" cannot be the same. I had occasion in another place to make a careful study of the scope of these words "jurisdiction" and "power" and of the related phrases "court of competent jurisdiction", "court competent to try" and "not empowered by law", and I came to the conclusion, and I have not since seen any reason to depart from that conclusion, that the characteristics of jurisdiction are merely:—

(*a*) power to deal with offences or matters of the class in question;

(*b*) power to deal with persons of the class in question. In some cases it has been suggested that the question of revenue is also a determining factor of jurisdiction, but that is not now the better opinion. The word "jurisdiction" has therefore in legal parlance a special signification though it is frequently used in judgments as if it connoted the same as "power". Frequently the word "jurisdiction" is merely used loosely for "power" and the decision would be the same, if the word "power" were substituted. In other cases where a court has found that a defect was so serious as to be normally incapable of remedy, it has been led to speak of the matter as if it was one of "jurisdiction". I may give a simple illustration of the distinction. A court may have power to hear an appeal in a particular matter, and it may have power over the particular persons concerned, it has then jurisdiction to hear the appeal, but if it proceeds to allow the appeal without giving notice to the other side, it has here exercised a power not vested in it.

The first two Clauses (*a*) and (*b*) of Section 115 have, so far as I am aware, seldom given rise to any difficulty, even where the distinction between "jurisdiction" and "power" has not been noted. It is the interpretation by the courts of Clause (*c*) in an effort to restrict the scope of this Clause which has given rise to difficulty. I have been referred by the opposite party here to a decision of their Lordships of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar*[2] where at page 799 they say that the point taken exception to must be one "involving jurisdiction." Again, two Judges of this Court in *Yad Ram* v. *Sundar Singh*[3], have used phraseology to the effect that the irregularity must occur "in the matter of jurisdiction", "in relation to the question of jurisdiction". I trust that I am not failing in the respect that is due to these pronouncements when I point out that none of these phrases occur in Section 115. They are paraphrases of the words in the section. But at the same time I am manifestly bound to give effect to phrases used by their Lordships of the Privy Council, to the best of my ability.

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[1] I. L. R. 35 All. 425

I confess that I am unable to understand, and therefore I am unable to apply, the distinction between a court assuming jurisdiction not vested in it [Sub-clause (*a*)] or failing to exercise jurisdiction vested in it [Sub-clause (*b*)] and on the other hand a court committing an illegality or irregularity "involving" jurisdiction.

A court must either have jurisdiction or not have it. If any of the elements of jurisdiction are missing, it has no jurisdiction. I am unable to appreciate how an irregularity can involve or affect jurisdiction or relate to jurisdiction without destroying that jurisdiction; it cannot destroy, so to speak, a percentage of the jurisdiction and not destroy it wholly. Nor is counsel for the respondent able to suggest any such case. He has suggested that if a court is hearing a case under Order XLI, Rule 11, which it has jurisdiction to hear, and considering the appeal to be a good one, instead of merely admitting and issuing a notice, decrees the appeal without hearing the other side, it has committed a material irregularity involving its jurisdiction. I cannot accept this as a true proposition. The court had full and complete jurisdiction and was exercising it, but in the exercise of its jurisdiction it was having recourse to a "power" which it was not granted by statute. Its jurisdiction was in no way "involved". It was merely exercising its jurisdiction and was committing a material irregularity while exercising that jurisdiction. The case would come within Section 115, Clause (*c*) not because the irregularity "involved" jurisdiction but because it was a very material irregularity, though no complaint could be made as regards jurisdiction. I would therefore hold that in considering Clause (*c*) all that the Legislature requires is, that the Court should consider whether the court below having jurisdiction in the matter, did in the exercise of its jurisdiction act illegally or with material irregularity. Any illegality or material irregularity may be a basis for revising the order of the lower court, and it is left entirely to the Revision Court to determine whether there has been such illegality or material irregularity as will dispose it to interfere. If a question of jurisdiction is involved, the court may act under Clause (*a*) or (*b*).

I have now to apply these considerations to the present case. The second point as I have set out above urged on behalf of the applicant here is that the lower appellate court did not decide the question whether a temporary injunction should be granted on the basis of certain principles alleged to be applicable to the grant of temporary injunctions, and when

[2] I. L. R. 40 Mad. 793

[3] I. L. R. 45 All. 425

Civil

1932

The District Board of Farrukhabad v Ikhlaque Husain

Boys, J.

counsel was asked what those principles are, he was forced to admit that the only principles which he could suggest were those which were applicable to perpetual injunctions. I am of opinion that there is no force in this contention. Order XXXIX provides for the granting of temporary injunctions, and Rule 2, Sub-rule (2) is particularly applicable.

> The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit.

Now Chapter IX of the Specific Relief Act deals with injunctions generally. As regards temporary injunctions, Section 53 expressly provides that they are regulated by the Code of Civil Procedure. Chapter X lays down a number of conditions involving the grant of perpetual injunctions. It would be strange indeed if the Legislature deliberately distinguished between temporary and perpetual injunctions in the Specific Relief Act, and yet it intended the very conditions which it applied to perpetual injunctions to be applied to temporary injunctions. In this contention therefore of the applicant here, I think there is no force.

The last point to which it is necessary to refer is the contention that the learned Judge did not apply a judicial discretion to the determination of the matter before him. The judgment does bear indications of haste and that the learned Judge did not deal with the matter quite so carefully as is his habit. But taking the judgment as a whole, I am not prepared to go so far as to hold that he did not really exercise a judicial discretion. The appearances on the face of the judgment, which lent some support to the contention may be only due to haste. In any event this does not call for a more careful examination, in view of the fact that the plaintiff has actually been reinstated to his position as Secretary of the District Board. This is aparently due to the fact that a new Board has been elected.

Mr. Gopal Sarup Pathak, who says that he appears both on behalf of Chhotay Lal, the rival quondam secretary, and also on behalf of the District Board, says that he was instructed by Chhotay Lal to pursue this revision, but he has no instructions at all, one way or other, from the District Board. Mr. Krishna Murari Lal says that he has heard definitely from his client, the plaintiff, that he has been reinstated in his position. If this is so it would appear that the only reasonable course would have been for the plaintiff to withdraw his suit, in which case, the present application would have automatically been struck off. It may not be that the plaintiff and the new District Board have actually brought themselves into contempt, but they have apparently approached doing so in allowing this litigation to proceed upon a false basis to the waste of public time and money. I would therefore dismiss this application, but I would make the parties to pay their own costs throughout.

Niamatullah, J.

NIAMATULLAH, J.—The facts which have given rise to this revision are stated in the judgment of my learned colleague and do not require to be supplemented for the purpose of my separate note on the question of law which emerges from them.

It is not disputed that the learned District Judge had jurisdiction to pass the order which he did. He cannot, therefore, be considered to have exercised a jurisdiction not vested in him by law. It is likewise admitted that he did not fail to exercise any jurisdiction vested in him. Section 115 (*a*) and (*b*) have, therefore, no application. His order granting a temporary injunction in appeal can be interfered with in revision only if Section 115 (*c*) is applicable.

The scope of Section 115 (*c*), C. P. C., has been the subject of consideration in numerous cases, and the difficulty which exists in construing that part of the section is greatly accentuated by numerous judicial dicta which have gathered around it. We are not, however, at liberty to disregard those dicta, some of which occur in the judgment of their Lordships of the Privy Council and Full Bench decisions of this Court. The difficulty is, to my mind, minimised if judicial pronouncements are construed with reference to the facts of the particular cases in which they occur and not as if they are part of statutory provisions.

Section 115 (*c*) empowers the High Court to interfere with an order passed by a subordinate court having jurisdiction to pass it, if it "acted in the exercise of its jurisdiction illegally or with material irregularity." These words were interpreted as far back as 1883 by their Lordships of the Privy Council in *Raja Amir Hasan Khan* v. *Sheo Bakhsh Singh*[4] as implying that a mere error of law in deciding a case cannot be said to be an illegal or irregular exercise of jurisdiction. Referring to the order passed by the subordinate court in that case, their Lordships observed

> that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

In a later case, *Bal Krishn* v. *Basdeo*[5], their Lordships again emphasised the view in the following words:—

> It will be observed that the section applies to jurisdiction alone, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

These cases afford instances in which though an error of law was committed in deciding a case, jurisdiction could not be considered to have been exercised illegally or with material irregularity. It has been held in numerous cases decided by the High Courts that even where a question of limitation or *res judicata* has been erroneously decided, the High Court has no power to interfere in revision under Section 115 (*c*). The observations of their Lordships of the Privy Council in the two cases cited above were differently interpreted by different High Courts. We are bound to accept the view laid down by the Full Benches of this Court. I may refer to *Yad Ram* v. *Sundar Singh*[6] in which it was laid down that if the Court was competent to determine a question of law and did determine it, the High Court cannot interfere in revision merely because it considers that decision to be erroneous in point of law.

Applying the rule deducible from the cases mentioned above to the facts of the case before us, we have to accept that an appeal lay to the District Judge from the order of the trial court refusing to grant a temporary injunction, that the learned District Judge had jurisdiction to hear the appeal and to decide it and that if he decided the case before him wrongly, he cannot be considered to have acted in the exercise of his jurisdiction illegally or with material irregularity. The learned munsif expressed an opinion on the merits of the case on more than one important points in deciding the question whether a temporary injunction should be granted. The learned District Judge, on the other hand, expressed himself as follows:—

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[4] L. R. 11 I. A. 237 at 239

[5] L. R. 44 I. A. 261

[6] I. L. R. 45 All. 425

> Further he (the munsif) discussed the question whether under law the condition of probation was legal or not. I am not going to discuss whether the condition of probation was legal or otherwise. The case is yet pending and in my opinion the case is to be decided after recording some evidence. Some oral and perhaps documentary evidence must be produced in support of what happened on July 26, 1931. That question is an important one in this case. Even if the condition of probation was legal, it is to be seen whether the proceeding of non-confirmation by the Board on July 26, 1931 was legally conducted. Therefore at this stage I refrain from expressing any opinion as to the question of law, because it would influence the learned munsif in his decision of the case.

In other words, the learned District Judge refused to pre-judge the merits of the case and proceeded to decide the case on a different ground, which he enunciated in the following words:—

> In my opinion, in cases of interim injunction we should see whether the plaintiff has a right or not, and if he has got a right, *status quo* should be maintained. I do not agree that the plaintiff would not incur any irreparable loss. He was a practising vakil. Now his practice, whatever it was, is totally gone; and if he starts practice again, it will take a long time to gain the same practice as he had before . . . . . So if he has a right, he would be entitled in his case to an injunction, and therefore the interim injunction should be granted.

There is an apparent inconsistency in the judgment of the learned District Judge in so far that he noted as one of the questions for decision whether the plaintiff had a right or not, but based his decision on his view that, unless a temporary injunction were granted, the plaintiff would suffer an irreparable injury, without expressing any opinion as regards the plaintiff's right. Reading his judgment as a whole, including the earlier part of it quoted above, he seems to have been of opinion that the case should be decided on a consideration of the balance of convenience and that the merits of the case should not be pre-judged. If this was his view, I do not think any error can be attributed to the learned District Judge. He might not have happily expressed himself; but there can be no doubt that he deliberately refrained from expressing any opinion on the question whether the plaintiff had the right which he claimed in the suit.

In granting or refusing to grant a temporary injunction a court has a wide discretion under Order 39, Rule 2, C. P. C. The exercise of that discretion should be in a judicial manner, depending upon the circumstances of each case. No hard and fast rule can be laid down for the guidance of the courts as regards the exercise of such discretion. If a court grants or refuses to grant a temporary injunction on the ground of balance of convenience, it is not correct to say that the discretion has been exercised otherwise than judicially only because the court of revision thinks that it would have passed a different order in the circumstances of the case.

For the reasons stated above, I agree with my learned colleague in dismissing the revision.

BY THE COURT—The application is dismissed. The parties will bear their own costs throughout.

Application dismissed

CIVIL
1932
April 22
PULLAN, J.
NIAMATULLAH, J.

SOHNI (*Defendant*)
versus
RAJ KUMAR SINGH JAIN AND OTHERS (*Plaintiffs*)*

Partition Act, Sec. 4—"Transferred"—Meaning of—"Undivided family"—Owns dwelling house—Share of one member sold in execution of a decree against him—Whether "transferred" to auction-purchaser.

Where the undivided share of one of the members of an undivided family, in a dwelling house belonging to the family, is sold in execution of a decree against him, it is 'transferred' to the auction-purchaser within the meaning of Sec. 4 of the Partition Act. The word 'transfer' in Sec. 4 of the Partition Act is used in its ordinary sense, namely, change of ownership from one to another; and the words "transfer of property," as used in Sec. 5 of the Transfer of Property Act, cannot be imported in Sec. 4 of the Partition Act.

Sultan Begam v. *Debi Prashad*, I. L. R. 30 All. 324 (F.B.) *referred to.*

SECOND APPEAL from a decree of BABU BIND BASNI PRASAD, Second Additional Subordinate Judge of Benares, confirming a decree of BABU MAHESHWARI DAYAL, city Munsif.

B. Malik for the appellant.

A. Sanyal, K. N. Malaviya and *Sunit Kumar Tagore* for the respondent.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an appeal by one of the defendants in a suit for partition of two houses in the city of Benares. They were purchased in the names of Mst. Chunia and Mst. Sohni, the wives of Parshotam and Harkishen respectively. It is immaterial to determine whether the houses really belonged to the husbands or the wives as all the four were impleaded as defendants and set up a common defence. The plaintiff-respondent purchased the half share standing in the name of Mst. Chunia in execution of a simple money decree against her, and subsequently instituted the suit for partition which has given rise to this appeal. The defence was founded on S. 4 of the Partition Act. It was pleaded that the two houses which adjoin each other, are dwelling houses belonging to the undivided family consisting of Parshotam Das and Harkishun and their wives, and that the plaintiff-respondent is entitled to no more than the

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*S. A. 719 of 1930

Niamat-ullah, J.

value of the half share which the defendants undertake to purchase. Both the courts below have overruled the defence and decreed the plaintiff's claim for actual partition. Mst. Sohni has preferred the present second appeal impleading the plaintiff and her co-defendants as respondents.

The learned second Additional Subordinate Judge held that the houses in dispute are dwelling houses within the meaning of S. 4 of the Partition Act, and that the defendants' family is an undivided family as contemplated by the aforesaid Section. He, however, held that S. 4 of the Partition Act did not apply inasmuch as the word "transfer" in that Section does not include an auction sale and as the section applies only to cases in which only one house is sought to be partitioned. According to him it is inapplicable where more than one dwelling house is the subject-matter of a partition suit.

The learned advocate for the plaintiff-respondent has sought to support the decree appealed from not only on the grounds on which the judgment of the learned Subordinate Judge proceeds but on other grounds as well. Sec. 4 of the Partition Act runs thus:—

> (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf.
>
> (2) If in any case described in Sub-section (1) two or more members of the family being such share-holders severally undertake to buy such share, the court shall follow the procedure prescribed by Sub-section (2) of the last foregoing section.

The finding of the lower court that the houses in question are dwelling houses of the defendant's family has not been challenged before us. It has been held in *Sultan Begam* v. *Debi Prasad*[1], that S. 4 of the Partition Act is not limited to joint Hindu families but applies where the family is undivided *qua* the dwelling house. It is, however, argued that the defendant's family is not an undivided family in the above sense. Reference is made in this connection to the statement of Bachau, the husband of the appellant Mst. Sohni. He admitted:

> My brother and I have been living separately for 8 or 10 years. My brother also lived in the house in which I live. Both the houses adjoin each other, and are separate. The doors are separate.

It is argued on the strength of the passage quoted above that the two brothers had divided the houses, each taking one of them. This position is, however, wholly inconsistent with the plaintiff's case set forth in his plaint in which it is clearly alleged that he purchased the half undivided share of Mst. Chunia in each of the two houses, and that the defendants were not willing to have an amicable partition of them. That the plaintiff purchased an undivided half share in the two houses at the auction sale held in execution of the decree against Mst. Chunia also negatives the theory of partition. If the contention put forward before us be accepted, the necessity for a partition ceased to exist, and the plaintiff should be deemed to be the owner of one of the two houses. We must take it for the purposes of this case that both the houses are the joint property of the two brothers or their wives, and that the plaintiff purchased a half undivided share in each of them. The learned Subordinate Judge held against the plaintiff's contention on this part of the case, and we think rightly.

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[1] I. L. R. 30 All. 324 (F.B.)

Niamat-ullah, J.

The view expressed by the learned Subordinate Judge in his judgment, namely, that S. 4 of the Partition Act does not apply to a case in which the plaintiff obtained a share in an undivided dwelling house at a sale held in execution of a decree is, to our mind, incorrect. The process of reasoning by which he arrived at that conclusion is not only faulty but unintelligible. S. 4 of the Partition Act applies to a case in which a share of 'a dwelling house' belonging to an undivided family has been "transferred" to a person who is not a member of such family. It is clear to us that where an undivided share of one of the members of an undivided family is sold in execution of a decree it is "transferred" to the auction-purchaser, and does not remain vested in the judgment-debtor. The learned Subordinate Judge refers to Ss. 2(*d*) and 5 of the Transfer of Property Act. The former merely declares the repeal of certain enactments as regards certain territories, and contains a saving clause to the effect that nothing contained in the Transfer of Property Act shall affect "any transfer by operation of law or by, or in execution of, a decree or order of a court of competent jurisdiction". It may be accepted that the provisions of the Transfer of Property Act do not affect any transfer in execution of a decree but the section cannot have any bearing on the interpretation of S. 4 of the Partition Act. S. 5 of the Transfer of Property Act provides that in certain specific sections of that Act "transfer of property" means "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons". It is not possible to extend the operation of S. 5 to other parts of the Transfer of Property Act than those mentioned in S. 5. Much less can the words "transfer of property" as used in S. 5 be imported in S. 4 of the Partition Act. We are of opinion that the word "transfer" in S. 4 of the Partition Act is used in its ordinary sense, namely, change of ownership from one to another. It should be noticed that S. 5 of the Transfer of Property Act occurs in Chapter 2, which relates to "transfers of property by act of parties" and words "transfer of property" have, therefore, to be applied in the peculiar sense given by S. 5 in relation to cases dealt with in that chapter. For these reasons we hold that S. 4 of the Partition Act applies to the case before us, and that if the defence is otherwise a good one, it cannot fail only because the plaintiff-respondent purchased not by a private treaty but at an auction sale in execution of a decree against Mst. Chunia.

The second ground on which the judgment of the learned Subordinate Judge proceeds is still less cogent. He maintains that if two or more dwelling houses belonging to an undivided family are the subject of a partition suit, the defence contemplated by S. 4 is not admissible. Stress is laid on the words "a dwelling house" occurring in S. 4. The learned Subordinate Judge has obviously overlooked that each of the two houses is "a dwelling house" and is sought to be partitioned. In reference to Section 13 of the General Clauses Act which provides that unless a contrary intention is implied singular words occurring in a Statute should be taken to include the plural, the learned Subordinate Judge is of opinion that a contrary intention appears from S. 4 of the Partition Act, and therefore the singular should not be held to include the plural. We are unable to find any words in S. 4 of the Partition Act which preclude an application of the rule contained in S. 13 of the General Clauses Act. Apart from this consideration the provisions of S. 4 are general enough to apply to every dwelling house a share of which has been transferred to a person who is not a member of the undivided family to which the house belongs and is sought to be partitioned. If the family is large enough to need several dwelling houses to accommodate it, and the share of one of the members in all such houses is transferred to a stranger, on no principle can the other members of the family be precluded from availing themselves of the protection afforded by S. 4 of the Partition Act. We have no hesitation in holding that the view taken by the learned Subordinate Judge is unsustainable.

For the foregoing reasons we are satisfied that S. 4 of the Partition Act is applicable, and that the defendants having undertaken to buy his share, the plaintiff is only entitled to half of the value of the two houses. As both the courts below overruled the defence they did not have the houses valued to ascertain the amount which the defendants must pay to the plaintiff for his share in the two houses. In the view we have taken this becomes necessary. Accordingly we allow the appeal, set aside the decrees passed by the courts below, and remand the case to the court of first instance with a direction that it should make a valuation of the two houses and proceed in the manner required by S. 4 of the Partition Act. The appellant shall have her costs in all the courts up to date from the plaintiff-respondent.

Appeal allowed
Case remanded

Civil
1932
April 25
Sulaiman, C. J.
Mukerji, J.

MURLIDHAR AND ANOTHER (*Defendant*)
versus
JAINTI PRASAD AND OTHERS (*Plaintiffs*)*

Specific Relief Act, Sec. 9—Inapplicability of—Decree-holder put in formal possession by execution court—Plaintiff's objection under Or. XXI, R. 100 C. P. C. dismissed—Suit under Sec. 9 of Specific Relief Act—Whether maintainable.

After formal delivery of possession had been given to the defendants of a house purchased by them in execution of a decree, the plaintiffs filed an objection under Or. XXI, R. 100 C. P. C. The execution court, holding that plaintiffs had not been in possession, dismissed their objection. They then sued under Sec. 9 of the Specific Relief Act, and the lower court,

*Civ. Rev. 377 of 1931

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1932

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PRASAD

finding that plaintiffs had been in possession of the house and were wrongly dispossessed within 6 months of the suit, restored possession to them. *Held*: that formal delivery of possession was given to the defendants in due course of law and Sec. 9 of Specific Relief Act had no application, and the lower court acted without jurisdiction or, to say the least, with material irregularity, in decreeing the plaintiffs' claim under that section without going into plaintiffs' right to possession. (2) that as a regular suit under Or. 21, R. 103 was now barred by time, the plaintiffs should be allowed to amend the plaint and convert the suit into one for possession based on title or right to possession.

CIVIL REVISION against the decree of Second Munsif of Bulandshahr.

K. N. Katju and *P. L. Kshetry* for the applicants.

U. S. Bajpai, Shiva Prasad Sinha and *S. B. L. Gaur* for the opposite parties.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is an application in revision by the defendants arising out of a suit under Section 9 of the Specific Relief Act. The defendants in execution of their mortgage decree purchased a house at auction and applied for delivery of possession. On February 23, 1930, the Amin delivered possession to the defendants. The present plaintiffs filed objections under Order XXI, Rule 100 C. P. C. but their objections were ultimately dismissed. Instead of bringing a regular suit they filed a suit under Section 9 of the Specific Relief Act alleging that they had been wrongly dispossessed.

The learned Munsif has gone into the question of fact and has come to the conclusion that the plaintiffs were in possession of the house and were wrongly dispossessed within six months of the suit. He has accordingly restored possession to them.

The defendants have come up in revision and urge that no suit lay under Section 9 of the Specific Relief Act.

It seems to us that the contention of the defendants must be accepted. There is no doubt that formal delivery of possession was given to the defendants in due course of law through an officer of the court. It was not a case where the defendants themselves dispossessed the plaintiffs. The plaintiffs filed an objection in the court alleging that they were in possession and had been dispossessed by the holder of the decree. The court investigated their claim and held that they had not been in possession. It accordingly dismissed the objection.

Under Section 103 C. P. C. any party not being a judgment-debtor against whom an order is made under Rule 101, may institute a suit "to establish the rights which he claims to the present possession of the property", but subject to the result of such suit (if any) the order is conclusive.

The order of the execution court is conclusive against the present plaintiffs unless they can get a decree establishing their right which they claim to the present possession of the property. Their merely showing that they were in possession and had been dispossessed would not be sufficient. As a matter of fact the finding of the court that they were not in possession at all on that date is binding upon them. They must establish their right to possession on the assumption that they were not in possession on that date. The suit to establish the right to possession contemplated by Section 103 C. P. C. is, in our opinion, not one under Section 9 of the Specific Relief Act.

This is also clear from the language of Section 9 of the Specific Relief Act itself. It is only where a person has been dispossessed without his consent "otherwise than in due course of law" that he can recover possession in the summary proceeding. In a case where the execution court has put the auction-purchaser formally in possession and has dismissed an objection raised by the rival claimant, it is not a case of dispossession, otherwise than in due course of law. The delivery of possession was in fact in due course of law.

This view is further strengthened by the circumstance that whereas a period of six months is prescribed under Article 3 of the Indian Limitation Act for a suit under Section 9 of the Specific Relief Act, there is a period of one year under Article 11 (*a*) of the Act for a suit by a person to establish his right to the present possession of the property against whom an order has been passed by an execution court. Obviously the two classes of suits are of a different nature and fall in different categories.

We are accordingly of opinion that Section 9 of the Specific Relief Act had no application whatsoever to the present suit, and the court below has acted without jurisdiction or, to say the least, with material irregularity in decreeing the claim under that section without going into the plaintiffs' right to possession. .

We however find that if the present suit were dismissed and the plaintiffs were compelled to institute a fresh suit for declaration, their claim would be barred by time. We consider it unnecessary to decide whether any bar of *res judicata* arises against the plaintiffs in consequence of a previous declaratory suit brought by at least some of them, which failed.

We allow this revision and setting aside the decree of the court below, send the case back to that court with directions to fix a reasonable time for allowing the plaintiffs, if they be so advised, to amend their plaint, so as to convert it into one for a regular suit for possession either based on title or right to possession and to pay the additional court-fee for such relief. If the plaintiffs fail to amend the plaint, the court would dismiss the suit. If they amend the plaint, the defendants would be at liberty to file a supplementary written statement, and the case would then be disposed of according to law.

We direct that in any event the defendants must pay the costs of the plaintiffs of the present litigation in both the courts.

Revision allowed
Case remanded

CIVIL

1932

May 6

MUKERJI, J.
BENNET, J.

HIRA SINGH AND ANOTHER (*Plaintiffs*)
versus
CHANDAN SINGH AND OTHERS (*Defendants*)*

Tenancy Act (III of 1926), Sec. 121 and Schedule IV, Group D—Alleged tenants of a plot—Declaratory suit in Civil Court—Relief—'Owners of a pucca *well'—Whether Civil Court has jurisdiction.*

Plaintiffs alleging themselves to be tenants of a certain plot instituted a suit in the Civil Court for a declaration that they were owners of a *pucca* well in the plot, and the defendants who were admittedly zemindars of the land in question denied that the plaintiffs were tenants and alleged that the well had been made by them. *Held,* that the suit amounted to one for a declaration of the right of the plaintiffs as tenants, and such a suit will cover the question of the ownership of the well, and the revenue court alone had jurisdiction to entertain it.

ORDER on reference submitted by the District Judge, Aligarh, under Section 267 of the Agra Tenancy Act (III of 1926).

Krishna Murari Lal for the applicants.

M. L. Chaturvedi for the opposite parties.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a reference by a learned Munsif under Section 267 of the Agra Tenancy Act, Act III of 1926, enquiring for a direction of this Court as to whether the munsif has jurisdiction to entertain the suit in question. Learned counsel for defendants drew attention to the fact that one of the three defendants had died and he desired that the case should be adjourned for proceedings of abatement or substitution of names to be taken by the munsif. But we consider that we must first decide the question as to whether the munsif has jurisdiction to entertain the suit. The plaint asked for a declaration that the plaintiffs were owners of a *pucca* well in plot No. 326 of a certain village and that defendants had no connection with that well. The plaintiffs set forth in their plaint that they were the tenants of No. 326. The written statement denied that the plaintiffs were tenants of that number and alleged that the well had been made by the defendants. The plaint admitted that the defendants were the zamindars of the land in question. We consider that the case is governed by the provisions of Section 121 of the Agra Tenancy Act and that the suit amounts to a suit for a declaration of the right of the plaintiffs as tenants. Such a suit will cover the question of the ownership of the well which is situated in No. 326 claimed by the plaintiffs as their tenancy. The plaintiffs have omitted to ask for a relief in regard to No. 326 merely with the object of making their plaint resemble a plaint in which the civil court will have jurisdiction. Chapter VII of the Agra Tenancy Act deals with the question of improvements and all questions in regard to improvements are cognizable by the revenue court. The fourth schedule, Group (*d*) provides that applications under Chapter VII in regard to improvements are triable by Assistant Collectors in charge of sub-divisions. Under these circumstances we consider that the revenue court alone has jurisdiction, and we return this reference to the learned Munsif who should return the plaint to the plaintiffs for filing in the proper court. The plaintiffs will pay the costs of this reference and the costs of the court below.

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* Mis. Case 739 of 1931

Reference answered

CIVIL
1932
May 23
IQBAL AHMAD, J.

BISHAMBHAR NATH
versus
ACHAL SINGH*

Municipalities Act (II of 1916), Sec. 318 and Civil Procedure Code, Sec. 115—Order of District Magistrate—Passed in exercise of appellate jurisdiction conferred by Sec. 318—Whether revision lies to High Court,

The Court of the District Magistrate while deciding an appeal under Sec. 318 of the Municipalities Act is not subordinate to the High Court and accordingly no revision lies to the High Court.

CIVIL REVISION from an order of J. H. DARVIN ESQ., District Magistrate of Agra.

K. D. Malaviya for the applicant.

Baleshwari Prasad for the opposite party.

The following judgment was delivered by

Iqbal Ahmad, J.

IQBAL AHMAD, J.—A preliminary objection has been taken to the hearing of this application in revision. The order sought to be revised is an order of the District Magistrate of Agra purporting to have been passed by him in exercise of the appellate powers conferred on him by Section 318 of the Municipalities Act, Act II of 1916. The application before me purports to be an application under Section 115 C. P. C.

The revisional jurisdiction conferred on the High Court by that section is limited to cases decided by "any court subordinate to such High Court" and it is argued by the learned counsel for the opposite party that as the court of the District Magistrate when dealing with appeals under Section 318 of the Municipalities Act is not subordinate to the High Court this court has no jurisdiction under Section 115 C. P. C. to revise the orders passed by the District Magistrate under Section 318 of the Municipalities Act.

The learned counsel for the applicant contends that in view of the fact that by Section 319 of the Municipalities Act the court hearing an appeal under Section 318 can make a reference only to the High Court and that on such reference the High Court has not only to express its opinion but to decide the matter referred to it the court hearing an appeal under Section 318 must be deemed to be subordinate to the High Court and in support of this contention he has placed reliance on the case of *Sadeck Abdulla* v. *Mahomed Abdulla Hasanali*[1].

I am unable to agree with the contention of the learned counsel for

*Civ. Rev. 29 of 1932

[1] A. I. R. 1929 Bom. 190

the applicant. That the officer or the District Magistrate hearing an appeal under Section 318 is a court is put beyond doubt by reference to Section 320 of the Municipalities Act, and the only question that remains for consideration is whether or not that court is subordinate to this court within the meaning of Section 115 C. P. C. In the determination of this question no assistance can be had from Section 3 C. P. C. for the simple reason that the enumeration of subordinate courts in that section is not exhaustive and there may be courts not referred to in that section that may be subordinate to this court. It appears to me, however, that a court can be said to be subordinate to another court only if the latter court has appellate or revisional jurisdiction or power of superintendence given to it by some statutory provision over the former court and that the mere authority to decide a reference does not necesarily make the court making a reference subordinate to the court deciding the same. Further, as by Section 115 this court is given revisional powers only with reference to cases decided by subordinate courts, that section can only have reference to courts over which this court has a judicial and not a purely administrative power.

Neither appellate nor revisional powers have been conferred on the High Court over the court of the District Magistrate by the Municipalities Act. On the contrary it is provided by Clause (2) of Section 321 of that Act that the order of the appellate court under Section 318 shall be final. Nor am I aware of any statutory provision conferring on this High Court power of superintendence over courts hearing appeals under Section 318 of the Municipalities Act. I, therefore, hold that the decision sought to be revised by this court is not the decision of any court subordinate to this court and, as such, the application for revision is incompetent.

In my judgment the Bombay case relied upon by the learned counsel for the applicant has no application to the case before me. It was decided in that case that with regard to questions arising in reference to cases to be stated by the Resident at Aden for the decision of the High Court of Judicature at Bombay under Section 8, Aden Courts Act (II of 1864) the Resident's court is subordinate to that High Court within the meaning of Section 115 C. P. C. The learned Judges who decided that case relied on the preamble to and on Section 31 of the said Act in support of the conclusion arrived at by them. By the preamble it is provided *inter alia* that

> It is expedient to provide for the superintendence or revision of such judgments and proceedings by the High Court of Bombay and by Section 31 the High Court at Bombay is authorized and empowered to make and issue general rules for regulating the practice and proceedings of the court of the Resident and to frame rules for every proceeding in the said court, etc.

In view of these provisions the learned judges held that the court of the Resident at Aden was a court subordinate to the High Court of Bombay within the meaning of Section 115 C. P. C. notwithstanding the fact that by Section 15 of the said Act it is provided that the Bombay High

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1932
BISHAMBHAR NATH v. ACHAL SINGH
Iqbal Ahmad, J.

Court is not a court of appeal as regards the decisions by the court of the Resident at Aden.

The reasons assigned by the learned judges of the Bombay High Court for holding that that court has revisional powers over the President's Court at Aden have no application to the case before me. Provisions analogous to the provisions contained in the Aden Courts Act are not to be found in the Municipalities Act and as already stated the court of the District Magistrate under the Municipalities Act has not by any statutory provision been made subordinate to the High Court in matters decided by it under the Municipalities Act.

The mere fact that under certain circumstances the District Magistrate is authorized to make references under the Municipalities Act to this court, cannot, in my opinion, be a justification for holding that the District Magistrate is subordinate to this court in matters coming under the Municipalities Act. A reference has been made in the Bombay case to the decision in *In the matter of John Thomas*[2] in which it was observed that a reference was "a modified form of appeal" and the learned judges of the Bombay High Court appear to have been inclined to the view that the mere fact that a court is empowered to entertain a reference made by another court makes the court making the reference subordinate to the court deciding the same. With all respect I am unable to agree with this view. In the absence of a definite statutory provision to the effect that the decision of the court making the reference is to be in accordance with the decision of this court on the matter referred to it, I can discover no justification for holding that the court making the reference is subordinate to this court. There is no such provision in the Municipalities Act. The appellate court under that Act is no doubt empowered to make a reference to the High Court for the decision of the point on which it entertains doubts but it is not bound to decide the point referred to this court in accordance with the decision of this court. After deciding the matter referred to it under that section this court cannot enforce compliance with its decision and even if the appellate court in deciding an appeal under Section 318 decides the point referred to this court otherwise than in accordance with its decision, this court cannot interfere with that decision. To me there appears to be no analogy between a reference and an appeal. An appeal is preferred by an aggrieved party whereas a reference is made not by a party but by a court. The decision of the subject-matter of appeal is by the court entertaining the appeal whereas the decision of the matter about which a reference is made is not necessarily by the court deciding the reference.

For the reasons given above, I hold that the court of the District Magistrate while deciding an appeal under Section 318 of the Municipalities Act is not subordinate to this court and accordingly no revision lies to this court and the preliminary objection is well founded.

I dismiss this application with costs.

Application dismissed

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[2] 6 Beng. L. R. 180

CRIMINAL

1932

July 18

BENNET, J.

CHIRANJI LAL
versus
MAHADEO PRASAD*

Criminal Procedure Code, Sec. 146(1)—Two joint owners both in joint possession fighting—Likelihood of breach of peace—Whether magistrate entitled to pass order under Sec. 146 and direct parties to file a partition suit in civil court.

The case of two joint owners both in joint possession is covered by the words "unable to satisfy himself as to which of them was in possession" in Section 146 Cr. P. C. as it is a case where the magistrate cannot decide which of them was in exclusive possession.

When two joint owners of barren land in an urban area are fighting and there is a likelihood of a breach of the peace between them, a magistrate is entitled to pass an order under Sec. 146 Cr. P. C. directing that the land should be kept in attachment pending the decision of the partition suit to be filed in the civil court within three months. *Paramhans Pande* v. *Sheodarshan Singh*, I. L. R. 48 All. 397 *distinguished.*

CRIMINAL REFERENCE by the Sessions Judge of Allahabad.

B. Malik for the applicant.

Balmakund for the opposite party.

The following judgment was delivered by

Bennet, J.

BENNET, J.—This is a reference by the learned Sessions Judge of Allahabad recommending that an order of a magistrate under Section 146 Cr. P. C. should be set aside. The order directs that certain landed property should be kept in attachment pending the decision of the civil court and the order directs the parties to file a partition suit in the civil court within three months. This order was first attacked on the ground that there was no finding by the magistrate that there was a likelihood of a breach of the peace. Under Section 145(1) the magistrate to whom a report is made by the police comes to a finding that he is satisfied of the likelihood of a breach of the peace and issues notices to the parties. There is such an order of the magistrate in the notices which he issued to the parties in this case that there was a likelihood of a breach of the peace. It is not necessary for the magistrate to again come to a finding on this point in his subsequent order.

The next ground on which the order of the magistrate has been attacked is that the conditions are not satisfied under which he can pass an order under Section 146 Cr. P. C. The facts which existed in the present case are that on January 15, 1924 the District Judge gave a decree in a civil appeal which was subsequently upheld by this Court. Under that decree the party of Chiranji Lal, the applicant in revision, was held to be entitled to possession of a certain area of about 5 biswas. It is admitted that the possession was joint with the opposite party. Certain observations were made by the Judge in regard to a portion of 2 biswas 9 dhurs, but I do not think that it is necessary to come to an exact interpretation of what that judgment meant in the present proceeding. It is sufficient that the

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*Cr. Ref. 383 of 1932

Judge decided that there was certain property which was joint. The present dispute has admittedly arisen in regard to the same property. The question is whether when two joint owners are fighting and there is a likelihood of a breach of the peace between them, a magistrate is entitled to pass an order under Section 146 Cr. P. C. or not. The property in the present case is barren land in an urban area and possession can only be exercised by actual physical possession. The wording of Section 146(1) is

> If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent court has determined the rights of the parties thereto, and the person entitled to possession thereof.

Do the words "unable to satisfy himself as to which of them was in possession" cover the case of two joint owners both in joint possession or do they not? I consider that these words do cover that case and that if there are two joint owners in possession jointly, it is a case where the magistrate cannot decide which of them was in exclusive possession. Learned counsel then argued that such a case of joint possession would not come under Chapter XII at all, or that the court should take security under Section 107 Cr. P. C. But the wording of Section 145(1) is "that a dispute likely to cause a breach of the peace exists concerning ***any land***". The section does not define the land as being land in the possession of one party or another but merely that it is land and that there is a dispute and that that dispute is likely to cause a breach of the peace. All these elements exist in the present case where there is land and there is a dispute and the dispute is likely to cause a breach of the peace. The fact that the land is admittedly in joint possession of the parties merely in my opinion makes it unnecessary to produce evidence as to it being in the exclusive possession of one party, that is, if it is admittedly in possession of both parties. In any case the finding is apparently that it is in possession of both parties and it is on that account that the magistrate has ordered a partition to be obtained from the civil court.

The next ground which was argued was that there was nothing to refer to the civil court as has been held in the case of *Paramhans Pande* v. *Sheodarshan Singh*[1]. In that case the civil court had awarded joint possession to the parties and it was held by a learned single Judge of this Court that there was nothing more that the civil court could do except to partition the property. The court did not consider that partition would be a determination of a title or right to possession. But I consider that in a partition the title and right to separate possession of each portion of the joint property is determined for one of the parties and what has been formerly a subject of dispute between them would by a partition suit be determined. Further in the case which formed the subject of that ruling there was a question of the joint possession of 10 bighas of *sir* land. The court pointed out that such possession might be exercised by obtaining a share of profits. In the present case the land is not agricultural land and no possession can be exercised by obtaining a share of profits. The case is, therefore, different. Under the circumstances of the present case I consider that the order of the magistrate was correct and therefore I refuse this reference. I would point out to the learned Sessions Judge that when a magistrate tenders an explanation it is his duty to make a comment on that explanation, but in the present case the explanation has been forwarded without any comment. The parties in this proceeding will pay their own costs.

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[1] I. L. R. 48 All. 397

Reference refused

CIVIL
1932
July 7
PULLAN, J.
NIAMATULLAH, J.

RAM NATH (*Plaintiff*)
versus
NANAK CHAND AND OTHERS (*Defendants*)*

Transfer of Property Act, Sec. 6(d)—Applicability of—Award—Co-sharer—To appropriate income—Condition in restraint of alienation during his life-time—Rights of transferee from him.

By an award, which partitioned the family property, specified shares in the shops in question were allotted to *M*. The award defined the rights of *M* in the shops as follows:—"He is the absolute owner thereof. He is to appropriate and maintain himself with the income and rent of such property, but he will have no power to make any transfer, such as sale, mortgage, lease, hypothecation as security and *theka* for a term or in perpetuity, etc., in respect of such property; and if he does make a transfer, the same shall be considered to be invalid. Besides *M* any one among his descendants will have power to make mortgage, etc." *M* while in possession assigned his rights in the shops to the plaintiff, who thereupon instituted a suit for partition, making *M's* co-sharers parties to the suit. *Held,* that subject to the condition in restraint of alienation, assuming it to be valid, the shares in the shops in question vested in *M* and no one else, and his right of enjoyment described as full ownership being unfettered, he could claim separate enjoyment of his share of the shops by partition, and the defendants, who had no *locus standi* to eject the plaintiff or to question his right of possession, could not question his right to obtain partition by virtue of his present possession of the shares of *M* in the shops in dispute; and Sec. 6(*d*) of Transfer of Property Act had no application.

SECOND APPEAL from a decree of PANDIT KEDAR NATH MEHRA, Additional Subordinate Judge of Farrukhabad, reversing a decree of MR. S. M. AHSAN KAZIMI, Munsif of Kanauj.

S. N. Sen and *N. C. Sen* for the appellant.

G. S. Pathak for the respondents.

The judgment of the Court was delivered by

Niamatullah, J

NIAMATULLAH, J.—This appeal arises out of a suit for partition of two shops, the plaintiff claiming a three-fourths share in one and half in the other. He claims title from Mangu Lal, defendant No. 3 under a sale deed dated December 15, 1919, executed by the latter. The deed purports to transfer to the vendee all rights which the vendor had. Mangu Lal himself did not contest the plaintiff's suit but one of his half brothers, the present respondent No. 1, resisted it on grounds which will presently appear. The plaintiff also claimed a subsidiary relief of damages amounting to Rs.500 on the allegation that defendant No. 1 completely demolished a portion of one of the shops and appropriated the materials thereof. The munsif, before whom the suit had been instituted, decreed the plaintiff's claim for partition and to damages amounting to Rs.120 to be paid by defendant No. 1. The lower appellate court dismissed the suit in its entirety on an appeal preferred by defendant No. 1. In the present second appeal by the plaintiff, the only contesting respondent is defendant No. 1, though other defendants including Mangu Lal, the plaintiff's vendor, have been impleaded as respondents.

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*S. A. 227 of 1931

It is not disputed that the shops in question formed part of ancestral property in the hands of one Mathura Prasad, who had four sons. One of these sons is Mangu Lal, under whom the plaintiff claims and who was born of Mathura Prasad's first wife. Defendants Nos. 1, 2 and Basdeo, father of defendants Nos. 4 and 5 were the sons of Mathura Prasad by another wife. In consequence of certain disputes which arose in the lifetime of Mathura Prasad, the entire family property was partitioned through certain arbitrators, who gave an award on February 26, 1909. It provided, *inter alia,* that

> the property specified below and entered under head C belongs to him (Mangu Lal), who is the absolute owner thereof (*malik kamil hai*). He is to appropriate, and maintain himself with the income and rent of such property, but he will have no power to make any transfer, such as sale, mortgage, lease, hypothecation as security and *theka* for a term or in perpetuity, etc., in respect of such property; and if he does make a transfer, the same shall be considered to be invalid (*najaiz*). Besides Mangu Lal any one among his descendants (*aulad*) will have power to make mortgage, etc.

Among the properties thus given to Mangu Lal are shares in the two shops now in question. As already stated, he was given a three-fourths share in one shop and half in another. Another part of the award provides that Mathura Prasad is to collect rent and pay to Mangu Lal his share thereof. Mathura Prasad subsequently died, and it does not appear who collected the rent of the joint shops; but it was admitted by defendant No. 1 in the court of first instance

> that Mangu Lal was in possession of the shops, although he confines (*sic*) that possession to have been for maintenance only and through receipts of proceeds directly and indirectly.

This admission is noted in the judgment of the first court under issue No. 4, which relates to limitation and adverse possession—a plea raised by defendant No. 1.

It was pleaded in defence that Mangu Lal had transferred the property in dispute to the mother of defendant No. 1 by a sale deed, dated July 22, 1902, that the reference to arbitration and the award were null and void for certain reasons stated in the written statement, which it is not necessary to mention in detail, and that if the award is valid, Mangu Lal had no transferable interests in the shops so as to give any right to his transferee, the plaintiff. The only ground on which the plaintiff's right to claim partition has been challenged before us is that, Mangu Lal having been given no more than a right to maintain himself with the income of the property allotted to him by the award, his transferee, the plaintiff-appellant, acquired no rights which can entitle him to maintain a suit for partition. The validity of the reference and the award on the allegations mentioned in the written statement has not been questioned before us and so far as we can gather from the judgment of the lower appellate court, it was not challenged in that court also.

The court of first instance, which held that the condition in restraint of alienation, contained in the award, was unenforceable, relied in support of its view on S. 10 of the Transfer of Property Act. It is argued before us that that section applies to transfer and that an award is not a transfer. Reliance is placed on some observations of their Lordships of the Privy Council in the recent case of *Mohammad Raza* v. *Abbas Bandi Bibi*[1] in which a family arrangement was in question. Their Lordships expressed the view that S. 10 of the Transfer of Property Act was not applicable to a family arrangement which is not a transfer and the validity of which should be considered according to the rules of justice, equity and good conscience. Their Lordships, however, proceeded to consider the case on the assumption that S. 10 of the Transfer of Property Act was applicable and held that the condition in restraint of alienation in that case was not absolute and was, therefore, not void for repugnancy. It should be noted that in that case the question arose after the death of the transferor, between his heir and the transferee. We do not propose to decide this case with reference to S. 10 of the Transfer of Property Act. Mangu Lal being alive and a party to this case, it is not necessary to decide whether he has only a life interest, which will be the case if the condition in restraint of alienation, mentioned in the award, is valid, or he is an absolute owner, as the award declares him to be, and whether the subsequent condition depriving him of the right to alienate is void, being in derogation of full ownership conferred by the award. In the existing circumstances, the controversy is narrowed down to the question whether Mangu Lal, who is in possession, could claim separate enjoyment of his share of the shops by partition and, if so, whether he could assign his own right of enjoyment, jointly with his co-sharers or separately by partition, to the plaintiff-appellant.

The object of the arbitrator seems to have been to preserve the property for the descendants of Mangu Lal, who was probably a spendthrift and was considered likely to squander away his share of the family property; and therefore it was considered to be in the interest of his descendants (it should be noted that at the date of award Mangu Lal had no issue) that his right of full ownership, expressly recognized, be fettered by the condition to which reference has already been made. It seems to us that an alienation by Mangu Lal in contravention of that condition is not void but voidable as against Mangu Lal's descendants, who have been declared to be the ultimate beneficiaries, having power to transfer. Subject to that reservation, assuming it to be valid—a point on which we express no opinion—the property is vested in Mangu Lal and no one else. So long as Mangu Lal is alive, the right of enjoyment described as full ownership is unfettered. The award does not provide that in case Mangu Lal makes an alienation in violation of the aforesaid condition, he is to forfeit his right of enjoyment and the property is to pass to another person, nor has any other member of his family a present vested right which can entitle him to eject Mangu Lal's transferee, to whom he chooses to transfer his right

[1] 1932 A. L. J. 709

of possession. The transferee, being in such possession as Mangu Lal had, can, at least, rely upon his possessory right against a person who can claim no right in himself. Even a trespasser can exercise acts of ownership, except as against the rightful claimant. This being so, it is impossible for defendant No. 1 to resist the claim of the plaintiff-appellant, who has for the time being stepped into the shoes of Mangu Lal. The latter does not contest his claim. The defendant No. 1 can have no more right to resist the claim of the plaintiff-appellant to obtain partition of the shops than he would have had if Mangu Lal himself had sued for partition. It may be mentioned incidentally that the award does not forbid partition of the shops at the instance of Mangu Lal.

The learned advocate for the contesting respondent relies on S. 6(*d*) of the Transfer of Property Act, which provides that

> an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

It is said that Mangu Lal has only a right to maintain himself with the usufruct of the shops. We are unable to accept this contention. If Mangu Lal's right is as limited as this contention presupposes, the property must be shown to be vested in some body else, so that a mere personal right of maintenance should be deemed to have been carved out and given to Mangu Lal, and the ownership is vested in some one else who can eject persons having no title. It is conceded that the property is not vested in any living person other than Mangu Lal. Cases between a landlord and the transferee of his tenant having no right to transfer or between a person in whom the paramount right is vested and the transferee from a holder under a maintenance grant, to which Sec. 6(*d*) may possibly be applicable are easily distinguishable. In all such cases the transferee is ejected by virtue of a right of re-entry contained in the lease or grant, or by virtue of proprietary right being vested in another person who can eject trespassers. In this class of cases the person in whom the paramount right is vested can be prevented from entering on the property only by the lessee or grantee, as the case may be, who has the right of enjoyment. Any other person, even though he may be a transferee of a person or grantee, who *ex hypothesi* acquires no right under his transfer, cannot question the right of the paramount owner to enter on his own land. If the lessee or grantee having no right of transfer has himself abandoned possession and transferred it to a third person, the person in whom the paramount title is vested can re-enter. All that he need establish in support of his right of re-entry is that the lessee or grantee abandoned his interest in the property restricted in its enjoyment to him personally. As already stated, Mangu Lal is the only person in whom the property is at present vested, and if he has chosen to place the plaintiff in the position he himself occupied there is no one who can eject the latter. The defendant No. 1 can have no *locus standi* to eject him or to question his right. In these circumstances, we hold that S. 6(*d*) of the Transfer of Property Act does not apply and, in any case, does not entitle the defendant No. 1 to question the right of the plaintiff to obtain partition by virtue of his present possession of the shares of Mangu Lal in the shops in dispute.

The learned advocate for defendant No. 1 relied on *Kuldip Singh* v.

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Niamatullah, J.

Khetrani Koer[2] and *Basangowda* v. *Irgowdatti*, in which it was held that S. 10 of the Transfer of Property Act did not apply to cases of compromise and family arrangement. We have already referred to the Privy Council case on the point and have not considered it necessary to have recourse to S. 10. For the rest those cases have no bearing, as in the former the reversioners in whom the estate was vested sued for a declaration that the alienation was invalid, and in the second it was held that the widow's interest could not be attached by her creditors in execution of a simple money decree, she having been held on the construction of the compromise between her and her husband's reversioners to possess no 'disposing power' within the meaning of S. 60, Civil Procedure Code.

In the view of the case we have taken, this appeal must succeed. The learned Subordinate Judge did not arrive at any finding as regards the plaintiff's claim for damages. The munsif, however, clearly found on the evidence of one of the defendant's own witnesses that one of the two shops had fallen down and that defendant No. 1 appropriated its materials including galvanized iron sheets. The munsif also referred to other relevant matters and assessed the damages at Rs.120. We do not think it necessary to remand the case for determination by the lower appellate court of the amount of damages. We are satisfied that the finding of the munsif is correct. Accordingly we set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff-appellant shall have his costs in this and the lower appellate court from defendant No. 1.

Appeal allowed

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[2] I L. R. 25 Cal. 869

PRIVY COUNCIL

THE RIPON PRESS AND SUGAR MILL COMPANY, LIMITED, BELLARY

versus

V. GOPAL CHETTI AND OTHERS*

CIVIL

1931

July 28

LORD
BLANESBURGH
LORD
ATKIN
SIR
LANCELOT
SANDERSON

Companies Act, Secs. 162(vi), 174, 183—Company—Winding up order on petition of share-holders—Appeal—Form of—Duty of liquidator—Solvent company—Court should have regard to wishes of contributories ascertained by meetings—Preponderating influence of one share-holder—Of itself no reason for winding-up—Lapse of time—Whether winding-up order wrongly made to be maintained.

Where a winding-up order is made upon the petition of share-holders, an appeal at the instance of other share-holders is properly brought in the name of the company. (*In re Diamond Fuel Co.*, (1879) 13 Ch. D. 400 at 405). In such an appeal the only duty of the liquidator is from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the court of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the court ought to know, and it is no part of his duty actively to oppose the appeal at the expense of the company.

*P. C. A. 95 of 1928

CIVIL

1931

THE RIPON PRESS AND SUGAR MILL COMPANY, LIMITED, BELLARY *v.* V. GOPAL CHETTI

Where a company ordered to be wound up has no creditors, so that the contributories only are interested in the result of the liquidation, the court, under Section 174 of the Companies Act, should have regard to their wishes, ascertained by meetings convened under Sec. 183(2).

Under Section 162(*vi*) of the Companies Act, 1913, which empowers the court to wind up a company if it is of opinion that such a course is just and equitable, the fact that one of the share-holders has a preponderating voice in the company by reason of his owning or controlling a large number of shares is of itself no reason for winding up the company.

Loch v. *John Blackwood,* [1924] A. C. 783 *distinguished.*

A winding-up order having been made in 1924 by the High Court on appeal, with effect from 1922, the Judicial Committee upon an appeal heard in 1931, although of opinion that the order was not justified when made, did not set aside the order except as to costs, having regard to the lapse of time and intervening events—the business of the company had ceased for years and its undertaking had been broken up, and the task of adjusting liability for the mischief which had resulted from that liquidation presented a prospect of far-reaching and ruinous litigation.

APPEAL from a decision of the High Court of Judicature at Madras.

K. V. L. Narasimham and *Begum Farrukhi* for the appellants.

W. H. Upjohn, K.C. and *K. Rustomji* for the respondents.

The following judgment was delivered by

Lord Blanesburgh

LORD BLANESBURGH—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated November 13, 1924, reversing a judgment and order dated November 3, 1922, of a single Judge of the same High Court in its ordinary original civil jurisdiction. These orders were made in the matter of a petition presented to the Court on May 1, 1922, for the compulsory winding-up of the appellant company. By the order of November 3, 1922, Mr. Justice Kumarswami Sastri dismissed the petition with costs. On appeal his order was discharged by that of November 13, 1924, and the compulsory winding-up of the company was thereby decreed. This appeal from that order reached the Board for hearing more than six years after it had been made. Its discharge accordingly involved the supersession of all proceedings in a liquidation which as a result of it had then been in operation for more than eight years. To this fact are attributable the grave difficulties which have confronted the Board in disposing of the appeal.

The company was constituted in 1882 for the purpose (1) of erecting a cotton-pressing factory at Raichur in Hyderabad and (2) of erecting a sugar factory at Hospet in the Madras Presidency of British India. It was registered in Madras solely because part of its business was to be carried on in British India. But for the Hospet project it would have been registered in the Nizam's Dominions. And the Hospet factory did not materialise. It was definitely abandoned as a project in 1909. The company has never done any business in British India. Its sole activities have been centred at Raichur in connection with the factory which in due course was erected there. The fact that the fixed property of the company and its business have thus been in one jurisdiction and its place of incorporation and statutory obligations in another has always been a source of difficulty. It hampered the company in its competition with local rivals: it exposed it to the risk of double taxation: its accounts were necessarily kept at Raichur in the local vernacular, and the compilation of the annual statements at Bellary from these materials in a form to meet the requirements of the statute law of British India must always have been difficult and never quite satisfactory. It is unfortunate that in the liquidation no allowance appears so far to have been made for, or consideration given to, these difficulties inherent in the situation.

The company was not a private company, but its share-holders were never numerous. Its articles of association were those of Table A of the Act of 1882, with modifications introduced which did not affect its status as a public company. It had a nominal capital of Rs.1,25,000, divided into 250 shares of Rs.500 each. Of these, 200 shares were issued at the time of its formation, Rs.250 being then called up on every share. This paid-up capital sufficed for the establishment of the Raichur factory. The 200 shares with Rs.250 paid up were in May, 1922, in the hands of 24 holders or sets of holders.

The original articles of the company, Clauses 7 and 8, provided for the appointment of named persons, as secretaries and treasurers at an allowance of 5 per cent on nett profits, and as agents in charge of the factories at a like allowance. Between 1905 and 1909 K. Venkata Rao, of whom much will be heard in the sequel—it is around him that the whole controversy has raged—had become one of the two agents.

In 1909 and 1910 the original offices of secretary and treasurer and agent were abolished, and by special resolutions of the company, passed and confirmed unanimously on May 7 and 28, 1910, Clauses 7 and 8 of the company's articles of association were cancelled, and it was resolved that, in lieu thereof, the firm of K. U. S. Ramachander & Co. should be appointed treasurers of the company on condition of their retaining the company's moneys without interest, and lending moneys to the company without interest whenever required.

In view of the allegations of the petition with reference to this arrangement—operative, as it was, for so many years—it is convenient to note, in passing, the deliberation with which it was made—the special resolution of May superseding with a technical amendment an earlier special resolution adopted with similar unanimity in April, 1910. It is material also to note that under the arrangement the firm was called upon to discharge the duties which had therefore devolved upon the secretary, treasurer and agent combined, and that in any advantage that might accrue to it from the fact that, like a banker, it was not required to pay interest on the company's balances, was to be found the only counterpart for the 10 per cent on profits which, under the superseded arrangement, had to be found by the company.

The firm K. U. S. Ramachander & Co. was the family firm of Venkata Rao. From 1910 and earlier he had been at its head. In 1922 he was 73 years of age. It is impossible to read the record without seeing that, even at a later date, he remained a man of outstanding ability and strong personality. From 1910 his was undoubtedly the predominant influence in the firm, although he was only one of nine members, as also in the directorate of the company, although the evidence is clear to show that no

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Lord Blanesburgh

duly qualified share-holder who desired a seat on the Board was ever excluded therefrom. His influence, real, and, for anything that appears, thoroughly well deserved, was not, at all events, unwelcome. Everything points to the conclusion that the share-holders, for benefits resulting to them therefrom, were well content to leave the management of the company's affairs in Venkata Rao's hands.

At all relevant times a large number of shares in the company stood registered in his own name, and in the names of his firm and of different individual members of his family, some of them members of the firm. But the number which at any time he really controlled is left in complete uncertainty. His own personal holding was never large. He complains in his evidence that members of his family had become, prior to the date of the petition, at variance with him. The petitioners have put in the minutes of a meeting of June 23, 1917 (Record Part II, p. 7), at which K. Ramachander, his eldest son, is found voting against him in favour of a larger dividend. Indeed, their Lordships can find nothing in the record to show that if at any time any disagreement with Venkata Rao's action or policy had existed amongst the share-holders, it would not have found effective expression as, for the moment at all events, it did, at the meeting of August 21, 1921, to which reference will presently be made. The proceedings of the share-holders up to that date do not indicate that as the petition suggests they were there merely to register Venkata Rao's decree. They do show that up to 1921 there was never any serious disagreement amongst them.

The first trace of conflict originates with a resolution proposed by Venkata Rao as an extraordinary resolution at a general meeting of the company held on August 6 of that year. The resolution, in effect, was that in view of the complete abandonment of the Hospet venture and of difficulties resulting from its British Indian incorporation, the registration of the company should be transferred to Hyderabad. The proposal, as might, perhaps, have been expected from what has been already said, was accepted unanimously at that meeting. But Subhapati Rao, a share-holder, a vakil of 30 years of age, who now becomes as prominent in the drama as Venkata Rao himself, although the holder of a single share only, and with, therefore, it might perhaps have been supposed, no very extensive interest in dividends, detected in the resolution or thought or said that he detected a subtle device on the part of Venkata Rao to make the recovery of dividends more difficult. Accordingly, at the meeting held on August 27, 1921, to confirm the resolution, he proposed an amendment to the effect that the company should be wound up voluntarily. And his amendment was carried by a bare majority of the members present, and Venkata Rao's original resolution was therefore lost, although the amendment was not, of course, affirmatively effective.

From this incident must be dated the movement, such as it was, headed by Subhapati Rao, culminating in the petition and ultimately in the winding-up order which is now under review.

The petition, as has been said, was presented on May 1, 1922. There were six petitioners. Subhapati Rao is one; his brother, Lakshmikanta Rao, holding two shares, is another; a third has since died; and a fourth,

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Sidabasappa, sold his 21 shares in the company on November 2, 1924, before the winding-up order was made. The whole six petitioners between them held no more than 32 shares out of the total of 200. Only one other share-holder, the respondent, Madam Venkayya, supported them. The company, in its opposition to the petition, represented the views of a preponderant majority. It was amply solvent. Creditors were in no way interested, if they existed at all.

The petition is an attack upon Venkata Rao from every angle. That that attack was inspired throughout by Subhapati Rao has never been questioned, while Venkata Rao has reiterated in evidence that it is from some unexplained enmity to himself on the part of Subhapati Rao and from that alone that everything has resulted—the winding-up petition, the appeal from the order dismissing it, and the whole course of the supervening liquidation so marked in its hostility to himself. Their Lordships are not prepared to treat these assertions lightly. They have never been contradicted by Subhapati Rao, although he has given evidence on two occasions and has made many affidavits in the course of the liquidation. No petitioner, except himself, has ever taken any part in the proceedings. The petition, for the terms of which Subhapati Rao is clearly, primarily, and not improbably exclusively responsible, is inexcusable in the recklessness and misleading character of its most serious allegations, and their Lordships have been compelled to note that throughout the recorded proceedings in the subsequent liquidation the activities of Subhapati Rao have been exclusive, constant, persistent, and officious, not to be explained by his insignificant material interest in the liquidation or its results. It is necessary to approach the consideration of the case with these most disturbing facts in mind. The learned trial Judge was able to dismiss the petition on what may be called its own demerits. Their Lordships will anticipate so far as to say that it is almost inconceivable that the High Court could have wound up the Company as and when it did or have justified its order by the reasons assigned had these matters been even remotely present to the minds of the learned Judges there. [Their Lordships then examined the evidence and agreed with the trial Judge that the charges against Venkata Rao were not established, and continued as follows:—]

In the result the learned Judge, as has been already noted, found that the charges made by the petition had not been proved in any particular. It had been conceded, he said, that unless the case could be brought within Clause 6 of Section 162 of the Indian Companies Act no order could be made: no misconduct had been proved against Venkata Rao or the other directors. The fact that Venkata Rao had a preponderating voice in the company by reason of his owning or controlling a large number of shares was of itself no reason for winding-up the company; the allegation that dividends had not been paid regularly was no ground for winding-up, but the trouble had only arisen in transmission cases. The petitioners had had inspection of all the accounts, and in no instance had these been shown to be wrong. As regarded the sum proposed to be spent on machinery, it was hardly likely that Venkata Rao, with his preponderating interest, would ruin the company for the pleasure of annoying the other share-holders.

Their Lordships subscribe to that judgment. The order dismissing the petition with costs was in their judgment, on the evidence before the Court, the only possible order. They think it both fair and right to add that on a careful consideration of all the evidence they can find no justification worthy of the name for the suggestion that during Venkata Rao's long tenure of office his management of the company's affairs had in view any other object than the welfare of the company in which as a share-holder he was, directly and indirectly, so largely interested. Nor have they in the evidence found any proof that moneys retained by the firm were normally in excess of reasonably possible prospective needs or that there was an impropriety on the part of the treasurers in retaining the moneys they did retain or on the part of the directors in recommending their retention. The balances were, in fact, the working capital of the company, even although some portion of them might without illegality or even inconvenience have been distributed as dividend had the share-holders so insisted.

The petitioners appealed to the High Court by notice dated November 17, 1922. For some unexplained reason the appeal was not disposed of until November 13, 1924—nearly two years later. There were no new materials placed before the appellate Court to account for this loss of time, which would not have been possible in England, where winding-up appeals are placed in an interlocutory list in order to be beyond any such risk. Their Lordships hope that this case is, in this, as in so many other respects, exceptional. But this delay ought to have weighed with the learned Judges in reaching a decision. The difficulties created by a winding-up order in November, 1924, with effect from May 22, 1922, which so soon became manifest in the liquidation, might have given them pause. It does not appear that these difficulties were even present to their minds.

Nor is it easy either to discover or to state the actual reasons of the Appellate Judges for making a winding-up order when they did or at all. They were apparently led to do so partly by the case of *Loch* v. *John Blackwood*[1], which, as they noted, had not been available for the trial Judge's consideration, but which, so far as their Lordships can see, bears no resemblance either in principle or detail to the facts as proved in this case. For the rest, while the learned Judges do not in terms reject the Trial Judge's findings of fact, they ignore them altogether. They seem to treat allegations in the petition as true merely because they are placed there. They find neither in its contradictions nor in its charges any room even for criticism. This omission in relation to the alleged threats by Venkata Rao to call up the unpaid share capital of the company is particularly unfortunate. The learned Judges appear, without examination, to accept these charges as proved, while from their statement of the first of them, it is apparent that the nature of the charge made was quite misunderstood. Perhaps their conclusions on the whole matter may, however, best be taken from their own closing words:—

> It is evident that the affairs of this company are carried on in such a way that the members of one family are able to exercise a predominating influence over the management of the company and to secure certain benefits for themselves. The minority are unable to protest effectively

[1] [1924] A. C. 783

> against the actions of the directors because the majority of shares are in the hands of one family and the directors themselves are able to hold over the share-holders the fear of having to pay up the unpaid portion of their shares. This causes a lack of confidence in the management of the directors which there is no hope of improving so long as the present directorate continues and the funds are in the hands of the present treasurers. Under these circumstances, we think the only course we can take to secure the just rights of the share-holders is to direct the winding-up of the company.

Venkata Rao has sworn, and it has not been denied, that before the appeal was heard, two of the petitioners had notified to him their actual, although apparently not their formal, withdrawal from the proceedings. One had died; a fourth, Sidabasappa, as has been stated, had, before this judgment of the High Court, sold his shares. In active support of the petition, therefore, if Venkata Rao has sworn truly, there remained, at the date of the winding-up order, only Subhapati Rao and his brother, holding three shares between them, and Madam Venkayya, who had never even verified its allegations. A striking comment on the observations of the High Court when read in the light of the history already set forth.

But, presumably, these petitioning casualties were not—at least, all of them—known to the learned Judges, and Venkata's statement of them may have been exaggerated. Even so, the conclusions of the Appellate Court cannot, in their Lordships' judgment be supported. Their own examination of the petition leads them, on the evidence, to the inevitable conclusion that its allegations, so far as these were offensive, were entirely unproved. Its proper fate was the dismissal which it met with at the hand of the Trial Judge. The winding-up order on the materials before the High Court ought not to have been made. So far the present appeal is entirely justified.

But many further considerations emerging in subsequent events have to be weighed before it can be properly disposed of. To the statement and consideration of these, their Lordships now proceed.

At the instance of the directors, immediate steps were taken to have the order set aside. An application for leave to use the company's name as appellant was first made. This was strenuously opposed by Subhapati Rao, who, in an affidavit, challenged Venkata Rao to ascertain the contributories' views on the subject. At a meeting, in answer, held on April 2, 1925, 16 contributories holding 168 shares out of 200 declared themselves for an appeal in the company's name or, if that were not possible, for one in their own. Notwithstanding this declaration of their wishes (*see* Section 174 of the Act), the learned Judge in charge of the liquidation on November 19, 1925, refused the leave asked for, on the ground that Venkata Rao was then in default under an order made against him in the liquidation, and, on appeal to the Court, this refusal was, on December 18, 1925, upheld, on the expressed ground, the basis of which their Lordships are quite unable even to conjecture, that there was no reason to suppose that those who purported to be the company in the application "represented the wishes of the majority of the share-holders." This new misunderstanding of the position at another critical moment in the history is responsible for the further misfortune that an appeal against a winding-up order, so unusual in its occasion and circumstances, only became possible through the special leave granted by His Majesty on the recommendation of this Board two years later, on December 2, 1926. Four further years elapsed before the appeal was brought to a hearing—the greater part of that long interval having been apparently consumed in the preparation and printing of the supplemental appendices included in the record at the instance of the official liquidator.

The appeal, quite rightly, is in the company's name. The objection taken to its competence long persisted in was quite unfounded. In that respect it is in accord with a well-established practice, devised to meet the necessities of just such a situation as here arose.

But this is all mere form or style. The appeal is really that of the contributories who are behind it. They may be truly regarded as the appellants. See *In re Diamond Fuel Company*[2]. Of the respondents, the official liquidator alone has appeared to oppose. He has taken it upon himself to contest the appellants' case *ab initio*—the remaining respondents, with Madam Venkayya, their unpledged supporter, being all who remain of the original petitioners. They have kept themselves in the background throughout, doubtless by arrangement. The official liquidator in his printed case and at the Bar has said for them all that they could have said for themselves. Moreover, he has had printed and included in the record 364 pages of the proceedings in the winding-up, including a verbatim transcript of the depositions that have been taken in the course of it. What has really been attempted by this procedure is that the opposition to the appeal—the petitioners' business—shall be conducted even if it fails at the charge of the assets of the Company.

Such unusual partisan activity on the part of an official liquidator in relation to such an appeal clearly called for some justification, and this was sought to be supplied by referring to an order of November 14, 1928, by the Judge in winding-up, which directed the liquidator to oppose the appeal and do all the above things. Their Lordships have noted that the order referred to is really an affirmative answer by the learned Judge to questions asked by the liquidator on an *ex parte* summons, while the order made has been so liberally interpreted by the liquidator that in the second appendix he has had printed 124 pages of depositions, all taken after the date of the order and, save for a few lines here and there, entirely irrelevant, as their Lordships think, to any issue arising on the appeal.

Their Lordships are gravely concerned that such an order should ever have been asked for. They are even more concerned that it should have been acted upon with so little discrimination. The order, in principle, was sought to be justified by the representation doubtless made by the official liquidator to the learned Judge, and as a contention maintained before the Board, that in these appendices facts are disclosed which had they been known to the Court when the petition came before it would have made a winding-up order inevitable. It is merely an aggravation of the position that, in their Lordships' judgment, as will appear presently, no such facts are there disclosed. For, even if they had been, these were facts to be brought forward, if so advised, by the petitioner respondents at their own risk, and not by the liquidator at the charge of the assets.

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[2] 13 Ch. D. 400, 405

Their existence would have been no justification for his becoming partisan in a dispute between two sets of contributories concerning the propriety of an order from which his authority alone proceeded. His only duty on an appeal against such an order was from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the Board of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Board ought to know.

In the present case the liquidator's attitude is peculiarly invidious. It appears from the depositions that he was put forward by the petitioners for his office on the resignation of the official first appointed, and that his appointment was opposed by the Venkata Rao party for that very reason. He, too, was an "enemy". From him, therefore, on appointment, an attitude of unqualified detachment was specially to be desiderated. His contention of detachment in relation to this appeal has been to ask for and to obtain *ex parte* and to interpret with an excess of liberality an order which has enabled him free of expense to the petitioners, in relief of their responsibilities, and already at a cost far in excess of any possible interest of theirs in assets, to fight their battle, with, as will be seen, no success and at what, except as to a trifling amount, must be the inordinate expense of their opponents. It is to be hoped that orders like that of November 14, 1928, will not in future be lightly made in the course of an Indian winding-up. The only results of the order in the present instance have been excessive delay and utterly useless expenditure, both of which will, like the delay already referred to, be found to have been operative to the prejudice of the appellants, in absence of whom the order was made.

It was upon these appendices and their contents that the real opposition to the appeal was based by the official liquidator. When examined, they strike their Lordships as being for the most part quite irrelevant to the conclusion which he asked the Board to draw from their perusal. [After dealing with the contents of the appendices the judgment continued as follows:—]

Accordingly, their Lordships have reached the conclusion that the proceedings in the liquidation, the details of which—at such great expense—the official liquidator has introduced into the appeal, do not, in any way, help the case he has sought to make. On the contrary, they operate further to imperil it. For what, in their Lordships' judgment, these proceedings do show is that, owing to the mistaken principles upon which the liquidation has been conducted, doubtful orders have been made in the past and that, unless the methods hitherto adopted are for the future discarded, nothing can result from the further progress of the liquidation but the dissipation of the company's entire assets in expenses. In other words the liquidator's appendices, properly appreciated, point to the discharge of the winding-up order being called for rather than to the continuance of the liquidation being beneficial. And the proper choice between these two alternatives becomes thus ever more difficult.

This statement requires some expansion.

The outstanding fact in relation to this winding-up which seems so far to have been entirely missed is that the contributories are alone interested

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in its results. The company had no creditors. From this it followed that the liquidation was peculiarly one in which the Court, as to all matters affecting the contributories as a class, would have regard to their wishes as proved by any sufficient evidence (Act of 1913, Section 174) and one, also, in which the official liquidator (Section 183(2)), would lose no opportunity of summoning meetings of contributories for the purpose of ascertaining their wishes in respect of similar matters. Now, it is hardly too much to say that with consequences—serious in many other respects than excessive cost—these vital considerations have been consistently forgotten or ignored throughout the liquidation. [After pointing out two typical examples of the above and referring in detail to other orders made in the liquidation, the judgment continued:—]

Their Lordships have now detailed with much particularity the salient incidents in this long history. They have done so, laboriously they fear, but not finding it possible otherwise to make clear within the confines of a self-sufficient judgment the difficulty of the problem disclosed. What they find themselves faced with at the end of the day is a winding-up order, made two years after its presentation upon a petition which ought never to have been presented, for, even if not merely vindictive and malicious, the petition was entirely without proved merits. They find also that the winding-up order has in the liquidation been succeeded by a series of orders off-hand in form and on the face of them, at all events, made without full consideration of all relevant circumstances. Lastly, their Lordships find a liquidation in being which, if carried on as it has been begun, can, as they forecast it, end in nothing for the contributories but a call of all the unpaid capital to provide for payment of the costs and expenses. And for these disasters, one and all—with the exception only of the expense and trouble due to the recalcitrancy of Venkata Rao, the costs of which have already and rightly fallen upon him—the petitioners are mainly, if not indeed entirely, responsible. There is, therefore, so far, and even at this distance of time, everything to be said for the discharge of the winding-up order appealed against.

But what would now be the consequences of discharging that order? The business of the company has ceased for years: its undertaking has been broken up: its reconstitution except under new auspices is now probably quite impracticable: and the task of adjusting liability for the mischief which has resulted from the liquidation presents a prospect of far-reaching and ruinous litigation. Nor could these consequences be mitigated, nor could any bounds be set by their Lordships to the range and extent of future trouble if the winding-up order were now to be set aside. A direction to that effect would, their Lordships cannot doubt, be a calamity to all concerned. They cannot give it.

On the other hand, it seems to the Board by no means hopeless that if the liquidation be left operative, it may by a change of method be possible to avoid at least total disaster.

Their Lordships are, of course, well aware that it is not for them to dictate the future course of the liquidation. That is a matter for the learned Judge in winding-up. The judicial discretion in such matters is, at all events in the first instance, with him alone, and he may not divest himself or be divested of full responsibility for its exercise. The observations accordingly which immediately follow are made merely for his assistance. They are in no way directory. It is enough that they will have his attentive consideration. In their Lordship's view, then, it is essential, if complete disaster is to be avoided, that for the future this liquidation shall be conducted in a spirit of complete impartiality, as between different sets of contributories, and with due regard to the wishes of the contributories (Section 174). It will be for the learned Judge to consider whether this end can be attained under the present liquidator, who has identified himself so completely and, so far, so unfortunately, with the petitioners in their unworthy conflict with the main body of contributories, or whether it will not be necessary to place in the position of liquidator a man of no less high standing than the present official liquidator, but who has not hitherto been associated professionally or otherwise with either set of contributories, and who would be advised by a vakil, equally dissociated from either side, whose appointment would be authorised under Section 181 of the Act. It will further deserve most careful consideration at the hand of the learned Judge, whether in the future course of the liquidation, by whomsoever it is conducted, the audited accounts up to 1923 should not remain undisturbed for reasons similar to those which have led their Lordships to leave the winding-up order in being, and whether the accounts of the company for 1924 should not be taken on the best available materials and audited in order that on these accounts, as so taken, the actual amounts with which the treasurers are to be charged may appear as accurately as is now possible. Particularly, however, will it be for the learned Judge to determine if the liquidator should not be directed to consider, as a protection from all further litigation, whether the liquidation cannot be brought to an end by some scheme under which the whole remaining assets of the company would be taken over by the majority contributories on the terms of their providing for the authorised costs and expenses of the liquidation and a sum equivalent to the then existing value of the shares in the company of the remaining contributories; and whether, failing that, the liquidator should not be directed in relation to the dividend declared on December 22, 1924, and notwithstanding the orders on that subject previously made, either to complete its distribution out of the assets in his hands or enforce payment from each recipient of the dividend paid to him. In their Lordships' judgment, the preferable course, if funds permit, is, with the sanction of the Court, to complete the distribution. All these observations, however, as their Lordships have explained, express their own views only. They form no part of the order following.

The actual order now to be made should, their Lordships think, be as follows: That the winding-up order of November 13, 1924, although not justified when made, be, by reason of the lapse of time and intervening events, maintained except as to costs. As to these, the order will be discharged.

And their Lordships will humbly advise His Majesty accordingly.

As to costs, as the winding-up is allowed to continue, the petitioners cannot be ordered to pay the company's costs either of the petition or of the appeal to the High Court, proper though such an order would be.

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But they must not have costs in either Court, and if these costs have been paid by the official liquidator they must be repaid. The official liquidator must pay out of the assets the costs of the company—that is, the majority contributories—of the petition, of the appeal to the High Court and of this appeal. There will be no costs of this appeal to the petitioner respondents or Madam Venkayya. The Registrar will tax the costs of this appeal of the official liquidator, who will have liberty to apply in the liquidation for payment out of the assets of these costs or of such part of them as the Judge, in winding-up, may, in view of this judgment, allow, the official liquidator having further liberty reserved to apply to the learned Judge for payment otherwise than by the majority contributories of such of his taxed costs as may be disallowed out of assets.

It will be the duty of the official liquidator when applying for his costs to bring this judgment of their Lordships to the notice of the learned Judge.

Hy. S. L. Polak—Solicitor for the appellants.

Watkins & Hunter—Solicitors for the respondents.

HIGH COURT

CIVIL
1932
May 25
SULAIMAN, C. J.
YOUNG, J.

SARABDEO BHARTHI (*Plaintiff*)
versus
RAM BALI AND ANOTHER (*Defendants*)*

Limitation Act, Sec. 144—Religious Endowment—Transfer by manager without necessity—Adverse possession against idol—Time from which period begins to run.

When property does not vest in the Mahant, but vests in the idol and the Mahant purports to transfer it in his capacity as the manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale deed, and it cannot be deemed to have been postponed until the Mahant is dead.

FIRST APPEAL from a decree of S. M. ALAM ESQ., Subordinate Judge of Gorakhpur.

K. Verma for the appellant.

Shiva Prasad Sinha for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiff's appeal arising out of a suit brought by the plaintiff alleging himself to be the duly installed mahant, for possession of certain properties transferred by the former mahant.

In the connected appeals we have held that the plaintiff has established his claim as the *chela* of the last mahant, that it is proved that that mahant abdicated and resigned his mahantship and that he could validly do so, and that the present plaintiff was duly installed as his successor by election. It follows that the plaintiff was entitled to maintain the suit for recovery of possession of property transferred by the last mahant, provided there was no legal necessity for the transfer and provided his claim was within time.

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*F. A. 471 of 1928

This appeal relates exclusively to a sale deed dated November 18, 1912 executed by the former mahant, Ram Prasad, for Rs.3,499-15-0 in favour of Mst. Ureha, predecessor of defendants Nos. 3 and 4 in respect of village Batelpur. The court below has held that there is no legal necessity for this sale deed also, but has dismissed the claim on the ground of limitation.

In appeal it is urged that the view taken by the court below on the question of limitation is wrong.

Before 1929 there was at one time some authority for the view that a suit brought by a succeeding mahant to recover possession of property transferred by his predecessor was governed by Article 134 of the Limitation Act; but in the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[1] their Lordships of the Privy Council distinctly laid down that a mahant cannot be treated as a trustee to whom property had been conveyed in trust within the meaning of that article, and that therefore Article 134 would not be applicable. Their Lordships applied Article 144, which is the general article for suits for recovery of possession of immovable property.

The learned advocate for the appellant, however, relies on the concluding portion of that judgment for the proposition that adverse possession can never become adverse during the lifetime of the trustee who made the transfer. That case, however, was a special case, in which the plaintiffs were claiming rights as permanent lessees and they had been allowed to remain in possession by the succeeding mahant. Their Lordships came to the conclusion that the proper inference to be drawn from the circumstances of that case was that the new trustee who had power to continue the tenancy had continued it, and consequently the possession of the lessee never became adverse until his death. Where a person is claiming as a permanent lessee and is allowed to remain in possession by a succeeding trustee as lessee, he need not necessarily acquire adverse rights so as to become a permanent lessee in perpetuity. The case of an out and out transfer obviously stands on a different footing. In such a case the transferee from the very moment of his taking over possession asserts adverse title and remains in possession as an adverse proprietor.

Their Lordships of the Privy Council in the case of *Lal Chand Marwari* v. *Mahant Ramrup Gir*[2] do not think that the point was clearly covered by *Vidya Varuthi Thirtha's* case.

There has been a slight conflict of opinion in this country as a result of the last mentioned pronouncement. But a Bench of the Madras High Court in the case of *Rama Reddy* v. *Rangadasan*[3] came to the conclusion that adverse possession could only begin to run after the death or retirement of the last trustee who had made the transfer. On the other hand, the contrary view has been accepted by another Bench of the Madras High Court in the case of *Vadlamudi Sastrulu* v. *Thalluri Venkataseshayya*[4], by the Patna High Court in the case of *Badri Narain Singh* v. *Mahant Kailash Gir*[5] and the Lucknow Chief Court in the case of *Mahant Parkas Das* v. *Mahant Janki Ballabh Saran*[6] and also by the Calcutta High Court in

[1] 44 Mad. 831=20 A. L. J. 497

[2] 24 A. L. J. 105 at 112

[3] I. L. R. 49 Mad. 543

[4] 110 I. C. 894

[5] I. L. R. 5 Pat. 341

[6] I. L. R. 2 Luck. 239

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Debendra Nath Sadhukhan v. *Nahrmal Jalan.*

It seems to us that when the property does not vest in the mahant, but vests in the idol and the mahant purports to transfer it in his capacity as the manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale deed, and it cannot be deemed to have been postponed till the mahant died. So far as the vendee is concerned, his possession certainly becomes adverse from the very moment of the sale. We, therefore, think that there is no justification for holding that adverse possession would not commence to run in the case of an out and out transfer until the mahant is dead.

This view finds support from the rules laid down by their Lordships of the Privy Council in the cases of *A. S. S. Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[7] and *Damodar Das* v. *Adhikari Lakhan Das*[8] in both of which their Lordships held that adverse possession commenced from the date of the transfer.

We may also point out that the legislature itself realised the difficulty and hardship that might in some cases arise, and has accordingly intervened. Act I of 1929 adds Article 134(*b*) in the schedule, under which the suit by a new trustee can be brought within 12 years from the date of death, resignation or retirement of the transferor. We are accordingly of opinion that the view taken by the court below on the question of limitation was correct. The appeal fails, and it is hereby dismissed with costs.

Appeal dismissed

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[7] 21 A. L. J. 731

[8] 37 I. A. 147

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1932
May 27
SULAIMAN, C. J.
MUKERJI, J.

KISHAN CHAND AND ANOTHER (*Applicants*)
versus
LACHHMI CHAND AND OTHERS (*Opposite parties*)*

Civil Procedure Code, Sec. 109—'Final order'—Meaning of—Order passed on appeal by High Court setting aside the ex parte decree—Whether amounts to 'final order'.

A final order within the meaning of Sec. 109 C. P. C. need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, it is a final order within the meaning of that section.

On appeal to the High Court from an order of the lower court rejecting an application under Or. IX, R. 13 C. P. C. for setting aside an *ex parte* decree, the High Court allowed the appeal and set aside the *ex parte* decree with the result that the original suit was restored to its original number to be tried *de novo*. *Held*, that the order of the High Court is a final order within the meaning of Sec. 109 C. P. C. and is therefore appealable.

APPLICATION for leave to appeal to His Majesty in Council.

Mansur Alam for the applicants.

K. N. Katju and *S. N. Seth* for the opposite parties.

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*P. C. A. 8 of 1932

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KISHAN CHAND
v.
LACHHMI CHAND
Sulaiman,
C. J.

The judgment of the Court was delivered by

SULAIMAN, C. J.—This is an application for leave to appeal to their Lordships of the Privy Council from an order passed by a Bench of this Court.

A suit was brought by the plaintiffs for a declaration of title as to property in Schedule B attached to the plaint on the basis of a private partition and for other reliefs against the defendant No. 1. At his own instance defendant No. 2, the son of defendant No. 1, was made a party. There was a written compromise filed and signed by the plaintiffs and defendant No. 1 which, it was alleged, at one time had been provisionally agreed to by the pleader for the defendant No. 2. This compromise, however, was not verified by the pleader who was absent on the date fixed. The first court decreed the claim in terms of the compromise against the defendant No. 1 and decreed it *ex parte* against defendant No. 2 in terms of the compromise.

An application was later on filed on behalf of the defendant No. 2 for the setting aside of the *ex parte* decree passed against him. The court after considering the case came to the conclusion that the decree should not be set aside and it rejected the application. This application was numbered as Miscellaneous Application No. 200 in the original suit. A first appeal from order was preferred to this High Court from the order rejecting the application and a Bench of this Court allowed the appeal and set aside the *ex parte* decree as against both the defendants with the result that the original suit was restored to its original number to be tried *de novo*.

The defendants wish to appeal to their Lordships of the Privy Council from the order passed by the High Court.

Preliminary objections are taken by the learned advocate for the respondents that the valuation is less than Rs.10,000 and that there is no right of appeal because the order of this Court was not a final order within the meaning of Section 109 C. P. C.

As regards the first objection, no doubt the valuation of the suit as put down in the plaint was Rs.5,100 and the court-fee paid was on the basis of the Government revenue. But it is conceded on behalf of the respondents that the value of the property in Schedule B was more than Rs.10,000. It seems to us that the suit, being one relating to a declaration of title to the property in Schedule B and for other reliefs in respect of it, was one involving directly or indirectly a claim or question to or respecting property of the amount or value exceeding Rs.10,000. Section 110 C. P. C. does not speak of the valuation of the suit as put in the plaint but of the value of the subject-matter in dispute or of the value of the property affected by it. We, therefore, overrule this objection.

The second objection requires some consideration. Their Lordships of the Privy Council in the leading case of *Saiyid Mazhar Hossein* v. *Musammat Bodha Bibi*[1] laid down that an order is a final order when it comprises the decision of the High Court upon the cardinal issue in a suit, that issue being one which goes to the foundation of the suit, and one which can

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[1] I. L. R. 17 All. 112

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never, while this decision stands, be disputed again. In that case their Lordships actually entertained the appeal from an order remanding the case on a finding reversing the decree of the original court that the gift in dispute was valid. The only two cases which have been brought to our notice and in which their Lordships of the Privy Council held that no appeal could lie were *Radha Kishan* v. *The Collector of Jaunpur*[2] and *Ramchand Manjimal* v. *Goverdhandas Ratanchand*[3].

In *Radha Kishan's* case an application for setting aside an *ex parte* decree was disallowed by the original court without the courts being satisfied by any investigation as to whether or not the defendant had been prevented by any sufficient cause from appearing when the suit was called on for hearing; and the High Court reversed that order and sent the case back for investigation as to whether the defendant had sufficient cause for non-appearance. It is noteworthy that the *ex parte* decree was not set aside by the High Court and the whole case was not reopened, but the application itself was sent back for further enquiry. Their Lordships of the Privy Council emphasised this distinction in their judgment on page 226 and pointed out that what was remanded was merely the application immediately before the court, to wit the application to set aside the decree and it was this application which the Subordinate Judge would under the remand proceed to dispose of. Such an order, therefore, was held to be a mere interlocutory order, directing procedure and not deciding the cardinal point in the case itself.

Ram Chand's case was entirely different. A suit for damages was brought inspite of a previous arbitration agreement between the parties. The defendant applied under Section 19 of the Indian Arbitration Act for a stay of proceedings with a view to the issues being referred to arbitration under that section. The trial Judge granted the stay but the Judicial Commissioner reversed that order and refused to stay the proceedings. Their Lordships held that the order was not a final order as it did not finally dispose of the rights of the parties but left them to be determined by the courts in the ordinary way. It is to be noted that under Section 19 of the Indian Arbitration Act the court had a discretion to stay proceedings where there had been a previous submission. The appellate court in the exercise of that discretion had declined to stay proceedings. That case, therefore, is clearly distinguishable.

It seems to us that as soon as the *ex parte* decree was passed by the court, the court became *functus officio* and the suit terminated for the time being. A fresh proceeding was initiated by an application under Order IX, Rule 13 C. P. C. for the setting aside of the decree. The application, of course, related to the previous suit but it was a miscellaneous application separately numbered which was a proceeding in itself. The matter in controversy in this new proceeding was not the merits of the original suit but the question whether the plaintiffs should be deprived of the rights which had accrued to them by virtue of this *ex parte* decree. If there was no sufficient cause for setting aside the *ex parte* decree, the decree

[2] I. L. R. 23 All. 220

[3] I. L. R. 47 Cal. 918

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would stand and the defendants would be bound by it and would not be allowed to reagitate the matter by a separate suit. The rights acquired under an *ex parte* decree are substantive rights independently of the merits of the original suit. The trial court held that no good cause had been shown and that, therefore, the *ex parte* decree had been validly passed and the plaintiffs were entitled to the benefit of that decree. On appeal this court came to a contrary conclusion. The result is that the *ex parte* decree in favour of the plaintiffs has been finally set aside and, so far as the proceedings relating to the setting aside of that decree are concerned, they have finally terminated by the order of this High Court and now it is the original suit which has been reopened and restored to its original number. The order of this High Court cannot be questioned again in the course of the trial of the suit or by way of appeal except to their Lordships of the Privy Council.

In the case of *Radha Mohan Datt* v. *Abbas Ali Biswas*[4] it was held by a Full Bench of this Court, of which one of us was a member, that the propriety of an order setting aside an *ex parte* decree under Order IX, Rule 13 C. P. C. cannot be questioned in an appeal from the decree ultimately passed in a suit and that the proceeding relating to the setting aside of the *ex parte* decree was a separate case which was decided by that order.

The learned advocate for the respondents further contends that an order cannot be a final order unless it actually decides the rights of the parties, that is to say, the merits of the case itself. He argues that in the present case all that has happened is that the defendants have been allowed a further opportunity to produce fresh evidence which is a matter of procedure only. It seems to us that the final order within the meaning of Section 109 need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, it is a final order within the meaning of that section.

This view finds full support from two decisions which have been cited before us, *Meghraj* v. *Bidyabati Koer*[5] and *Lachmi Narain* v. *Balmakund*[6]. In these case the plaintiff's suit had been dismissed for default and the remand order by the High Court merely reopened the case. Nevertheless both the Calcutta and the Patna High Courts held that it was a final order inasmuch as the controversy between the parties in that proceeding was finally determined. We are not aware that any objection was taken before the Privy Council.

The language of Section 109 C. P. C. is wide enough to cover this case, and in the absence of any clear authority to the contrary we must hold that the order in question is a final order and is, therefore, appealable.

It is not necessary for us to express any opinion whether when on appeal the High Court refused to record a compromise which has been

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[4] [1931] A. L. J. 377

[5] 21 Cal. L. J. 279

[6] 6 Pat. L. J. 116

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recorded by the court below, an appeal would lie; vide *Bhagwati Dayal* v. *Dhan Kunwar*[7]. We may have to reconsider this point when a question directly arises. We may in passing remark that the case cited above may be distinguished on a supposition that the alleged compromise was entered into in the course of the suit itself and not in any separate proceeding. Nor is it necessary for us to express any opinion whether when questions of *res judicata* or limitation arise and are disposed of by the High Court as a preliminary point, a cardinal point has been decided.

In our opinion the case fulfils the requirements of Sections 109 and 110 C. P. C. and the applicants are entitled to appeal, and we certify accordingly.

Leave granted

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[7] 24 A. L. J. 331

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May 23
MUKERJI, J.
BENNET, J.

RAM SHANKER (*Plaintiff*)
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (*Defendants*)*

Provincial Insolvency Act (V of 1920), Secs. 59(c), 57 and 56 and Government of India Act, Sec. 32—Official receiver makes a contract—Liability on contract—Property of insolvent liable if court's sanction obtained, otherwise receiver personally liable—No liability on Secretary of State for acts of receiver.

The proprietor of a printing press was adjudicated insolvent and the official receiver of the time, who was appointed receiver of the insolvent's estate, arranged with the plaintiff that the press should remain for a period in the house of the plaintiff where the press was, at the rent which was paid by the insolvent. The official receiver failed to pay the sum due to the plaintiff, and the plaintiff thereupon brought the present suit to recover the sum due, making the Secretary of State party to the suit.

Held: that all that the official receiver can do by making a contract is in the first place to render the property of the insolvent liable for the performance of the contract, if the receiver has obtained the sanction of the insolvency court to the making of the contract, and if he has not obtained that sanction, then he is personally liable on the contract. Under no circumstances there is any liability imposed on the Secretary of State in Council by an official receiver making a contract. Even if it were shown that he is in any sense an agent of the Secretary of State or the Government, the official receiver has no authority to make contracts on behalf of the Secretary of State or the Government.

Where the official receiver was appointed by the Government to perform certain duties under the Provincial Insolvency Act, the duties being imposed by statute, the Government has no liability for whatever the official receiver has done in the discharge or supposed discharge of his duty or supposed duty.

The Regulations of the East India Company, which govern the liability of the Secretary of State in virtue of Sec. 32 of the Government of India Act, drew a distinction between the acts of executive officers for which a certain liability might be assumed under Regulation III of 1793, Chapter XI,

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and the acts of courts for which Regulation I of 1823, Sec. 38, disclaimed all responsibility.

CIVIL REVISION from an order of MAULVI S. M. SAIDUDDIN, Judge, Court of Small Causes at Agra.

S. C. Das for the applicant.

U. S. Bajpai for the opposite parties.

The judgment of the Court was delivered by

BENNET, J.—This is a case which has come before a bench of this Court on revision on the application of the plaintiff one Ram Shanker, who brought a suit against the Secretary of State for India. The chief grounds put forward in the application in revision are that the Judge of the Small Cause Court Agra, had no jurisdiction to review his *ex parte* decree and that sufficient grounds were not made out for that review. Further that the claim of the plaintiff should have been allowed on the merits.

The claim of the plaintiff as set forth in his plaint was that one Damodar Das proprietor of a printing press was adjudicated insolvent and the official receiver of the time was appointed receiver of the insolvent's assets and that the official receiver took possession of the press and the premises which were leased at a rent of Rs.55 to the Damodar Printing Press by the plaintiff. Further that the official receiver on April 1, 1927 agreed to pay the said rent and that the official receiver kept possession of the house until February 19, 1928. A sum of Rs.605 was therefore due to the plaintiff for use and occupation of the said premises and that the official receiver had failed to pay. The Secretary of State was represented before the Small Cause Court and the claim of the plaintiff was decreed apparently after a contest on February 26, 1931. The only issue which had been framed in that suit was "For what amount, if any, is the defendant liable?" On March 12, 1931 Mr. Akhtar Ali, the Government Pleader made an application to the Judge of the Small Cause Court stating that in this suit which had been decided a most crucial issue had not been framed which was "is the Official Receiver an agent or servant of the Secretary of State and is the Secretary of State liable for the acts of the official receiver?" He further stated that he had produced rulings to show that the Secretary of State was not liable. A review was therefore prayed for. The learned Small Cause Court Judge held that as the necessary issue had not been framed, therefore the review should be granted and he directed that the issue should be framed accordingly. An application bearing no date but with a stamp dated June 21, 1931 was then made on behalf of the plaintiff asking that the official receiver be added as a defendant. The Secretary of State therefore became defendant No. 1 and the official receiver became defendant No. 2. The suit therefore was again tried by the learned Judge of the Small Cause Court and he dismissed the suit of the plaintiff by an order of July 18, 1931. The grounds of dismissal are firstly that the evidence falls short of proving any contract with the former official receiver, that a suit for compensation for use and occupation was also not maintainable, that the insolvency court had refused permission to sue the present official receiver, that the suit was barred by three years limitation against the official receiver and was not maintainable against him for want of notice under Section 80 C. P. C., that the suit could not succeed against the Secretary of State because the official receiver had done nothing for which his principal may be held liable even if he were to be considered for certain purposes an accredited agent or servant of the Secretary of State.

The grounds on which the revision has been urged in this Court are mainly that the order for review of judgment was without jurisdiction, because the Secretary of State had not paid the decretal amount or furnished sufficient security along with the application for review. In the Provincial Small Cause Courts Act, Section 17 it is laid down that at the time of the application for review of judgment such deposit must be made or such security must be filed and there is no exception made on behalf of the Secretary of State. This argument is undoubtedly correct, and we consider that if the attention of the learned Small Cause Court Judge had been drawn to this provision of the Small Cause Courts Act he should not have granted the review in question. But apparently this point was not raised before him. However, we are now dealing with a question of revision under Section 25 of the Small Cause Courts Act and there is a discretion given by this section to the High Court. The words used in this section are that the High Court may call for the case and pass such order with respect thereto as it thinks fit. We are therefore to consider not merely whether the learned Small Cause Court Judge has made a technical error in his procedure, but we are to consider whether the order at which he has finally arrived is an order which substantially does justice between the parties. We therefore consider that it is incumbent on us to see whether there is any liability on the Secretary of State for the alleged acts of the former official receiver. It is not now contended before us that there is any liability on the present official receiver and we are clearly of opinion that there is no such liability. As regards the position of the official receiver we are of opinion that it would have been necessary to give him the two months notice prescribed by Section 80 C. P. C. and we are further of opinion that as his name was not brought on the record until a period of three years had elapsed from the origin of the cause of action according to the plaint, therefore the suit against him would be time-barred.

We now turn to consider the general question which is of much greater importance, namely, whether there is any liability of the Secretary of State for the acts of an official receiver. Under Section 56 of the Provincial Insolvency Act V of 1920 the court may appoint any person as a receiver. There is nothing in this section which indicates that the Government or the court have any liability for the acts of a receiver. On the contrary it is laid down in Section 56(4) that where a receiver appointed under this section occasions loss to the property by his wilful default or gross negligence, the court may direct that his property be attached and sold and may apply the proceeds to make good any balance found due from him for any loss so occasioned by him, that is, that a receiver can be made personally liable for his negligence as regards the property entrusted to him. It is obvious from the section that the liability of a receiver as regards his actions towards other persons would be personal and that he would not involve the court or the Government in any liability as regards other persons. Section 57 states that the Local Government may appoint certain persons as official receivers and that such persons shall be receivers for all cases of insolvency unless the court for special reasons otherwise directs. It is also provided in Sub-sections 3 and 4 that sums payable in respect of the services of official receiver shall be credited to a fund and the official receiver shall receive remuneration out of that fund, but not beyond a fixed rate. In Section 59 it is provided for both classes of receivers that they may by leave of the court carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same. Apparently the former official receiver was acting under this provision in Section 59 (*c*) when he arranged with the plaintiff that the press should remain for a period in the house of the plaintiff where the press was. It is important to note that that arrangement should have been made by leave of the Court and it is not shown in the present case that any such leave was obtained.

We now turn to deal with the general question of liability of the Secretary of State. It is laid down in the Government of India Act, 9 and 10 Geo. V, Ch. 101, Section 32 as follows:—

> (1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.
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> (2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.

It is therefore necessary for us to examine what would have been the liability of the East India Company in a case like the present. The earliest law dealing with the liability of the East India Company is contained in Bengal Regulation III of 1793, and this is the foundation of the liability in question. It is provided in the preamble and in Sections 10 and 11 as follows:—

> Preamble:—They have resolved that the authority of the laws and Regulations so lodged in the courts shall extend not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial concerns of the public, shall be amendable to the courts for acts done in their official capacity in opposition to the Regulations; and that Government itself, in superintending these various branches of the resources of the state, may be precluded from injuring private property they have determined to submit the claims and interests of the public in such matters, to be decided by the courts of justice according to the Regulations, in the same manner as suits between individuals.
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> X. Collectors of the revenue and their assistants and native officers, commercial residents and agents and their assistants and native officers employed in the provision of the investment, salt agents and their assistants

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> and native officers concerned in the manufacture of salt, the collectors of the customs and their assistants and native officers employed in the collection of the customs, the mint and assay masters and their assistants and native officers, are declared amenable to the zillah or city court in the jurisdiction of which they may reside or carry on the public business committed to their charge, for any acts done in their official capacity, in opposition to any Regulation printed and published in the manner directed in Regulation XLI 1793.
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> XI. If a native, or any other person not being a British subject shall consider himself aggrieved under any Regulation printed and published in the manner directed in Regulation XLI 1793, by an act done by any of the officers of Government described in Section X pursuant to a special order originating with the Governor-General in Council or the Board of Revenue or of Trade, the officer by whom the Act may be done is not to be liable to be sued for it. In such cases, Government is to be considered as the defendant; and the person deeming himself aggrieved is to present a petition to the Judge of the Dewanny Adawlut of the zillah or city to which the officer by whom the act complained of may have been done shall be amenable in his public capacity, stating wherein he considers himself injured under the Regulations, and praying that the Governor-General in Council will order the court of Dewanny Adawlut in which the cause may be cognisable to try the points or matters contested agreeably to the Regulations .

Now it is also provided in Bengal Regulation 1 of 1823, Section 38 as follows:—

> It is hereby declared and enacted, that Government is not and shall not be held liable for any error or irregularity which may have occurred, or shall occur, in any order, proceeding, or decree of any court of Judicature, whether a revenue or other officer of Government may or may not have been, or shall or shall not be, employed in giving effect to the order, proceeding, or decree deemed to be erroneous or irregular. Nor shall any officer of Government be held liable for anything done or suffered in conformity with an order, proceeding, or decree of a court as aforesaid and if any person or persons shall sue Government, or any officer of Government, for anything done or suffered under an order, proceeding, or decree of court as aforesaid, such person or persons shall be nonsuited, with costs. The same principle is and shall be held applicable to all orders, proceedings, or decree made, held, or passed by any public officer, in virtue of powers vested in him for the judicial cognizance of any pleas, suits, complaints, or informations whatsoever, unless otherwise specially provided.

From these two Regulations the whole of the case-law of the liability of the Secretary of State has evolved. We may point out in the beginning that in England it was not possible to bring a suit against the Crown and that the only procedure for a person who wishes to have a remedy against the Crown is by a petition of right which is left at the Crown office and if the law officers of the Crown approve then a fiat is granted. "Let justice be done and the suit proceeds between the petitioner and the Crown". The East India Company did not occupy the same position in India as the Crown did in England, and therefore the procedure arose under the rule of the Company that a certain liability attached for certain purposes to the East India Company. That liability has been continued against the Secretary of State by the Act of 1858 and the Act of 1920. It is true that in

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most cases which have come before the courts the contest has been on the liability of the Secretary of State for torts committed by Government officers in India and the question has not so often arisen on account of liability on contract, because it is easier to ascertain the liability on a contract by the simple criterion of whether the officer in question was authorised to bind the Secretary of State by his contract. We may refer to some of the earlier rulings. In the case of *Ghackjee Dadajee* v. *The E. I. Company*[1] a police officer under a warrant from the Governor in Council of Bombay trespassed into a house. Sir Erskine Perry held that an action against the Company would not lie, as they were a governing body and were only liable for personal misconduct. In *Shibhajan Durga Prasad* v. *Secretary of State*[2] there was a suit for negligence of a police officer for property seized under the Cr. P. C. and Jenkins, C. J. quoted the above case and held that the Secretary of State was not liable as the East India Company had never been held liable for the illegal acts of Governors and Members of Council. The case of *Dhakjee Dadajee* v. *Secretary of State for India in Council* was also quoted in *Ross* v. *Secretary of State*[3], where the Government was held not to be liable as a principal for the acts of its servants as agents. The court also quoted from Story on page 63 as follows:—

> Section 319—It is plain, that Government itself is not responsible for the misfeasances, or wrongs, or negligences or omissions of duty of the subordinate officers or agents engaged in the public service, for it does not undertake to guarantee to any of persons the fidelity of any of the officers or agents, whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests.

This passage is also cited with approval in the *Secretary of State for India in Council* v. *Kasturi Reddi*[4]. Similarly in a recent case of *Mackenzie* v. *The Corporation of Chilliwack*[5] their Lordships of the Judicial Committee appear to have been of opinion that a local authority can be made responsible for the misconduct of a constable appointed by it, if at all, only on the ground that the appointment was not fitly or properly made. A different class of case is *P. & O. S. N. Co.* v. *The Secretary of State for India in Council*[6]. Here the P. & O. Company sued for damages caused by the servants of the Government dockyard at Kidderpore. It was held that the Secretary of State was responsible as this was a business undertaken by Government. The ruling distinguished acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertaking which might be carried on by private individuals without having such powers delegated to them. Acts of the sovereign power are said to be the maintenance of the Army, the Navy and the Judicial service. It will be noted that in Regulation III of 1793, Section 10 laid a certain liability on collectors of revenue which might be adopted by the East India Company. Cases in which this liability has been held to lie on the Secretary of State are reported in *Hari Bhanji* v. *Secretary of State in Council*[7], where the collector had illegally levied a duty and Government was held liable if Government had ratified the act, and in *Dayaram* v. *Secretary of State*[8] where it was held that the person who pays takavi under protest has a right to sue in the civil court under Section 183 of the Land Revenue Act.

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[1] 2 Morley's Digest, 307 (1843)

[2] 37 Mad. 55 (1913)

[3] 28 Bom. 314 (1904)

[4] 26 Mad. 268

[5] [1912] 107 L. T. 570

[6] 5 Bom. H. C. R. Appendix (1861)

[7] 4 Mad. 344 (1879)

There is an important doctrine in English law to the effect that the Crown cannot be liable for the acts which its servants perform in accordance with statutory provisions. This has been recognised in 37 Mad. 55 at page 67 where there is a reference to *Tobin* v. *The Queen*[9] for the proposition that independently of the doctrine that the queen can do no wrong, the Crown could not be made liable for the action of a Naval Captain purporting to act under the Slave Trade Acts in seizing and destroying the plaintiff's vessel, as he was not acting in obedience to the command of her Majesty but in the supposed performance of a duty imposed on him by Act of Parliament. This doctrine was also applied in 28 Bom. 314 (1904) where it was held that the Secretary of State in Council could not be made liable for the negligence of a chief constable about the custody of hay seized by him under the Cr. P. C. At page 352 the quotation is made, but it is settled law that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. We would point out that in the present case the official receiver was appointed by Government to perform certain duties under the Provincial Insolvency Act. Those duties were imposed by statute and therefore the Government has no liability for whatever the official receiver has done in the discharge or supposed discharge of his duty or supposed duty. There is one other ruling of this court dealing with this question of liability of the Secretary of State reported in *Secretary of State* v. *Sukhdeo*[10], where the plaintiff's property was wrongfully seized by a magistrate and sold for a fine which was really against another person. It was held by each of the two Judges that the Crown was not liable to pay compensation for the illegal acts of its servants, but it was bound to make restitution to the extent it had benefited by the illegal acts. The two Judges were agreed on this point of the non-liability of the Crown although they differed on other points.

We may now turn to the question of contracts. Part III of the Government of India Act, 9 and 10, Geo. V is headed Property, Contracts, and Liabilities and in that part it is laid down in Sections 29, 29-A and 30 what contracts can be made under that Act. Then follows Section 32 stating the liability of the Secretary of State to which the plaintiff has made reference in the present case. It would appear *prima facie* that the liability of the Secretary of State on contracts was limited to the contracts laid down in the previous sections, and if so the present case would clearly not involve the Secretary of State in any liability as the contract in question was not one which would come under any of the sections of Part III. We also find in Manual of Government Orders, Paragraph 1455, which states:

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[8] 25 A. L. J. 1002

[9] [1864] C. B. N. S. 310 at 349

[10] [1898] A. W. N. 173

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> The rules regulating the powers of the Government of India and Local Governments to enter into or sanction contracts and agreements involving liabilities on the part of the State are contained in Appendix 34.

Appendix 34 of the Manual of Government Orders lays down certain definite conditions which must be observed for contracts. It is obvious that the alleged contract in the present case does not comply with the necessary conditions in Appendix 34. There is moreover nothing to show that a person in the position of an official receiver has any authority whatever to bind the State by his contracts. We are of opinion that all that he can do by making a contract is in the first place to render the property of the insolvent liable for the performance of the contract, if the receiver has obtained the sanction of the insolvency court to the making of the contract, and if he has not obtained that sanction, then he is personally liable on the contract. Under no circumstances do we find that there is any liability imposed on the Secretary of State in Council by an official receiver making a contract. Even if it were shown that he is in any sense an agent of the Secretary of State or the Government, it has not been shown that the official receiver has any authority to make contracts on behalf of the Secretary of State or the Government. We are of opinion that the Regulations of the East India Company drew a distinction between the acts of executive officers for which a certain liability might be assumed under Regulation III of 1793, Chapter XI, and the acts of courts for which Regulation 1 of 1823, Sec. 38 disclaimed all responsibility. For the reasons which we have set forth we are of opinion that the Secretary of State in Council was not liable for the alleged act of the official receiver in the present case. Accordingly we consider that the final order of the Small Cause Court Judge dismissing the suit of the plaintiff is an order which has done substantial justice between the parties. We therefore think that this is a case in which we should not interfere and we dismiss this application in revision. We direct that the applicant should pay the costs of the Government Advocate in the present case.

Application dismissed

BHAGWAN SAHAI AND OTHERS
versus
RAM CHANDER AND OTHERS*

Civil

1932

May 6

Mukerji, J.
Bennet, J.

Tenancy Act (III of 1926), Sec. 121—Co-tenants—Suit for determination of shares in occupancy holding—Cognizable by revenue court alone.

> A suit for the determination of the quantity of share held by each co-tenant in an occupancy holding is covered by Sec. 121 of the Tenancy Act (III of 1926) and is cognizable by the revenue court.

Reference under Section 267, Clause (2) of the Agra Tenancy Act (III of 1926) submitted by the Additional Subordinate Judge, Bulandshahr.

Hari Pal Varshni for the applicants.

The opposite parties were not represented.

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*Mis. Case 753 of 1931

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Mukerji, J.

The judgment of the Court was delivered by

MUKERJI, J.—This is a reference by a learned Munsif under Section 267 of the Agra Tenancy Act on the question of jurisdiction to entertain a certain suit.

The plaintiffs' case is as follows:—

An occupancy holding originally belonged to four brothers, one of whom, now represented by the defendants, separated taking a fourth share in the lands. After this separation there came into existence two holdings one independent of the other. The holding which was held by the three brothers became the property of the plaintiffs' ancestor alone, because two of the brothers died without any issue. Later on, out of the larger holding 4 bighas were given to the defendants by way of concession with the result that out of the holding the plaintiffs' share is 21 bighas 13 biswas and the defendants' share is 4 bighas and 10 biswas. The plaintiffs went to the revenue court asking for a partition. There the defendants denied the title of the plaintiffs to the larger amount of the share claimed by the plaintiffs and the revenue court directed the plaintiffs to obtain a declaration as to their title. The plaintiffs accordingly asked for a declaration that certain specified plots together bearing an area of 21 bighas 13 biswas were the plaintiffs' property, while certain other plots together bearing an area of 4 bighas 8 biswas belonged to the defendants, although the total area formed in the revenue papers only one holding. In the alternative, the plaintiffs asked for a declaration that in the entire holding of 26 bighas and odd the plaintiffs' share was 21 bighas and 13 biswas.

The learned Munsif was doubtful as to whether the suit could be taken cognizance of by him, and, therefore, he made the reference.

No body has appeared on behalf of the defendants, in this court. We are of opinion that the suit is cognizable by the revenue court and revenue court alone. It is a fact admitted by the plaintiffs that the defendants are co-tenants of the holding. The dispute is about the quantity of share held by each party. Under Section 121 a tenant may sue any person claiming through the landholder, that is to say, any person who claims to be a co-tenant, for a declaration of his right as a tenant. The suit, in our opinion, is covered by Section 121.

A suit for division of tenancies under Section 37 is also cognizable by the revenue court and revenue court alone (*see* Fourth Schedule, Group B, serial No. 1).

We hold that the suit is cognizable by the revenue court and direct the learned Munsif to return the plaint for presentation to the proper court. The plaintiffs must pay the costs of this reference and the costs incurred by the defendants in the court below.

Reference answered

BADRI PRASAD MISIR (*Plaintiff*)

versus

BIJAI NAND TEWARI AND ANOTHER (*Defendants*)*

Civil

1932

May 25

SULAIMAN, C. J.
YOUNG, J.

Pre-emption Act, Sec. 4(10)—Vendor sells property not in his possession—Vendee recovers property from third party—Whether transaction amounts to sale and is pre-emptible.

Where a person, who is not in possession of his property and is unable to raise money to sue for its recovery, sells the same to the defendant for cash consideration, and the defendant recovers the property from the third party by a suit, the transaction falls within the definition of 'sale' under Sec. 54 of the T. P. Act and such sale is pre-emptible on payment of all that the vendee has had to pay.

Kalyan v. *Desrani*, I. L. R. 49 All. 488 *distinguished.*

SECOND APPEAL from a decree of PANDIT RUP KISHAN AGHA, District Judge of Allahabad, modifying a decree of MAULVI MUHAMMAD TAQI KHAN, Munsif of Mirzapur.

S. N. Verma for the appellant.

Shiva Prasad Sinha for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiff's appeal arising out of a suit for pre-emption of a part of the property sold under a sale deed by the vendor in favour of the vendee. At the time of the sale the property transferred was not in the possession of the vendor but was held by a third party against whom a suit had to be instituted in order to recover its possession. The vendor was not in a position to raise money and was consequently unable to sue for recovery of the property and merely transferred his entire proprietary interest to the vendee for a sum of Rs.5,000 which included certain prior debts as well.

The vendee then brought a suit and subsequently recovered the property from the third party. It was after this that the present suit for pre-emption was instituted by the plaintiff.

The learned Subordinate Judge in a careful judgment came to the conclusion that the sale was pre-emptible and that the plaintiff should pay the market value of the property as it now stands free from all debts. On appeal the lower appellate court has dismissed the suit holding that the sale was not pre-emptible at all. In our opinion the view taken by the lower appellate court was quite wrong. Under the sale deed the only benefit which the vendor obtained was the receipt of Rs.5,000 as consideration. He was not to get any more advantage if afterwards the vendee succeeded in recovering the property from the vendor. He was also not liable if the suit failed. Thus the total consideration which passed to the vendor was the sum of Rs.5,000 neither more nor less. He transferred his entire ownership in the property to the vendee in exchange for this cash consideration. The transaction therefore falls within the definition of "sale" under Section 54 of the Transfer of Property Act. Under Section 11 of the Agra Pre-emption Act such sale is pre-emptible.

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*S. A. 1534 of 1930

CIVIL

1932

BADRI PRASAD MISIR *v.* BIJAI NAND TEWARI

Sulaiman, C. J.

The learned advocate for the defendants relies on the case of *Kalyan* v. *Desrani*[1]. In that case the vendor had not sold the whole of the property which was in the possession of a third party to the vendee, but had transferred only a part of it for cash consideration. In addition to paying the price mentioned in the deed the vendee undertook to fight out the litigation and incur all the costs in restoring the vendor's share to him free from all trouble. Thus the total consideration which the vendor received was cash plus an undertaking to restore his property to him. It was merely held by the Bench of this Court that such a transaction was not a "sale" pure and simple, as defined in Section 54 of the Transfer of Property Act. The present case is obviously distinguishable, because here the vendor got no other consideration except the cash consideration mentioned.

The next question is whether the vendee is entitled to any compensation for the improvement that has been effected in removing the cloud on the title. We have already pointed out that the vendee might have waited for the expiry of one year during which a suit for pre-emption could be brought. The result of the litigation launched by him has certainly improved the value of the estate. The vendee should both on the principles of equity and on the analogy of the Mohammedan Law get at least a proportionate amount of the total costs incurred by him whether in court or out of court, in recovering possession of the property. We do not think that he is entitled to claim the enhanced value of the property as it now stands, after the cloud has been removed, independently of the costs incurred by him. The enhanced value subsequent to the sale deed is in the nature of an acquisition to the estate and we do not see why the vendee should get the benefit of it when there was no pressing necessity for him to sue within a year. The pre-emptor is entitled to step into the shoes of the vendee and to take the whole estate and pay for all that the vendee has had to pay. The benefit of the subsequent enhancement in value would go to him. In this view of the matter we think that the vendee can only insist upon payment to him of a proportionate amount of the actual costs incurred by him. The courts below have gone into the present market value of the property, but they have not decided what costs the vendee had to incur in recovering the estate. We cannot dispose of the appeal finally without a clear finding on the last mentioned question. We accordingly remit the following issue to the court below for a finding:—

What was the proportionate amount of the total costs actually incurred by the vendee in recovering the estate from the third party?

The burden of proving this lies upon the vendee, and both parties will be at liberty to produce any fresh evidence which they are advised to produce. The findings should be returned within three months, if convenient. The usual ten days will be allowed for objections.

Issue remitted

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[1] I. L. R. 49 All. 488

SHAHZAD SINGH (*Plaintiff*)
versus
JIACHHA KUNWAR AND OTHERS (*Defendants*)*

CIVIL

1932

June 1

SULAIMAN, C. J.
BANERJI, J.

Specific Relief Act, Sec. 27(b)—Agreement between parties—Term of—'In case of contemplated transfer, property to be transferred to other party for proper price—Deed of exchange executed between representatives of one party and a stranger—For value and without notice—Previous agreement unenforceable against transferee.

Two sets of persons entered into an agreement in 1874 that in case of a contemplated transfer of certain property, it would be transferred to the other party for proper price. In 1928 a deed of exchange was executed between the representatives of one party and a stranger. In a suit for enforcement of the previous agreement brought by the representatives of the other party, the lower court found that the transferee had no notice of this agreement. *Held,* that no matter what principle or statute governed the obligation of the representatives, the provisions contained in Sec. 27 of the Specific Relief Act must apply and the transferee for value without notice was protected and the contract could not be enforced against her.

Aulad Ali v. *Ali Athar,* I. L. R. 49 All. 527 *distinguished.*

SECOND APPEAL from a decree of S. MAITRA ESQ., Additional District Judge of Ghazipur, confirming a decree of BABU KRISHNA DAS, Subordinate Judge.

Haribans Sahai and *S. N. Verma* for the appellant.

P. L. Banerji, Janki Prasad and *A. P. Pandey* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiff's appeal arising out of a suit for specific performance of a contract entered in an agreement dated January 24, 1874 between the predecessors of the parties. Two sets of persons agreed that in case of a contemplated transfer the property dealt with in the agreement was to be transferred to the other party for a proper price.

On July 30, 1928 a deed of exchange was executed between the representatives of one of the parties and Mst. Jiachha Kunwar. The representatives of the other party brought a suit to enforce the previous agreement. Both the courts below have dismissed the claim. The lower appellate court has distinctly found that Mst. Jiachha Kunwar had no notice of this deed of agreement when she took the property for valuable consideration.

The learned advocate for the plaintiff in second appeal first urges that this finding must not be accepted because the plea was not clearly taken in the written statement that there was no specific issue on the point, and because Mst. Jiachha Kunwar was not examined on oath. We however find that in Paragraph 5 of her written statement she stated that she had no knowledge of this agreement. The issue framed by the first court was very comprehensive and was to the effect:

> Is the plaintiff entitled to get the property in suit by virtue of the agreement and has the plaintiff any preferential right of pre-emption as against the defendant first set.

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*S. A. 1372 of 1930

CIVIL

1932

SHAHZAD SINGH
v
JIACHHA KUNWAR

Sulaiman, C. J.

Both the courts below have gone into this question and found that she had no notice. It seems to us that when there was a denial by her in the written statement and when she led evidence and produced her son who was looking after her affairs that she had no knowledge of it, and when the agreement was more than 56 years old and there was no evidence whatsoever to show that she could have had any knowledge of it, the court below was justified in recording the finding that she had no notice, particularly as she was a stranger to the family and an illiterate "pardanashin' lady and there was nothing which would excite her suspicion or put her on inquiry. We think that the finding of the lower appellate court that she had no notice of the deed of agreement must be accepted in second appeal.

The learned advocate for the appellant relies on the Full Bench case of *Aulad Ali* v. *Ali Athar*[1]. That case is undoubtedly an authority binding upon us that a contract of this kind not only binds the parties thereto but also their representatives. In that case one of the parties to the agreement was the defendant transferor who obviously had knowledge. The transferee from him did not apparently plead want of notice, and this point was not pressed before the Full Bench which accordingly did not decide it.

In the present case the transferee has been distinctly found to have been a *bona fide* transferee for value without notice. It seems to us that whether Section 37 of the Indian Contract Act or general principles of equity, justice and good conscience applied to the heirs of the promisor, the transferee for value was protected. If the principles embodied in Section 40 of the Transfer of Property Act were applicable, even then the obligation cannot be enforced against a transferee for consideration and without notice of it, nor against the property in his hands. The contract in dispute was entered into in 1874, before the coming into force of the Transfer of Property Act, but after the Contract Act had been passed. It is clear that the specific performance of the contract can be enforced only under Sec. 27 of the Specific Relief Act which section makes an exception in favour of a transferee for value who has paid his money in good faith and without notice of the original contract. We therefore think that no matter what principle or statute governs the obligation of the representatives, the provisions contained in Section 27 of the Specific Relief Act must apply, and the defendant, who is a transferee for value without notice, is protected and the contract cannot be enforced against her.

The plaintiff alleged that the transaction was one of sale, but the finding of the lower appellate court that it was a transaction of exchange is conclusive against him. The suit has therefore been rightly dismissed and we dismiss this appeal with costs.

Appeal dismissed

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[1] I. L. R. 49 All. 527

SALONA BIBI (and after her death) ZUBAIDA BIBI (*Plaintiff*)
versus
BU ALI KHAN AND OTHERS (*Defendants*)*

Civil
1932
June 2
Pullan, J.
Niamat-ullah, J.

Mohammedan Law—Waqf by Shia—Waqif reserving to himself as mutwalli a larger sum for collections and mutwalli's dues than for succeeding mutwallis—Whether waqf valid.

Where the waqif, who was an old man when he dedicated the property and had retained only a very small property for himself, assigned to himself as mutwalli a larger sum for collections and mutwalli's dues than he assigned to those who were to come after him and for whom collection would be a matter of no difficulty and little expense; *held*, that in making this distinction between himself and the succeeding mutwallis, the waqif was not reserving to himself any portion of the profits, but was merely making allowance for additional expense which would be incurred during his life-time in carrying out the purposes of the waqf, and the waqf was therefore valid under the Shia Law.

Abadi Begum v. *Kaniz Zainab*, 25 A. L. J. 51 *referred to.*

FIRST APPEAL from a decree of BABU CHATUR BEHARI LAL, Additional Subordinate Judge of Jaunpur.

K. N. Katju and *Hyder Mehdi* for the appellant.

B. E. O'Conor and *Mushtaq Ahmad* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This is a plaintiff's appeal from the decision of the First Additional Subordinte Judge of Jaunpur, dismissing the plaintiff's suit. One Shabbir Ali Khan died on June 25, 1925. He had been a comparatively wealthy man, but he had, at the time of his death, disposed of all his property. He had made two deeds of gift on December 22, 1914 and January 30, 1916 in favour of Bu Ali who was his wife's nephew, and he had made two sale deeds on December 22, 1915 and January 17, 1925 in favour of Mst. Tahir Bibi who is Bu Ali's wife. All the rest of his property had been made, on January 30, 1916, the subject of a wakf, and he himself had remained mutwalli until his death. The office of mutwalli had descended in accordance with the deed of wakf on Bu Ali.

The present suit has been brought by Mst. Salona Bibi, who claimed one-third share in the estate of Shabbir Ali, being one of his heirs under Shia law. She sought to set aside all the deeds of transfer made by Shabbir Ali Khan on the ground that he was a man of weak intellect and was under influence exercised by Bu Ali Khan and his wife. There is nothing, in our opinion, to show that Shabbir Ali Khan was a man of weak intellect, or that the influence exercised upon him by Bu Ali Khan and Bu Ali Khan's wife was of such a nature that it can be described as undue influence. It appears that he had brought up Bu Ali Khan, who was his wife's nephew from childhood, and Bu Ali Khan's wife, Mst. Tahira Bibi, was the niece of the present plaintiff, and therefore related to Shabbir Ali Khan by blood. The family tree shows that Shabbir Ali Khan had no near relations. The plaintiff was his uncle's grand-daughter, and the dispositions made by him in favour of Bu Ali Khan and his wife, who looked after him in his old

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*F. A. 352 of 1928

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1932

SALONA BIBI v. BU ALI KHAN

Pullan, J.

age, were, in our opinion, prompted by affection and cannot be challenged on the grounds set up by the plaintiff.

The wakfnama, however, has been attacked on the ground that it is void under Shia law in that the wakif Shabbir Ali Khan reserved a benefit under the wakfnama for himself. The property dedicated is valued at Rs.6,000. It is landed property consisting of small shares in various villages. The income is stated in the wakfnama to be Rs.581-12-4 and the Government revenue is Rs.246-3-4. The annual profit is stated to be Rs. 335-9-7 which should be Rs.335-9-0. The wakif took from this Rs.110 as collection dues and his dues as mutwalli, and agreed to spend the balance on various charitable and religious objects. By a subsequent clause he reduced the sum to be taken by the mutwalli, if the mutwalli was Bu Ali Khan or any male or female descendants of his, from Rs.110 per annum to Rs.50 per annum, and there is a further clause enacting that if Bu Ali or any other mutwalli failed to carry out the objects of the wakf, the leaders of the Shia community might see that the mutwalli carried out the objects of the wakf, and in this case the mutwalli was to get only Rs.23 for collection, that is to say, he was to be entitled only to receive Rs.25 as the cost of collecting rents and so forth, but was to receive nothing for his other duties as mutwalli. It is not disputed that under the Shia law a wakf in which the wakif has reserved to himself during his lifetime the profits of the property is void *ab initio*. Where, however, the wakf is a mutwalli, he can take the salary fixed for mutwallis generally in the same way that if one should make an appropriation for poor and should himself become poor, or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits (Baillie's Digest of Mohammedan Law, Part II, page 218). In the case of *Abadi Begum* v. *Kaniz Zainab*[1], their Lordships of the Privy Council stated that in that case they were disposed to hold that the two principal wakfnamas were wholly invalid by reason of the reservation in the wakif's favour finding that in that case

> the settler under colour of fixing her salary as mutwalli was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutwallis or could reasonably have been assigned to them.

It is true that in the present case Shabbir Ali Khan assigned to himself as mutwalli a larger sum for collections and mutwalli's dues than he assigned to those who were to come after. We find, however, that the sum assigned to himself was only Rs.110 per annum, and he was required to collect Rs.581 in rents from different villages. He was an old man when he dedicated the property, and he retained at that time only a very small property for himself, having surrendered the bulk of his property in the villages in which the dedicated property is situated to Bu Ali. It is probable, therefore, that in order to make these collections and carry on the work of the wakf it would be necessary for Shabbir Ali Khan to employ a servant to collect the rents and conduct the business of the property. For this purpose a sum of some Rs. 9 per month was in no way excessive. The case of Bu Ali and his immediate descendants is different. Bu Ali already

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[1] 25 A. L. J. 51

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1932
SALONA BIBI
v.
BU ALI KHAN
Pullan, J.

owned property in all these villages through the gifts made in his favour by Shabbir Ali Khan. It may easily be understood that the collection would be a matter of no difficulty and little expense to Bu Ali Khan. This fact may account for the difference in the amount reserved for Shabbir Ali Khan and the amount reserved by him for Bu Ali Khan for expenses of collection, and in our opinion we are entitled to hold that in making this distinction between himself and the succeeding mutwallis Shabbir Ali Khan was not reserving to himself any portion of the profits, but was merely making allowance for additional expense which would be incurred during his lifetime in carrying out the purposes of the wakf. In our opinion the wakf is valid under the Shia law, and neither the wakf nor the other transfers are liable to be set aside at the instance of the plaintiff. We accordingly dismiss the appeal with costs.

Appeal dismissed

CIVIL
1932
June 7
SULAIMAN, C. J.
BANERJI, J.

SHRI KISHAN LAL AND OTHERS (*Defendants*)
versus
BIJAI SINGH (*Plaintiff*) AND LACHHMI NARAIN
AND OTHERS (*Defendants*)*

Tenancy Act (Local Act III of 1926), Sec. 82—Grove—Sold in execution of decree against grove-holder—Landholder's suit for possession of grove alleging that transfer was prohibited by custom—Lies in revenue court only.

> Where a grove was sold in execution of a decree against the grove-holder after the enforcement of the new Tenancy Act, the landholder could sue for the recovery of the grove from the auction-purchaser on the allegation that there was a custom prohibiting transfers of groves, in the revenue court only, under Sec. 82 of the Tenancy Act, impleading both his tenant and the transferee, and an appeal in such a suit lay to the revenue court.

SECOND APPEAL from a decree of BABU GAURI PRASAD, Additional District Judge of Mainpuri, reversing a decree of BABU RAJA BAHADUR, Munsif.

Shiva Prasad Sinha for the appellants.

U. S. Bajpai, G. Agarwala, S. B. L. Gaur and *K. N. Agarwala* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a defendants' appeal arising out of a suit brought by the landholder for a declaration that the property in dispute, which is a grove land, was not liable to be sold in execution of a money decree against the landholder's grove-holder and for possession of the property. In substance the plaint is for the ejectment of the purchaser of the grove on the allegation that such a transfer was invalid and the landholder was entitled to recover possession of the grove. The defendants pleaded that the grove was transferable as there was no custom prohibiting such a transfer. There was no plea taken that the civil court had no jurisdiction to entertain the suit. The plaintiff, however, put forward the case that there was a custom prohibiting transfers of groves.

The suit was instituted on September 6, 1927, after the coming into force of the new Tenancy Act, and the auction sale of the grove also took place shortly after the coming into force of the new Act. The first court dismissed the suit but on appeal the lower appellate court has given the plaintiff a decree against the auction-purchaser on the ground that there is a custom under which sales of grove are prohibited.

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*S. A. 1570 of 1929

In second appeal the point is taken that the civil court had no jurisdiction to entertain the suit. As the point goes to the root of the matter and is one of jurisdiction, and as an appeal would lie to the Commissioner if a suit were filed in the revenue court, we are bound to entertain this objection if it is valid. The question of costs however is another matter.

In Sec. 3 (2) of the Agra Tenancy Act "land" means land which is let or held for agricultural purposes, or as groveland or for pasturage. It is clear that a grove under the new Act is land within the meaning of the Act. It is also clear that under Section 197 (*a*) a grove-holder is a non-occupancy tenant.

It follows that under Sec. 3, Sub-clause (8) a grove is a holding. On the plaintiff's own showing there is a custom under which transfers are prohibited, with the result that no transfer can take place under Sec. 197 (*b*). It follows that the holding would be non-transferable under Sec. 23 and also under Sec. 34 of the Act. It then follows that according to the case put forward by the plaintiff there has been a transfer in contravention of the two sections and it is therefore void under Sec. 34(1). But Sec. 82 provides that if a tenant transfers his holding or any portion thereof contrary to Sub-section (1) of Sec. 34, both he and any person who may have obtained possession of the whole or any portion of the holding in pursuance of any such attempted illegal transfer, shall be liable to ejectment at the suit of the landholder, and to every such suit both the tenant and the transferee shall be made parties.

It is therefore obvious that if Sec. 82 were applicable to the transfer of a grove in execution of a decree and were not confined to voluntary transfers by the tenant, the landholder can sue both the tenant and the transferee in the revenue court. It would then follow that adequate relief could be claimed in the revenue court. As a suit for such relief would be expressly provided for in Sec. 82, no other court but the revenue court can take cognisance of such a suit. This is made clear by Sec. 230. The explanation to that section shows that if the cause of action is one in respect of which adequate relief might be granted by the revenue court, it is immaterial that the relief asked for from the civil courts may not be identical with that which the revenue court could have granted.

The learned counsel for the respondents however contends that the provisions of Sec. 82 cannot apply to a sale in execution of a decree. There is no doubt that if the words were to be taken too literally, there may be some force in this contention, but it seems to us contrary to the general policy of the legislature, as indicated in the various sections of the Act, to hold that there is a distinction between a voluntary and an involuntary transfer in Sec. 82. After all both are transfers of a tenant's holding and there is no reason why in the case of a voluntary transfer the landholder should be bound to sue in the revenue court, whereas in the case of an in-

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1932
SHRI KISHAN LAL *v.* BIJAI SINGH
Sulaiman, C. J.

voluntary or compulsory transfer he should go to a civil court. Under the new Act provision has been made for institution of suits by landholders against tenants and their representatives in the revenue courts only.

We may also point out that a similar expression occurs in Sec. 52 of the Transfer of Property Act where the words are "the property cannot be transferred by any party to the suit". It has been held in numerous cases and there is now a consensus of opinion that the word 'transfer' in that section is wide enough to cover both voluntary and involuntary transfers.

It may also be pointed out that for the purpose of declaring that a non-occupancy tenancy is not transferable, Sec. 23 (1) would have been sufficient. Nevertheless the legislature has gone on to provide in Sec. 34 that every transfer made by a tenant in contravention of the provisions of this Act shall be void. We think the legislature could not have intended to leave out involuntary transfers from the scope of this provision. If a private transfer is void, so must be an involuntary transfer. The intention seems to be that where the transfer is void it cannot be validated by the consent of the landholder. We are therefore of opinion that Sec. 82 applies to this case and although the transfer was by means of a sale in execution of a decree against the tenant, the remedy of the landholder was to sue in the revenue court under Sec. 82 of the Tenancy Act impleading both the tenants and his transferee. We may point out that Sec. 82 falls under Schedule 4, Group B, Serial No. 10 of the Tenancy Act and an appeal in such a suit lies to the revenue court. In this view of the matter it is unnecessary to go into the question of custom. We therefore allow the appeal, set aside the decree of the lower appellate court and send the case back to the court of first instance with instructions to return the plaint for presentation to the proper court.

The plea of jurisdiction was not taken in the written statement; it appears to have been urged only at the time of the arguments. The defendants should not be allowed their costs in the first court. The trial court found the point in favour of the defendants and the lower appellate court has not considered it. The defendants will have their costs in the lower appellate court and in this court.

Appeal allowed

RAM CHARAN SAHU (*Judgment-debtor*)
versus
JUMNA PRASAD SAHU (*Decree-holder*)*

CIVIL
1932
June 7
SULAIMAN, C. J.
BANERJI, J.

Civil Procedure Code, Or. 21, R. 66—Proceedings under—Order fixing valuation to be entered in the sale proclamation—Whether appealable.

An order passed by the Executing Court in proceedings under Or. 21, R. 66 to the effect that "in the sale proclamation the valuation be fixed at 50 times of the land revenue", does not amount to a decree and is not appealable.

Nathu Lal v. *Yashodha Devi,* 1931 A. L. J. 1084 *relied on.*

*E. F. A. 203 of 1931

CIVIL

1932

RAM CHARAN SAHU v. JUMNA PRASAD SAHU

Sulaiman, C. J.

EXECUTION FIRST APPEAL from a decree of BABU CHARU DEB BANERJI, Subordinate Judge of Azamgarh.

A. P. Bagchi for the appellant.

Shiva Prasad Sinha for the respondent.

The judgment of the Court was delivered by

SULAIMAN, C. J.—This is a judgment-debtor's appeal purporting to be an appeal from an order passed in execution. The order in question is in the following words:—

> In the sale proclamation the valuation be fixed at 50 times of the land revenue.

This order was passed when there was a dispute as to the valuation to be entered in the proclamation of sale. It is obvious that there has been no adjudication of the rights of the parties and such an order therefore does not amount to a decree within the meaning of Sec. 47 read with Sub-section 2 of the Civil Procedure Code. This view is supported by the case of *Ajudhia Prasad* v. *Gopi Nath*[1] and followed in *Nathu Mal* v. *Yasodha Devi*[2]. We agree with the view that every order passed in proceedings under O. XXI, R. 66 cannot be a decree within the meaning of Sec. 47, unless it amounts to an adjudication on the rights of the parties.

In the case of *Shiam Lal* v. *Roshan Lal*[3] Piggott, J. was careful not to decide this point but all the same remarked:

> It might be equally dangerous to lay down that all orders passed by an executing court in the course of proceedings held under O. XXI, R. 66 of the Code of Civil Procedure are decrees and appealable as such.

The opinion of Walsh, J. in that case is in favour of the appellant. We are however not prepared to say that every order passed in proceedings held under O. XXI, R. 66 is a decree. In our opinion the order in question is not a decree and is therefore not appealable at all. The appeal is dismissed with costs.

Appeal dismissed

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[1] I. L. R. 39 All. 415

[2] 1931 A. L. J. 1084

[3] 14 A. L. J. 363

CIVIL

1932

June 8

PULLAN, J.
NIAMAT-ULLAH, J.

RAM KUMAR AND OTHERS (*Defendants*)
versus
GIRDHARI LAL AND ANOTHER (*Opposite party*)*

Civil Procedure Code, Or. 44, R. 1—Application to file an appeal in forma pauperis *—Whether applicant entitled as of right to be heard.*

> On an application to file an appeal in *forma pauperis*, which was laid before the District Judge with a report by the Munsarim drawing his attention to Or. 44, the District Judge passed an order as follows:—"I see no reason to allow this appeal. Application rejected." *Held,* that the applicant is not entitled as of right to be heard, and the order complied with the law.

CIVIL REVISION from an order of P. C. PLOWDEN ESQ., District Judge of Bareilly.

G. S. Pathak for the applicant.

G. Agarwala and *K. N. Agarwala* for the opposite parties.

*Civ. Rev. 589 of 1931

Civil

1932

Ram Kumar v. Girdhari Lal

Pullan, J

The judgment of the Court was delivered by

Pullan, J.—This is an application in revision of an order of the District Judge of Bareilly, who refused to entertain the applicant's application to file an appeal in *forma pauperis*. The order passed by the District Judge is as follows:—

> I see no reason to allow this appeal. Application rejected.

It is submitted that this order was passed in chambers, that it is not in accordance with the requirements of the law and that the applicant should have had a chance of being heard before the District Judge.

Order 44, Civil Procedure Code, prescribes that a court shall reject such an application, unless upon a perusal thereof and of the judgment and decree appealed from it sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Thus the duty of the judge in this case was to reject the application, unless he was satisfied that the judgment was wrong; and the manner in which he was so to satisfy himself was by reading the judgment and the decree. The Code does not provide for the presence of the parties or for any hearing of the application. We find that in the present case the application was laid before the judge with a report by the munsarim drawing his attention to the terms of Order 44 of the Civil Procedure Code. We cannot assume that the judge, in face of this report, passed an order saying that he saw no reason to allow the appeal without reading the judgment and the decree. It is, in fact, certain that the judge did read the judgment and that he came to the conclusion that there was no case made out by the appellant for setting that judgment aside. It is possible that the judge might have come to a different opinion had he heard arguments; but the law does not provide that he should hear arguments, and the intention of the Legislature is clearly expressed in O. 44, and that is that persons who do not pay the costs of an appeal are entitled to be heard only if the judge, after reading the judgment, is of opinion that on the face of it the judgment is wrong. We cannot find that the judge in this case acted with material irregularity. His order was brief; but we are satisfied that he complied with the law. We accordingly dismiss this application with costs.

Application dismissed

AN ADVOCATE OF BENARES—IN THE MATTER OF*

Civil

1932

June 10

Sulaiman, C. J

Mukerji, J

Civil Procedure Code, Secs. 109(c) and 151—High Court passes order of suspension against an advocate—Leave to appeal to Privy Council granted—Whether High Court can order that suspension should remain in abeyance.

Where leave to appeal to Privy Council is granted to an advocate from an order of suspension passed against him by a Full Bench, the High Court has inherent jurisdiction to order that the order for suspension should remain in abeyance till the appeal is disposed of by the Privy Council.

Application for leave to appeal to His Majesty in Council.

A. Sanyal for the applicant.

U. S. Bajpai (Government Advocate) for the Crown.

*P. C. A. 27 of 1932

The judgment of the Court was delivered by

SULAIMAN, C. J.—This is an application by an advocate of this Court for leave to appeal to His Majesty in Council from an order of suspension passed against him by a Full Bench on May 26, 1932. He has been suspended for a period of three months with effect from that date.

It appears that this High Court has on previous occasions treated such applications as falling under Section 109(*c*) C. P. C. and granted leave in fit cases. The words of that section are no doubt general and leave to appeal from any order is allowed when the case is certified to be a fit one for appeal to His Majesty in Council.

In re: *Parbati Charan Chatterji*[1], *in re*: *Rajendra Nath Mukerji*[2] and *in re*: *S. B. Sarbadhicary*[3] leave was applied for and granted by this Court. It also does not appear that any objection was taken to the granting of such leave before their Lordships of the Privy Council.

We think that inasmuch as an advocate has been ordered to be suspended from practice he is entitled to have the propriety of the order re-examined on appeal. We accordingly direct that leave be granted and we certify that this is a fit case for appeal to His Majesty in Council.

There is a further prayer that pending the disposal of the appeal to His Majesty in Council the order suspending the advocate from practice may not be carried into effect. No doubt this is not a case analogous to a decree in execution which can be stayed. But it is akin to a conviction for criminal offence. It is true that the order has already come into operation and is in force but it is equally true that the appeal before their Lordships of the Privy Council would take much more than three months for disposal. By the time it is finally disposed of, the order of suspension would have been exhausted and the appeal will in one sense become infructuous. The loss suffered by the advocate during this period would not be recouped in case his suspension is set aside.

We think that in a case of this kind we have inherent jurisdiction to order that the order for suspension should remain in abeyance till the appeal is disposed of by their Lordships of the Privy Council. We my refer to the case of *Ram Saroop* v. *Emperor*[4] for purposes of analogy.

The applicant has already undergone suspension for a period of fifteen days. We order that his suspension for the rest of the period should be held in abeyance till the matter has been finally disposed of. If his appeal is dismissed by the Privy Council he will have to undergo suspension for the remaining period.

Leave granted

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[1] I. L. R. 17 All 498

[2] I. L. R 22 All. 49

[3] 34 I. A. 41

[4] 25 A. L. J. 97

Civil

1932

June 13

Sulaiman, C. J.

Banerji, J.

KANAUJI LAL (*Applicant*)
versus
CHIRAUNJI LAL AND OTHERS (*Opposite parties*)*

Tenancy Act (III of 1926), Sec. 253 and Sec. 115 C. P. C.—Order of Assistant Collector setting aside dismissal for default of appearance—Whether revision lies to High Court.

No revision lies to the High Court from an order of the Assistant Collector setting aside a dismissal for default of appearance in a suit for profits. The language of Sec. 253 of the Tenancy Act of 1926, which has replaced the provisions of Sec. 115 C. P. C., precludes the High Court from entertaining the revision, because no appeal lies to the District Judge from the order sought to be revised.

CIVIL REVISION from an order of MR. MUHAMMAD SULTAN HYDER, Assistant Collector of Farrukhabad.

Shiva Prasad Sinha for the applicant.

M. N. Raina, Ram Nama Prasad and *Kanhaiya Lal* for the opposite parties.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is an application in revision by the defendant from an order setting aside a dismissal for default of appearance in a suit for profits in the revenue court. The Assistant Collector rightly or wrongly came to the conclusion that there was sufficient cause for the non-appearance of the plaintiff, and has therefore ordered that the dismissal for default be set aside and the original suit be restored to its number.

It is quite clear that no appeal lies from an order setting aside such a dismissal. Section 248(3) of the Agra Tenancy Act makes only such orders as are mentioned in Sections 47 and 104 and O. 43 appealable. This is not such an order.

It follows, therefore, that although if a decree were passed in a suit, an appeal might have laid to the District Judge, no appeal lies to him from the order in question. The language of Section 253 of the Agra Tenancy Act, which has replaced the provisions of Section 115 C. P. C., therefore precludes us from entertaining a revision, because no appeal lies to the District Judge from the order sought to be revised. The language of the section is in clear contrast with the language of Section 252 where the Board may call for the record of any case which has been decided by a subordinate revenue court in which no appeal lies either to the District Judge or to the Board.

The learned advocate for the applicant relies strongly on the case of *Misir Krishna Saroop* v. *Misir Raj Bahadur Singh*[1] in which a revision under Section 115 C. P. C. was entertained by another Bench of this Court. A preliminary objection does not appear to have been taken, and the question therefore was not expressly decided. It also appears that the attention of the Bench was not drawn to an earlier case of this Court, namely, *Jagdeo Singh* v. *Kesho Prasad Singh*[2], where it was clearly held that Section 115 does not apply to revenue court cases at all. Our jurisdiction in revision is confined strictly within the four corners of Section 253. In the circumstances, we do not think that that case is any binding authority upon us.

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*Civ. Rev. 263 of 1931

[1] 1931 A. L. J. 962

[2] I. L. R. 51 All. 1020

Sulaiman, C. J.

The language of Section 253 is quite clear. It cannot mean that in a suit in which, if a decree were passed ultimately, and appeal would lie to the District Judge, the High Court can interfere with every interlocutory order passed by the subordinate court. The jurisdiction is confined to cases where when a suit or application has been decided, an appeal lies from that order to the District Judge and no appeal lies to the High Court. It is not necessary for us to express any opinion whether the Board of Revenue can entertain a revision under Section 252 by holding that a case has been decided by a subordinate revenue court. The application is accordingly dismissed. We direct that the parties should bear their own costs of this revision.

Application dismissed

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BANERJI, J.

RAM AGYAN PANDEY (*Plaintiff*)*
versus
CHATRUGHUN SINGH AND ANOTHER (*Defendants*)*

Tenancy Act (III of 1926), Secs. 99 and 230—Tenant ejected from holding by a landholder—And not by the entire body of landholders—Tenant must still sue for possession in the revenue court.

According to Sec. 99 of the Tenancy Act of 1926 read with Sec. 230, a tenant ejected from his holding by his landholder or any person claiming as landholder to have a right to eject him, must sue such persons for possession in the revenue court, and it is not necessary that all the proprietors of the mahal should eject a tenant in order to give jurisdiction to the revenue court. *Subedar Singh* v. *Komal Singh,* A. I. R. 1929 All. 656 *followed.*

FIRST APPEAL from the order of the Subordinate Judge of Azamgarh.

A. P. Pandey for the appellant.

K. L. Misra for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a holding. In the plaint the plaintiff frankly admitted that defendant No. 2 is one of several zamindars in the village and defendant No. 1 is a ryot of defendant No. 2 and that the two defendants forcibly ejected the plaintiff from his holding and sowed crops. The relief claimed was a decree for possession and mesne profits. The first court came to the conclusion that the defendant's plea that the claim was not cognisable by the civil court could not be entertained. On appeal the lower appellate court came to a contrary conclusion. It is admitted that the dispossession took place after the coming into force of the new Tenancy Act and the case is no longer governed by the old Tenancy Act.

No doubt for some 3 years prior to the passing of the new Tenancy Act there were a few rulings of this Court in which it was laid down that an ejectment to come within the scope of Sec. 79 of the old Tenancy Act

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*F. A. F. O. 14 of 1931

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Sulaiman, C. J.

must be an ejectment by the entire body of landholders and not by few individual landholders. An ejectment by a large body of landholders acting jointly hardly ever occurs. Anyhow the case is now governed by Sec. 99 read with Sec. 230 of the new Tenancy Act. According to that section a tenant ejected from or prevented from obtaining possession of his holding or any part thereof by his landholder, or any person claiming as landholder to have a right to eject him, must sue such persons in the revenue court. The present section is much wider than the corresponding section of the former Act and there is no doubt that under the new section a tenant ejected by any person who is a landholder or who is a person claiming as a landholder, has his remedy only in revenue court, and the jurisdiction of the civil court is ousted. The policy of the legislature obviously is that disputes between tenants and landholders as regards agricultural holdings must be settled by the revenue court alone. If the mere fact, that there are some other landholders in the village in existence, were allowed to take the case out of the jurisdiction of the revenue courts, the result would be that many of the disputes between tenants and zamindars would have to be tried by the civil courts.

In the case of *Subedar Singh* v. *Komal Singh*[1] Dalal, J. held that the old rulings cannot be now considered to be binding because the wordings of Sec. 99 are now different from those of Sec. 79. He correctly laid down that it is not now necessary that only the landholder, that is, all the proprietors of the mahal, should eject a tenant in order to give jurisdiction to the revenue court; and that it is sufficient if any person claiming to have the right to eject as landholder has ejected the plaintiff. The learned Judge rightly distinguished the previous rulings on the ground that they were under the old section. We are in full agreement with the view expressed by him and hold that a suit of this nature could lie under Sec. 99 of the Agra Tenancy Act and that therefore the jurisdiction of the civil court is completely barred. The plaint has been rightly returned for presentation to the proper court. The appeal is accordingly dismissed with costs in all the courts.

Appeal dismissed

[1] A. I. R. 1929 All. 656

BARMHA SINGH AND OTHERS
versus
EMPEROR THROUGH MADHO SINGH*

Criminal

1932

June 13

King, J.
Thom, J.

Criminal Procedure Code, Secs. 145(1) and 537—Order under Sec. 145—Omission or irregularity in the proceedings—When High Court can set aside order.

A court of revision is absolutely prohibited from setting aside an order under Sec. 145 Cr. P. C. on account of any omission or irregularity in the proceedings (e.g., the omission of the magistrate to record his order strictly in accordance with the provisions of Sub-section (1) of Sec. 145), unless such omission or irregularity has in fact occasioned a failure of justice. *Madan Mohan Lal* v. *Sheoraj Kunwar*, [1932] A. L. J. 503 *followed.* *Abdul Rahman* v. *King-Emperor*, 54 I. A. 96 *referred to.*

*Cr. Rev. 21 of 1932

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BARMHA SINGH v. EMPEROR
King, J.

CRIMINAL REVISION from an order of BABU GANGA PRASAD, Sessions Judge of Fatehpur.

Durga Charan Singh and *Govind Das* for the applicants.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

KING, J.—This is an application in revision against an order passed by a Magistrate under Section 145 of the Criminal Procedure Code.

The application raises the question whether the magistrate's omission, to record in his order under Section 145 (1) the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists concerning some immovable property, vitiates the subsequent proceedings.

One Madho Singh made an application under S. 145 of the Code of Criminal Procedure alleging that there was a dispute between him and the persons of the opposite party regarding the possession of a certain field, and that there was a likelihood of a breach of the peace on account of the interference by the opposite party. He stated that the land was his sir and he had begun cutting his crop when the opposite party came with lathis and drove him away by force and threatened to kill him if he came near the field again. The magistrate called for a police report and also took evidence under S. 202 of the Code of Criminal Procedure. On March 13, the application was dismissed because Madho Singh failed to deposit the necessary process fees. On March 17, Madho Singh renewed his application. His statement was recorded and it was ordered that the application be put up next day with the previous papers. Next day the magistrate perused the previous papers and the police report and then passed an order in the following words:—

> Summon the parties to file written statements, and the property attached will not be released, if not yet so done.

It seems that the magistrate had authorised the police officer to attach the property if necessary.

Undoubtedly this order was not in the form required by Section 145 (1). The magistrate did not state the grounds of his being satisfied that there was a likelihood of a breach of the peace concerning the disputed plot of land. It is obvious that he was so satisfied by the police report and by the statements of the complainant and his witnesses, but he omitted to state in his order the grounds of his being so satisfied as he should have done, in conformity with S. 145 (1).

It has been argued for the applicants that even if no prejudice was caused to them, and even if no failure of justice has been occasioned, the omission in the magistrate's order had the effect of depriving him of jurisdiction to proceed further, and that the subsequent order passed under S. 145 (6) must be held to have been passed without jurisdiction.

Several rulings have been cited in support of this view: *Behari Lal* v. *Chhajju*[1], *Dan Pershad* v. *Ganesh*[2], *Nathu Ram* v. *Emperor*[3] and *Banka Singh* v. *Gokul*[4]. These rulings do no doubt support the applicant's contention that the magistrate had no jurisdiction to pass an order under a subsequent Sub-section of S. 145 without having made a preliminary order under Sub-section (1) in conformity with the requirements of that Sub-section.

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[1] 2 A. L. J. 272
[2] 11 A. L. J. 696
[3] 15 A. L. J. 270
[4] 25 A. L. J. 246

For the Crown, we have referred to a very recent case *Madan Mohan Lal* v. *Sheoraj Kunwar*[5] in which Boys, J. expressly considered three of the Allahabad rulings to which we have referred and expressed the view that S. 145 (1) is not mandatory except in this sense that the court will set aside an order passed under the latter clauses of S. 145, if there is any reason to believe that the omission of an order, or the passing of an order not strictly in the terms of Section 145 (1), led to some prejudice to one or other of the parties. It would be quite unjustifiable and unreasonable to set aside lengthy proceedings under Section 145 when the facts indicate that the parties could not conceivably have been prejudiced by the absence of a formal order, where it is manifest that they knew well all the facts and contested the matter with the advantage of the knowledge of the whole of the facts. The omission to draw up an order under S. 145 (1) has nothing to do with the question of jurisdiction.

That case is very much on all fours with the case before us now, and we endorse the reasoning adopted by the learned Judge in that case. In our opinion, the magistrate had power to deal with the matter in question, and with the persons in questions, and therefore had jurisdiction in the case. The magistrate also satisfied himself from the police report and from the evidence recorded that there was a likelihood of a breach of the peace concerning the field in dispute. If he omitted to record the grounds of his being so satisfied, in his order passed under Sub-section (1), he did not by reason of that omission lose "jurisdiction" to take further proceedings, although he was guilty of an omission or irregularity in procedure. The breach of a mandatory provision of the Code of Criminal Procedure does not necessarily amount to such an illegality as vitiates the whole trial or proceedings. For this proposition we rely upon the ruling of their Lordships of the Privy Council in *Abdul Rahman* v. *King-Emperor*[6]. In that case, a mandatory provision of the Code had been broken. But their Lordships held nevertheless that it was merely an irregularity which was curable under Section 537 of the Code, as no failure of justice had been occasioned and the accused had not been in any way prejudiced.

It is important to bear in mind the fact that the provisions of S. 537 are also mandatory. A court of revision is absolutely prohibited from setting aside an order under Section 145 on account of any omission or irregularity in the proceedings, unless such omission or irregularity has in fact occasioned a failure of justice. In view of the Privy Council ruling it is no longer open to a High Court to hold that S. 537 will not apply when there has been a breach of a mandatory provision of procedure, on the ground that such a breach is in illegality and not a mere irregularity. As a matter of fact most of the rules of procedure are mandatory. When anything is left to a magistrate's discretion, he can hardly be held guilty of an irregularity if he exercises a wrong discretion.

We think it is clear that we are not empowered to set aside the magistrate's order unless we hold that his omission to state his grounds for being

[5] [1932] A. L. J. 503

[6] 54 I. A. 96

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satisfied that there was a likelihood of a breach of the peace has in fact occasioned a failure of justice.

In the present case, we are satisfied that the omission of the magistrate to record his order strictly in accordance with the provisions of Sub-section (1) of S. 145 has not occasioned any failure of justice and has not in any way prejudiced the applicants, who have had a perfectly fair trial upon the merits. They raised no objection to the defect in the magistrate's order under Section 145 (1).

We agree with the learned Sessions Judge who relied upon a ruling of this Court in *Mst. Har Piari* v. *Nathe Lal*[7].

We accordingly dismiss the application and uphold the magistrate's order, but we would warn the magistrate to be more careful in future to follow strictly the procedure laid down in the Code.

Application dismissed

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[7] 18 A. L. J. 1140

CIVIL

1932

June 13

MUKERJI, J.
BENNET, J.

ANAND SINGH AND ANOTHER (*Defendants*)
versus
THE COLLECTOR OF BIJNOR (*Plaintiff*) AND UDAI RAJ SINGH AND OTHERS (*Defendants*)*

Contract Act, Sec. 134—"Act or omission of the creditor"—Meaning of—Failure of creditor to bring suit within limitation against principal debtor—Whether amounts to 'omission'—Sec. 145—Liability of principal debtor to indemnify surety—Limited to amount surety bound to pay at date of suit by creditor against surety.

Sec. 134 of the Contract Act intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part. The failure of the creditor to bring a suit within the period of limitation against the principal debtor is not an omission on the part of the creditor which would bring the matter within the provisions of Sec. 134 of the Contract Act.

The liability of the principal debtor to indemnify the surety is limited to the amount which the surety was bound to pay at the date of the suit instituted by the creditor against the surety. The liability of the principal debtor is not affected by a compromise under which the surety undertook to pay the creditor after a specified period with contractual interest including compound interest up to the date of payment.

FIRST APPEAL from the decision of the Deputy Commissioner exercising the powers of Subordinate Judge of Naini Tal.

S. K. Dar and *S. N. Seth* for the appellants.

U. S. Bajpai and *H. P. Sen* for the respondents.

The judgment of the Court was delivered by

Bennet, J.

BENNET, J.—This is a first appeal by defendant No. 1 Kunwar Anand Singh with whom his son Kunwar Sundar Singh has been joined as an appellant. The lower court has granted a decree in favour of the plaintiff, the Collector of Bijnor in charge of the Kashipur Estate under the court of wards, the estate being owned at present by the Raj Kumar Hari Chand

*F. A. 482 of 1928

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v.
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Bennet, J.

Raj Singh minor. The transactions out of which this suit has arisen are as follows:—

On June 14, 1911 the appellant Kunwar Anand Singh borrowed Rs.20,000 on a simple bond payable on demand from Bisheshwar Nath and Gauri Shankar, the rate of interest being annas 0-12-0 per cent per mensem with six monthly rests. On the same date defendant No. 2, the brother of Kunwar Anand Singh, Raja Udai Raj Singh, who was at that time the Raja of Kashipur, executed a surety bond by which he mortgaged certain property in Naini Tal called Strawberry Hall and Kashipur house. The deed set forth that he stood surety for the appellant and if the appellant failed to pay the sum of Rs.20,000, the Raja would pay the amount with interest and that he hypothecated the property for that purpose. Now on July 22, 1916, the appellant applied to be declared an insolvent and he was adjudicated an insolvent apparently in that year, although the exact date is not given. The limitation on the bond would have expired on June 14, 1917. On the day previous to that, on June 13, 1917, the creditors brought a suit against the Raja of Kashipur, defendant No. 2. They did not sue the principal debtor apparently because he had been declared an insolvent. A decree was obtained on a compromise on October 1, 1917 which was to the effect that the parties had agreed that the plaintiff's claim be decreed with costs and contractual interest including compound interest up to the date of payment and interest *pendente lite* with the provision that the defendant be not liable to pay any thing under the decree until after the expiry of seven years and that he be liable to pay them only such amount as may not have been paid in the interval by Kunwar Anand Singh, his heirs or receivers of his estate. Nothing was paid by Kunwar Anand Singh appellant and that as a result of this transaction the interest has very largely increased and the sum now claimed is Rs.66,000 and odd. On October 22, 1924, the creditors made an application for a final decree against the surety and the decree was passed on May 6, 1925. The claim had then increased to Rs.52,369-12-0. Subsequent to this decree on June 4, 1925, defendant No. 2, the Raja of Kashipur, executed a deed of relinquishment of his estate in favour of the minor plaintiff his son. This document is printed at page 71. In this document he stated that he transferred the estate

> to the transferee for ever subject to and charged with the payment of all lawful debts, liabilities and obligations (except such as are now barred by any rule or law of limitation) of the transferor and existing at the date of these presents the estimate amount of which is Rupees 3 laks or thereabouts and the transferee hereby covenants with the transferor that the transferee will duly pay and discharge all such debts, liabilities, etc.

Accordingly the plaintiff assumed the liability to pay the decree which had been passed on May 6, 1925 against the Raja. Eventually payments were made on May 7, 1926 and October 18, 1926 by the court of wards of a total amount of Rs.57,664-12-0 and interest. The plaintiff now sues to recover this amount from defendant No. 1 on the ground that the plaintiff has succeeded to the rights of the surety and that the defendant No. 1 is the principal debtor.

The first point with which we may deal is the question whether the

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plaintiff has the right of a surety to obtain a decree against the principal debtor. It is true that the Raja of Kashipur, defendant No. 2, did transfer his liabilities to the plaintiff but he did not transfer the right which would accrue to him as surety on paying the amount due from the principal debtor. Accordingly we are of opinion that any decree which can be granted should be granted to defendant No. 2 the Raja and not to the plaintiff.

The next point which we may deal with is the question of the amount of interest which would be due to the decree-holder if his claim is valid. Learned counsel for the appellant argued that the compromise of 1917 should not affect the liabilities of the appellant. By that compromise the surety undertook to pay after a period of seven years and the claim has now been swollen by the accumulated compound interest during this period of seven years. The appellant was no party to that compromise and no allegation has been made in the plaint to the effect that the appellant agreed to the compromise. There was therefore no pleading in the written statement on the point. We are of opinion that the liability of the appellant should be limited, if there is a liability, to the amount which the surety was bound to pay at the date of the suit against the surety which was at the expiry of the period of limitation plus the *pendente lite* interest at 6 per cent and simple interest at 6 per cent until the date of payment. Various other grounds were argued to show that there was no liability of the appellant. It was argued in the first place that at the date of suit there was a period of one day only within which the claim against the principal debtor became barred and that after June 14, 1917 the debt against the principal debtor was time-barred. Therefore it was said that the surety should have made a defence in the suit of the creditors that the debt had become time-barred against the principal debtor and that under Section 134 of the Indian Contract Act the surety would be thereby released. Various rulings were shown to us for this proposition. *Salig Ram Misir* v. *Lachhman Das*[1], *Jagmohan Singh* v. *Gatali*[2] and some earlier rulings, *Hazari* v. *Chunni Lal*[3], *Radha* v. *Kinlock*[4] and *Ranjit Singh* v. *Naubat*[5]. In these cases the suit against the principal debtor was barred on the date on which the suit was brought against the surety, and, therefore, the rulings will not apply to the present case. We are of opinion that Section 134 of the Contract Act does not apply to a case of this nature. That section says that the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is *released,* or by any act of omission of the creditor, the legal consequence of which is the discharge of the principal debtor, that is, the section applies where there is either a release or a discharge. The illustrations indicate the kind of release or discharge which is intended by the section. The illustrations of course are not intended to be exhaustive, but they do illustrate that the section intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part. In the present case it is suggested that the failure of the creditor to bring a suit within the period

[1] I. L. R. 50 All. 211
[2] [1930] 28 A. L. J. 1084
[3] I. L. R. 8 All 259
[4] I. L. R. 11 All. 310
[5] I. L. R. 24 All. 504

of limitation against the principal debtor is an omission on the part of the creditor which would bring the matter within the provisions of Section 134 of the Indian Contract Act. We are of opinion that the act or omission contemplated by that section is not an act or omission of this nature at all. We consider that in the present case it was not necessary for the creditors to sue the principal debtor, because at the time of suit against the surety the principal debtor had already become an insolvent, and, therefore, it was obvious that the creditors could not sue him without the permission of the insolvency court which was unlikely to be granted. It is true that the creditors made an application in insolvency and that application was rejected on the ground that their debt was time-barred. This of course was subsequent to the suit against the surety.

The next ground on which argument was made arises from this action of the creditors in making an application to the insolvency court. The order of the insolvency court was passed on September 21, 1918 and it is as follows:—

> Kunwar Anand Singh's pleader, Pandit Chandra Datta, objects on the ground that the Raja had taken over the debt, and applicant has himself in a previous case stated that he did not hold Kunwar Anand Singh liable. The debt appears to be time-barred and the objection of Kunwar Anand Singh is allowed regarding parts. I therefore order this debt of Rs.20,000 to be struck off the schedule of debts owed by the insolvent Kunwar Anand Singh.

This order shows that the debt of the creditors was struck off from the schedule of debts on the ground that it was time-barred. Nevertheless learned counsel argued that the subsequent discharge of the insolvent would release the insolvent from this debt in question. The discharge of the insolvent was on September 22, 1919. Under the Insolvency Act then in force, Act III of 1907, Section 45 (2) provided

> save as otherwise provided by Sub-section (1) an order of discharge shall release the insolvent from all debts entered in the schedule.

The debt of the creditors had been expunged from the schedule and therefore the discharge of the insolvent could not release the insolvent from the debt in question.

Some further argument was made in regard to the contingent debt which would arise when the surety, the Raja of Kashipur, paid the debt in question. It will be noted that no payment was made by the surety until long after the discharge on September 22, 1919. It was argued however that the surety defendant No. 2 might have applied to be entered as one of the creditors on account of this contingent liability. The section referred to in Act III of 1907 is Section 28. This section provides that a contingent liability to which a debtor may become subject before his discharge shall be deemed to be a debt provable under the Act. Now even if the Raja had made an application and had been entered as a contingent creditor, under the facts of this case the obligation did not arise before the discharge, as the payment was not made before the discharge and therefore the debt would not have been a debt to which the Act would have applied. As a matter of fact the Raja did not apply to have his contingent debt

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entered in the schedule, and therefore we do not consider that the question arises in this case, that is to say, that even if the Raja had applied and had been entered as a creditor on this contingent liability at the time of distribution of assets, the Raja had not made any payment and would not have been entitled to any distribution and that therefore the Raja could not have remained as a scheduled creditor and it would have been necessary to remove his name from the list of scheduled creditors, and therefore under Section 45, Sub-section (2) the order of discharge would not have released the insolvent from the contingent debt of the Raja.

Some further argument was made that the judgment between the creditors and the insolvent by the insolvency court holding that the debt of the creditors was time-barred would operate as *res judicata* between the plaintiff and defendant No. 1. In the insolvency order of September 21, 1918 there was no issue decided between defendant No. 1 and defendant No. 2 and the present plaintiff was not a party to those proceedings. We may note that the argument that the plaint is in any way time-barred is founded apparently on Section 140 of the Contract Act. That section lays down where a surety makes payment he is invested with all the rights which the creditor has against the principal debtor. But this is not the only section of the Contract Act under which the surety has a right. The surety also has a right under Section 145 of the Contract Act which states as follows:—

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

There would be no question of the right of the surety under Section 145 being limited to the rights of the creditor against the principal debtor.

For the reasons stated above we allow this appeal in part to the extent indicated, that is, a decree will be granted in favour of Raja Udai Raj Singh defendant 2 and the decree will be limited to the amount of the decree obtained by the creditors against the principal debtor as already stated, that is, the Rs.20,000 and interest at the contractual rate for six years and thereafter simple interest at 6 per cent per annum on the total amount up to the date of payment. As regards costs we consider that the objection which has been taken by the appellant that the plaintiff was not entitled to sue is an objection which might have been taken at an earlier date in the court below and if it had been taken learned counsel for the respondent No. 1 states that defendant No. 2 would be joined as a plaintiff. Under these circumstances we consider that the correct order as to costs will be that the decree-holder defendant No. 2 will receive proportionate costs in each court in accordance with the amount of his success on this decree and the appellant will receive proportionate costs in each court in accordance with the amount of his success.

Appeal allowed in part

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June 15

Sulaiman, C. J.

Banerji, J.

SRI RAM (*Judgment-debtor*)
versus
JAI KISHUN LAL AND OTHERS (*Opposite parties*)*

Civil Procedure Code, Sec. 53—Decree against Hindu lambardar for amount collected and also remaining uncollected—Lambardar dies before attachment—Son brought on record—Whether decree can be executed as against son.

A suit was brought against a Hindu lambardar and a decree was obtained against him, which was both for the amount collected by him and also for the amount remaining uncollected on account of his negligence. Before any property could be attached, the lambardar died. His son was brought on the record as his legal representative and execution was sought against him by the attachment and sale of the joint family property. *Held,* that in view of the provisions of Sec. 53 C. P. C. the decree can be executed as against the son to the extent of the joint family estate in his hands.

Bharat Singh v. *Tej Singh,* I. L. R. 40 All. 246 and *Rudor Pratap Singh* v. *Sharda Mahesh Prashad Singh,* A. I. R. 1925 All. 471 *followed; Bhagwati Saran* v. *Deo Saran,* A. I. R. 1928 All. 166 *dissented from.*

Execution Second Appeal from a decree of Babu Lakshmi Narain Tandon, District Judge of Shahjahanpur, confirming a decree of Babu Bhup Narain Avasthi, Assistant Collector, first class.

A. M. Khwaja and *Harnandan Prasad* for the appellant.

Shiva Prasad Sinha and *M. A. Aziz* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—This is a judgment-debtor's appeal arising out of an execution proceeding. It appears that the appellant's father was the lambardar of a village, and he did not pay the full share of the profits to the respondents decree-holders. A suit was brought against the father and a decree was obtained against him, which was both for the amount collected by him and also for the amount remaining uncollected on account of his negligence. Before any property could be attached, the lambardar died. His son was brought on the record as his legal representative and execution was sought against him by the attachment and sale of the joint family property. Objection was taken on behalf of the judgment-debtor that the decree could not be executed against him because he had received no assets from the deceased debtor, and that the debt was not binding upon him because it was based on the negligence of the deceased. Both the courts below have allowed the execution and overruled the objection of the judgment-debtor.

No doubt there were certain earlier rulings in which it was doubted whether the son of a Hindu lambardar could be liable for the amount of profits which remained uncollected owing to the lambardar's negligence or misconduct. But in the Full Bench case of *Bharat Singh* v. *Tej Singh*[1] Banerji, J., with whose judgment the other learned Judges concurred, laid down that the legal representative of a deceased lambardar is, so far as the assets of the deceased in his hands are concerned, liable to the same extent as the lambardar, that is to say, not only for the money actually collected

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*E. S. A. 297 of 1931

[1] I. L. R. 40 All. 246=16 A. L. J. 193

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Sulaiman, C. J.

by the lambardar, but also for money left uncollected owing to his negligence or misconduct. That is a binding authority for us, and shows that a Hindu son is liable for the amount or profits payable by his deceased father, whether actually collected by him or left uncollected owing to his negligence or misconduct. Such a debt cannot be treated as a debt tainted with illegality or immorality so as to exempt the son from his pious obligation to pay it. This being the view of a Full Bench of this Court, we must accept it as laying down the correct law.

In the case mentioned above, a decree was passed against the son of the deceased after the lambardar's death. The present case is much stronger, inasmuch as a decree had been passed against the father himself before he died. Had there been an attachment of the family property before his death, no doubt could possibly have arisen. But even if there was no such attachment, we are clearly of opinion that the decretal amount was a debt due from the father, which, in view of the pronouncement of the Full Bench, was a debt for the payment of which the joint family property, under the Hindu law, was liable.

This being the position, the decree can undoubtedly be executed as against the son to the extent of the joint family estate in his hands. Prior to 1908 there was considerable conflict of opinion as to whether when the father dies after the decree and before attachment, the decree can be executed against the joint family property in the hands of the son. That conflict has now been set at rest by the enactment of Section 53 C. P. C. under which property in the hands of a son or other descendant which is liable under the Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son as his legal representative. For purposes of execution proceedings the joint family property in the hands of the son must be deemed to be assets received by the son from the deceased father. See *Rudra Pratap Singh* v. *Sharda Mahesh Prasad Singh*[2]. The learned advocate for the appellant relies strongly on a single Judge decision of this Court in *Bhagwati Saran* v. *Deo Saran*[3]. The learned Judge in that case followed the reasoning of the earlier decision of this High Court and expressed doubt as to the liability of the son for the payment of debts incurred by the father in his capacity as lambardar based on his negligence or misconduct. The learned Judge thought that the joint family property in the hands of the son cannot be treated as a part of the private assets of the deceased, because the property comes to the son by right of survivorship and not by inheritance. The attention of the learned Judge was apparently not drawn to the new Section 53, for there is no reference to it in the judgment. We do not think that that case can be taken as an authority for the proposition put forward by the appellant. If it was intended to lay down that in spite of the provision of Section 53 the joint family property in the hands of the son cannot be treated as the assets of the father, then we dissent from that ruling. The appeal is accordingly dismissed with costs.

Appeal dismissed

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[2] 1925 A. I. R. All. 471

[3] 1928 A. I. R. All. 166

BHAROSA SHUKUL (*Plaintiff*)
versus
MANBASI KUER AND ANOTHER (*Defendants*)*

Civil

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June 14

PULLAN, J.
NIAMATULLAH, J

Hindu Law—Widow—Property acquired by her out of the savings of her husband's estate—When to be regarded as "accretion to her husband's estate"—Test for determination.

Where a Hindu widow acquired by pre-emption an undivided share in the same property in which she had already acquired the undivided share of her husband, out of the savings of her husband's estate, and treated the two properties as one, and seven years after her purchase by pre-emption she gifted the property to her brother's son, *held*, on a suit by the reversioner, that the widow intended that the property acquired by pre-emption should be treated as an accretion to her husband's estate, and her subsequent transfer to one who was no heir of her husband does not disprove the widow's intention at the time of the purchase.

Nabakishore Mandal v. *Upendrakishore Mandal*, 20 A. L. J. 22 and *Isridat Koer* v. *Mst. Hansbatti Koerain*, 10 I. A. 150 *relied on*. *B. Sheolochan Singh* v. *B. Saheb Singh*, 14 I. A. 63, *Rajah of Ramnad* v. *Sundara Pandiyasami Tevas*, 42 Mad. 581 and *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*, 49 Mad. 116 *referred to.*

SECOND APPEAL from a decree of BABU C. DEB BANERJI, Subordinate Judge of Azamgarh, modifying a decree of MAULVI S. EJAZ HUSAIN, Second Additional Munsif.

A. P. Pandey for the appellant.

S. S. *Shastry* for the respondents.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—The plaintiff sued as the reversionary heir of one Ramnarain Shukul for a declaration that a deed of gift executed by Manbasi Kuer, widow of Ramnarain Shukul, in favour of one Sabhapat Pande, is void as against the plaintiff. The property gifted is partly the property of Ram Narain Shukul and partly property obtained by pre-emption by the widow. The suit was decreed by the Munsif, but in appeal the Subordinate Judge held that the plaintiff was entitled to a decree only in respect of that portion of the property which belonged to Ramnarain. As to the other half he held that although it would have been considered to be an accretion to the husband's estate if the widow had died without making any disposition of it, the fact that the widow had actually disposed of it in her lifetime shows it to have been her own exclusive property, and the transaction as to this portion of the property cannot be challenged by her husband's heirs. We have been asked in second appeal to consider that there is in this case a presumption that the acquisition made by the widow must be regarded as an accretion to her husband's estate. It is not disputed that any profits which may accrue to a widow during her possession of her husband's estate become her stridhan, and can be used by her to acquire property for herself; but in certain reported cases a presumption has been drawn that the acquisitions so made are to be treated as accretions to the husband's estate unless she indicates a contrary intention. The first case cited is that of *Isridat Koer* v. *Mst. Hansbutti Koerain*[1], in which it was held that where a widow invested the unexpected income of her husband's estate and alienated the property so purchased together with the original estate of her husband for the purpose of changing the succession, the accretion was clearly established. In the present case the property acquired by the widow by pre-emption was an undivided share in the same property in which she had already acquired the undivided share of her husband. She treated the two properties as one and gifted them to her brother's son. In a later case *B. Sheolochan Singh* v. *B. Saheb Singh*[2], their Lordships took the view that where a widow invests the income derived from her husband's property in the purchase of other property, *prima facie* "it is the intention of the widow to keep the estate of the husband as an entire estate and that the property purchased would *prima facie* be intended to be an accretion to that estate." Both these cases appear to us to favour the appellant's claim. That the property acquired by the widow was acquired from the savings of her husband's estate is, in our opinion, a finding of fact of the courts below, and it is clear that she treated the property so acquired as one with the property received from her husband, and alienated the property so united in such a manner as to defeat the claim of the reversioners. In the latest ruling of their Lordships of the Judicial Committee which has been reported in *Nabakishore Mandal* v. *Upendrakishore Mandal*[3], there is a passage which may, in our opinion, be quoted with advantage in the present case:—

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*S. A. 1359 of 1929

> There remains only the transaction which was entered into later on May 5, 1895. That was entered into by the survivor of the two widows, Prasanna Kumari. The alleged justification for this depends on different considerations. It is said that the property sold had been acquired by the widow out of her stridhan, and that consequently she was quite free to deal with it as she thought best. Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own yet it must be traced and shown to have been so dealt with and in this case there is no sufficient evidence of this having been done. Further, in this particular case it appears that part, at least, of the property had been purchased from the tenants of the estate itself. This does not mean that the inheritance had been so acquired, but that, owing, it may be, to difficulties which had arisen in connection with the occupiers, their tenant rights had been bought in part by the release of the arrears of rent and in part by a payment of cash, and having so acquired their interest, it was the property which they had formerly occupied which was sold under the kobala of May 5, 1895. If that be the true transaction no question could arise about the right of the widow in connection with her stridhan, because the tenant rights so acquired would be an obvious accretion to the husband's property, which if it were possible for her to segregate, would require some more unequivocal act for the purpose than anything to be found in this evidence.

[1] 10 I. A. 150

[2] 14 I. A. 63

[3] 20 A. L. J. 22

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Bharosa Shukul v. Manbasi Kuer

Pullan, J.

We consider that in the present case it is proper to hold that the widow, when she acquired by pre-emption a second undivided share in the property and added it to the undivided share of her husband, which she already possessed, was making, in the words of their Lordships, "an obvious accretion to her husband's property", and even if we consider the subsequent alienation to a stranger to be an indication that at the time of the alienation she did not wish to treat the property so united as being her husband's estate, we are still met with the difficulty that the alienation was not made until seven years after the purchase of the property by pre-emption. We do not consider in the circumstances of this case that the fact that the widow made such an alienation in her lifetime is any proof that when she made the purchase she had no intention of making an accretion to her husband's property, and as a matter of fact she herself stated that she made the purchase and the transfer in pursuance of her husband's wishes, indicating thereby that she did not wish to treat the property so acquired as her stridhan. The Subordinate Judge was in error in supposing that the matter can be decided simply on the finding that the widow is still alive but so far as the question of presumption goes, we have been referred to a ruling of their Lordships of the Judicial Committee reported in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevas*[4] in which their Lordships suggest that there is authority for holding that the presumption may be the other way and this view has been taken by the Madras High Court in several cases, notably that of *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb*[5]. That was a case in which the ladies who made the purchase had not been in possession of the corpus of the estate, and as the learned Judges held, there was consequently no room to presume the widows' intention to make them accretions to their husband's estate, and the decision of the Privy Council on which they relied (42 Mad. 581) appears to us to determine the true method in which this question must always be solved. Their Lordships observed:

> At the outside it is a presumption and it is a question of fact to be determined if there is any dispute whether a widow has or has not so dealt with her property.

We take this principle as our guide. We have no doubt that when the widow, acting as she says at her husband's wish, rounded off the property which she had received from him by acquiring another portion of the same estate, she intended the property so acquired to be treated as an accretion, and her subsequent transfer to one who was no heir of her husband involving as it does an unlawful transfer of her husband's own estate to a stranger, does not disprove the widow's intention at the time of the purchase. Indeed the authority of their Lordships of the Judicial Committee may, as we have shown above, be cited to indicate that such a transfer proves rather than disproves the widow's intention to make an accretion to the estate of her husband. (10 I. A. 150). In our opinion the plaintiff in the suit was entitled to the decree which he sought. We accordingly set aside the decree of the lower appellate court and allow the appeal with costs and restore the decree of the court of first instance.

Appeal allowed

[4] 42 Mad. 581

[5] 49 Mad. 116.

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June 15

Sulaiman, C. J.

Banerji, J.

SHANKAR LAL (*Plaintiff*)

versus

HASHMI BEGAM AND ANOTHER (*Defendants*)*

Limitation Act, Sec. 19 and Pre-emption Act, Sec. 4(9)—Whether pre-emptor is a person deriving his title through the vendee within the meaning of Sec. 19.

A pre-emptor is not a person deriving his title through the vendee within the meaning of Sec. 19 of the Limitation Act so as to make an acknowledgment of the vendee made in his written statement filed after the claim for pre-emption has been brought, an acknowledgment of his predecessor in title binding upon the pre-emptor.

SECOND APPEAL from a decree of G. O. ALLEN ESQ., District Judge of Agra, confirming a decree of MAULVI MUHAMMAD JUNAID, Subordinate Judge.

B. Malik and *N. P. Asthana* for the appellant.

S. K. Dar, Baleshwari Prasad and *M. A. Aziz* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage deed dated July 15, 1916, executed by Mohammad Abdus Salam in favour of the plaintiff, L. Shankar Lal. It appears that after this mortgage Abdus Salam sold the equity of redemption on September 1, 1919 to Narain Das. A suit for pre-emption was brought by Mst. Hashmi Begam on July 13, 1919. In his written statement dated October 26, 1920 Narain Das admitted the existence of this previous mortgage. The suit was decreed on December 2, 1920 under a compromise and Mst. Hashmi Begam deposited the pre-emption money and got the property. Subsequently on February 18, 1924 she sold the property to Mst. Nizami Begam.

The present suit was instituted on July 13, 1929 against Hashmi Begum without originally impleading Nizami Begum. She was subsequently impleaded on October 19, 1929 and the plaint was amended and an addition was made that time was extended as against her by virtue of the acknowledgment contained in the aforesaid written statement of Narain Das.

It is obvious that if the acknowledgment does not help the plaintiff the suit against Nizami Begum would be barred by time; on the other hand, it would be in time if the plaintiff could take advantage of that acknowledgment.

Both the courts below have held that the pre-emptor Hashmi Begum cannot be said to have derived title through the vendee Narain Das and that therefore the acknowledgment made by Narain Das was of no avail under Sec. 19 of the Indian Limitation Act.

Section 19 provides that where before the expiration of the period of limitation an acknowledgment of liability has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time of the acknowledgment. The

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*S. A. 1588 of 1930

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question is whether a pre-emptor can be said to be a person deriving title through the vendee against whom he sues and obtains his decree.

It was pointed out by Mahmud, J. in *Govind Dayal* v. *Inayat Ullah*[1] that the right of pre-emption is not a right of 'repurchase' either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of "substitution" entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. The claim for pre-emption is based on the principle of an infringement of the pre-emptor's right when the vendor instead of offering the property to him sells it to the vendee. The pre-emptor obviously has a paramount title as against the vendee and sues to enforce his right by displacing the vendee and by getting himself substituted in his place. The result of a decree in the pre-emption suit is not a resale of the property by the vendee to the pre-emptor involving any fresh contract or conveyance. When the decree is for pre-emption which places the pre-emptor in the shoes of the vendee thereby becoming the representative of the original vendor, the court enforces the original obligation of the vendor to offer the property to the pr-emptor and substitutes the pre-emptor in place of the vendee because the transfer to the latter has taken place in violation of the pre-emptor's preferential right. It follows, in our opinion, that a pre-emptor, although he is substituted in place of the vendee and steps into his shoes, is not a representative of the vendee and therefore cannot be said to derive title through the vendee. As has been pointed out by the trial court in this case there are various considerations which support this view. Sec. 4 (9) of the Pre-emption Act defines the right of pre-emption as the right to be substituted in place of the transferee by reason of his right of pre-emption. The decree in a pre-emption suit under Or. 20, R. 14 directs the delivery of possession of the property to the pre-emptor whose title, however, accrues from the date of the payment of the pre-emption money. It does not direct the execution of any sale deed by the vendee in favour of the pre-emptor. Moreover the old view as now incorporated in Sec. 24 of the Pre-emption Act makes all transfers made by the vendee subsequent to his purchase voidable at the option of the decree-holder. If the latter were a representative of the vendee it would be difficult on principle to hold that he is not bound by the previous transfers. We therefore think that it is not possible to hold that a pre-emptor is a person deriving his title through the vendee within the meaning of Sec. 19 of the Indian Limitation Act so as to make an acknowledgment of the vendee made in his written statement filed after the claim for pre-emption has been brought, an acknowledgment of his predecessor in title binding upon the pre-emptor. It is to be noted that there was no acknowledgment of this mortgage made by the vendor Abdus Salam in his sale deed. The plaintiff relies exclusively on the acknowledgment made by the vendee Narain Das in his written statement. That in our opinion does not help him. The appeal is accordingly dismissed with costs. *Appeal dismissed*

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[1] I. L. R. 7 All. 775

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June 20

IQBAL AHMAD, J.

LAXMI NARAIN
versus
KING-EMPEROR*

Criminal Procedure Code, Secs. 107, 202 and 203—Magistrate requested to take action under Sec. 107—Whether magistrate can refer matter to police for enquiry and report independently of Sec. 202—Notice issued under Sec. 112—Right of Crown to conduct case.

A magistrate is not competent to proceed under Secs. 202 and 203 of the Cr. P. C. when dealing with a petition requesting him to take action under Sec. 107, but he can, independently of those sections, refer the matter to the police for enquiry and report before issuing a notice under Sec. 112 in the exercise of his absolute discretion. In acting under Secs. 107, 108, 109 or Sec. 110 of the Cr. P. C. the magistrate does not, so long as he does not record an order in writing in accordance with Sec. 112 calling upon any person to show cause, act judicially. *P. Sangiri Reddy* v. *K. Koneri Reddi*, I. L. R. 49 Mad. 315 *followed; Hari Singh* v. *Jagta*, A. I. R. 1928 Lah. 649 *dissented from.*

The moment a notice is issued under Sec. 112, the Crown has the right to conduct the case against the person called upon to show cause and Sec. 495 of the Cr. P. C. gives discretion to the magistrate to permit the prosecution to be conducted by any person mentioned in that section.

CRIMINAL REVISION from an order of J. V. LYNCH ESQ., Magistrate first class of Cawnpore.

Basudeva Mukerji for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown

The following judgment was delivered by

Iqbal Ahmad, J.

IQBAL AHMAD, J.—This is an application in revision against an order of a Magistrate of the first class ordering that proceedings under Section 107 of the Criminal Procedure Code, that have been initiated against the applicant, be conducted by the police.

On July 30, 1931, one Manni Lal filed a petition before the learned Magistrate alleging that the applicant, along with certain other persons, was likely to commit a breach of the peace or disturb the public tranquility, and prayed that the persons named in the petition be bound down under Section 107 of the Cr. P. C. The learned Magistrate sent the petition to the police for enquiry and report. The police submitted a report on October 7, 1931, recommending that the applicant and the other persons named in the petition be bound down.

The Magistrate then issued a notice under Section 112 of the Cr. P. C. and directed the Sub-Inspector, who had submitted the report above referred to, to bring all the evidence and produce the same in court on February 24, 1932. On that date an application was filed on behalf of the applicant requesting the learned Magistrate to prevent the police from prosecuting the case. The learned Magistrate rejected the application.

Against the order of the learned Magistrate the applicant went in revision to the learned District Magistrate. The learned District Magistrate holding that the case "has become a Crown one and the Crown has to

*Cr. Rev. 208 of 1932

attend to the important work of prosecuting it" dismissed the application in revision.

Now the applicant has come to this Court. The learned counsel for the applicant contends that as the petition of Manni Lal was not a complaint as defined by Section 4(1) (*h*) of the Criminal Procedure Code, the learned Magistrate had no jurisdiction to proceed under Section 202 of the Code and send the same for enquiry to the police and, accordingly, the police had no *locus standi* to prosecute the case and to lead evidence against the applicant. In support of this contention he relies on a decision of the Lahore High Court, reported as *Hari Singh* v. *Jagta*[1]. In that case an application under Section 107 of the Cr. P. C. was presented by a man named Hari Singh and the Magistrate, after recording his statement, sent the case to the local zaildar for report. The zaildar reported that there was no sufficient ground for proceeding under Section 107 and dismissed the application. The learned District Magistrate, being of opinion that a Magistrate before whom an information contemplated by Section 107 of the Cr. P. C. is laid "may either at once refuse to proceed" or, if in his opinion, there is sufficient ground for proceeding, may act in the manner provided for by Chapter 8 of the Code, and that it is not open to him to refer to a zaildar or anyone else before deciding whether to proceed, made a reference to the High Court recommending that the order of the Magistrate dismissing the petition be set aside. The High Court held that as a proceeding under Section 107 of the Code cannot be regarded a complaint within the meaning of Clause (*h*), Sub-section (1), Section 4 of the Code, the Magistrate had no jurisdiction to deal with the case under Sections 202 and 203 of the Code and, accordingly, quashed the order of the Magistrate dismissing the petition and directed him to try the case in accordance with law.

If it was intended to lay down in that case that it is not open to a Magistrate, before whom a petition is filed requesting him to take action under Section 107 of the Code, to send the same for enquiry and report to the police, I, with all respect, am unable to agree with that decision. Such a petition is no doubt not a complaint and, therefore, it is manifest that the procedure prescribed by Sections 202 and 203 of the Code, which are confined in their operation to complainants as defined by the Code, has no application to such a petition. It follows, therefore, that a Magistrate is not competent to proceed under Sections 202 and 203 when dealing with such a petition, but I can discover no justification for holding that he cannot, independently of those sections, refer the matter to the police for enquiry and report.

It is to be noted that Section 107 of the Cr. P. C. is in Part IV of the Code which is headed "Prevention of Offences". The Magistrate is responsible for the maintenance of peace in the district. This responsibility is cast on him in his administrative and not in his judicial capacity. He is the sole authority to decide whether or not it is imperative for maintenance of peace to set the law in motion by initiating proceedings under Section 107 or other preventive sections in Chapter VIII of the Code. His discretion in this respect is absolute and unqualified. Accordingly his discretion to initiate proceedings under Section 107 or other preventive sections in Chapter VIII of the Code has not been trammelled by such conditions the fulfilment of which is a condition precedent to the issue of a process to a person to answer a charge formulated against him in a complaint. Complaints are for the redress of wrongs already committed, and from the moment a Magistrate takes cognizance of a complaint he acts judicially and, therefore, is bound to proceed in accordance with law, and in coming to a decision one way or the other to take cognizance only of such matters that constitute legal evidence in the case. But in acting under Sections 107, 108, 109 or Section 110 of the Code the Magistrate does not, so long as he does not record an order in writing in accordance with Section 112 of the Code calling upon any person to show cause, act judicially. In those sections complete discretion is given to the Magistrate either to act or not to act on the information received by him. The discretion to issue a notice under Section 112 in pursuance of an information received by him is absolute and uncontrolled by any conditions whatsoever. It is nowhere provided that the information contemplated by those sections must be information gathered from legal evidence, nor is there any provision as to the source from which the information may be received. The information may be conveyed to the Magistrate by a private individual or by an officer of the police. But in either case he is given a discretion to issue a notice to the person against whom he has received the information to show cause why he should not furnish security for keeping the peace or to be of good behaviour. With a view to satisfy himself as to the desirability or urgency of issuing a notice under Section 112 the Magistrate has, for obvious reasons, the right to test the accuracy of the information received by him before issuing the notice. The manner in which he is to do so is not provided for in the Code. The reason is not far to seek. The above sections being enacted simply with a view to prevent commission of offences and being a part of the administrative machinery for maintaining law and order, the Legislature did not think it fit to circumscribe the administrative powers of the Magistrate under those sections by making it obligatory on them to follow the procedure that by law they are bound to follow while dealing with complaints. A reference to Section 117 of the Code makes it clear that it is only after an order has been made under Section 112 that the Magistrate is to "proceed to enquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary". Clause 2 of that Section provides that "*such enquiry*" is to be made in the manner prescribed in the Code for "conducting trials and recording evidence" either in summons cases or in warrant cases as the case may be. It is only from the stage that the enquiry under Section 117 begins that the proceedings before the Magistrate become judicial proceedings. Before that stage the proceedings are more or less of an administrative character, and the Magistrate till then is not bound by rules of evidence. For the maintenance of law and order Magistrates have control over the police, and it is open to them to seek their assistance in the discharge of their duties. If a Magistrate before issuing a notice under Section 112 thinks it fit to consult the police in order to form an opinion as to whether or not he should issue such a notice, there is

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[1] A. I. R. 1928 Lah. 694

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Iqbal Ahmad, J.

nothing in the Code to prevent him from doing so. It follows, therefore, that, apart from the provisions of Section 202 of the Code, a Magistrate proceeding under Chapter VIII has the right to call for a report from the police before issuing a notice under Section 112. The view that I take is in consonance with the view taken in the case of *P. Sanjivi Reddy* v. *K. Koneri Reddi*[2].

The moment a notice is issued under Section 112, the Crown has the right to conduct the case against the person called upon to show cause and Section 495 of the Cr. P. C. gives discretion to the Magistrate to permit the prosecution to be conducted by any person mentioned in that section. That person may or may not be a police officer. In the present case, therefore, the Magistrate was fully competent to direct the police to adduce evidence in the case.

For the reasons given above, I dismiss this application.

Application dismissed

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[2] I. L. R. 49 Mad. 315

BADRI NATH AND ANOTHER (*Plaintiffs*)

versus

RAJA RAM AND OTHERS (*Defendants*)*

CIVIL

1932

June 20

MUKERJI, J.
BENNET, J.

Civil Procedure Code, Or. 22, R. 9—Preliminary decree—Death of decree-holder—Application by sons for making final decree without any prayer for setting aside automatic abatement—Final decree passed—Whether passed without jurisdiction.

On the death of the decree-holder after the passing of the preliminary decree, his sons made an application to the court for making the final decree without any prayer for setting aside the abatement which had automatically taken place on the failure of the sons to obtain a substitution of names within 90 days of the death of their father, and a final decree was passed. *Held,* on a suit for a declaration that the final decree was a nullity, that the nature of an abatement is not a final disposal of the case either by dismissal or by decreeing it and the court does not cease to have jurisdiction in the matter in which an abatement takes place, and the final decree is not therefore bad for want of jurisdiction.

Bibi Khozaima v. *Official Liquidator of Kayestha Trading and Banking Corporation Ltd.*, I. L. R. 2 Pat. 168 *dissented from.*

FIRST APPEAL from a decree of BABU RAM UGRAH LAL SRIVASTAVA, Subordinate Judge of Basti.

K. N. Katju and *M. N. Kaul* for the appellants.

P. L. Banerji and *H. P. Sen* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This appeal is by two of the plaintiffs in the original suit. The history of the case is this. One Ram Harakh Pande obtained a preliminary decree against certain defendants, including the plaintiffs of the suit out of which this appeal has arisen. This decree was made on January 24, 1924. Ram Harakh died some time in November of that year. On February 3, 1926, Ram Harakh's four sons made an application to the court which had passed the preliminary decree for making the preliminary decree final. Notices were issued to the defendants and nobody appeared to contest the application.

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*F. A. 47 of 1929

A final decree was passed on April 24, 1926. On April 26, 1928, the plaintiffs instituted the suit to obtain a declaration that the final decree passed against them was null and void.

The defence was various and the principal defence was that the suit was barred by *res judicata*. We may point out there that one of the grounds taken in the plaint was that the final decree had been obtained by fraud on court and the defendants. As to this they replied that there was no fraud.

The court below dismissed the suit, and hence this appeal by two only out of the five plaintiffs.

We have to consider two points; first, whether there was any fraud in obtaining the final decree and, secondly, whether the final decree was passed without jurisdiction, and, therefore, is null and void.

On the first point the only evidence on the record is the statement of Sadhu Saran, one of the plaintiff-appellants, to the effect that he received no notice alleged to have been issued before the preparation of the final decree. Supposing that Sadhu Saran did not receive any notice, it does not follow that there was any fraud perpetrated by the decree-holders, and therefore, the issue must be decided against the appellants. On the second point the argument is that the decree that was passed on April 24, 1926 was a nullity inasmuch as the court had no jurisdiction to entertain the application for making the final decree without setting aside the abatement which had automatically taken place on the failure of the sons of Ram Harakh to obtain a substitution of names within 90 days of the death of their father. We are of opinion that this argument is not at all sound. The nature of an abatement is not a final disposal of the case either by dismissal or by decreeing it. The word "abatement" literally means lessening or shortening and is now very little used except in legal phraseology. When a court is unable to proceed with a case pending before it for the reason that the proper parties are not before it, it is said that the case has abated. When an application is made to bring the necessary parties before the court, the court brings the proper parties before it and proceeds with the hearing. An application for setting aside an abatement may be made long after the case has actually abated. A cause may be shown by the party asking for the setting aside of the abatement as to why the application was not made earlier; Section 5 of the Limitation Act applies to such an application. If on the abatement of a suit, the court ceases to have jurisdiction, how is it possible for it to entertain an application for setting aside of the abatement made long after the three months' period ordinarily allowed for setting aside of the abatement has elapsed? We are, therefore, of opinion that the court does not cease to have jurisdiction in the matter in which an abatement takes place. In this view we are not prepared to accept the dictum of Mr. Justice Coutts of the Patna High Court in *Mussammat Bibi Khozaima* v. *the Official Liquidator of the Kayestha Trading and Banking Corporation Limited*[1] where the learned Judge made the following remark:—

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[1] I. L. R. 2 Pat. 168

> The abatement must, however, be set aside before the substitution can be made and in making the substitution without setting aside the abatement, the Court certainly acted without jurisdiction.

We have in this Court definitely held in a Full Bench decision in *Churya* v. *Baneshwar*[2] that an abatement takes place automatically and does not require an order of the court to be passed to that effect. Before this decision was given, the view taken by a Division Bench of this Court was that an abatement could take place only by the passing of an order to that effect—see *Gujrati* v. *Sital Misir*[3]. Assuming that, where a suit abates, the Court ceased to have jurisdiction to hear it, till the abatement is set aside, as held by the Patna High Court, in the view of this Division Bench the court would not cease to have jurisdiction simply because a certain party in a cause had died, for, according to that view, an abatement could take place only when an order to that effect has been made.

The Full Bench decision in *Churya* v. *Baneshwar*[2] was given on January 11, 1926 and could not have been published in Indian Law Report till, say, the end of the year. Even in unauthorised reports, it could not have been published till a few months later. When Ram Harakh Pande died on November 4, 1924, the earlier ruling of *Gujrati* v. *Sital Misir*, which was given in 1923, was the view of this Court and one can easily see, therefore, why, in the application of February 3, 1926 for the making of the final decree, there was no prayer for setting aside the abatement. As regards that application it was argued by Dr. Katju that it showed the *mala fides* of the sons of Ram Harakh, inasmuch as they did not mention the date of the death of their father. But if no abatement had taken place, for there was no order of the court in existence declaring an abatement, surely it was not necessary for the sons of Ram Harakh to mention the date of Ram Harakh's death and to apply for setting aside the abatement. We cannot, therefore, infer any bad faith from the application.

Now the question is whether the decree of 1926 is a nullity. We have found that the court which made the decree was possessed of jurisdiction. Thus the decree cannot be bad for want of jurisdiction on the part of the court making it. No other ground remains for arguing that the decree is a nullity.

We are clearly of opinion that the decree of 1926 operates as *res judicata* against the appellants, and it is not open to them to challenge it by a separate suit.

When the decree was passed in 1926 the defendants had either been served with a notice or not; in either case, the decree would be binding on the defendants. If, as we have found, there was no fraud in the passing of the decree, the only way in which it could be set aside was by an application under Order IX, Rule 13 of the Civil Procedure Code. No such application was made. On the other hand, we find that when execution was taken out and notices were served on the plaintiffs and the present appellants, they filed objections to the execution of the decree, but none of the grounds stated that the decree had been passed without any previous

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[2] I. L. R. 48 All. 334=24 A. L. J. 369

[3] I. L. R. 44 All. 459

Civil — 1932 — Badri Nath v Raja Ram — Mukerji, J.

information given to the objectors. The decree having not been taken exception to, in the only way it could be taken exception to, is binding on the plaintiffs and on the appellants, and it cannot be challenged by a separate suit.

In the result, the appeal fails and we hereby dismiss it with costs.

Appeal dismissed

Civil — 1932 — *June 22* — Mukerji, J. Bennet, J.

SAHDEO DAS (*Defendant*)

versus

RAJA RAM AND OTHERS (*Plaintiffs*)*

Civil Procedure Code, Sec. 92—Temple—Maintained by public subscriptions—Open to public for "Darshan"—Suit by worshipper for removal of manager—Trust for public benefit—Whether temple private or public—No presumption.

There is no presumption that any particular temple is public or private, and whether it is public or private depends on the facts proved in each case. *V. K. Kelu* v. *C. S. Siva Rama Pattar*, A. I. R. 1928 Mad. 879 *followed.*

A temple, which had been held by professed ascetics in succession from Gurus to Chelas, came to defendant by his being a Chela of his Guru and not by any deed of gift or will. The temple was maintained by public subscriptions and it was open to the members of the public attending it for "Darshan" or "worship" to make offerings. On a suit brought by plaintiffs, who were in the habit of worshipping at the temple and of making offerings and giving subscriptions, the defendant was removed from the office of manager on the finding that he had wasted the temple property. *Held,* that the endowment was a public endowment and the temple was a trust for the benefit of the public and therefore Sec. 92 C. P. C. applied and plaintiffs were entitled to maintain the suit.

First Appeal from a decree of Babu Preo Nath Ghosh, District Judge of Azamgarh.

S. D. Sinha for the appellant.

Janaki Prasad for the respondents.

The judgment of the Court was delivered by

Bennet, J.

Bennet, J.—This is a first appeal by the defendant No. 1, Sahdeo Das, against a decree of the District Judge of Azamgarh passed under Section 92, C. P. C. directing the removal of the appellant from the office of manager of a temple at Bahadurpur within a mile of Dohrighat in Azamgarh district. The chief point which has been raised before us in appeal is whether this temple is a public temple or a private temple. In other words, whether it is a trust created for public purposes of a religious nature which would come within the wording of Section 92 of the Civil Procedure Code and whether the plaintiffs are persons having an interest in the trust. The plaintiffs have shown that they have obtained the permission of the Legal Remembrancer to bring the present suit. The descent of the Gurus and Chelas of this temple is contained in the following table which is admitted by both parties.

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*F. A. 71 of 1929

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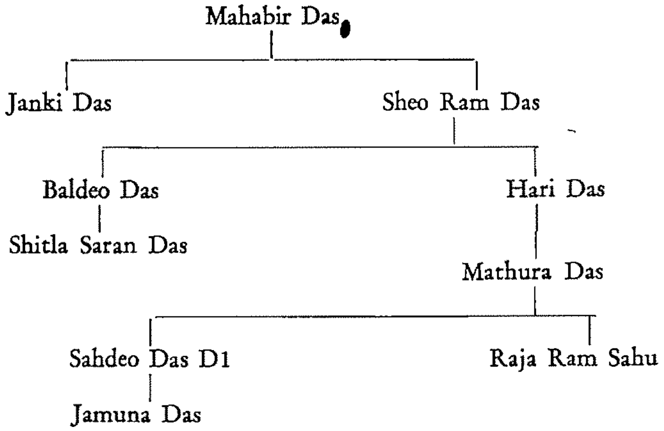

The history of the building is also common ground. Sheo Ram Das built this Thakurdwara in Bahadurpur and installed the idols of Ram and Janki in it. Hari Das, his disciple, purchased some property in the name of the deity. The present defendant-appellant has succeeded by virtue of his being Chela of Mathura Das. We do not agree with the proposition of law laid down by the learned District Judge in the following terms:

> All Hindu temples are presumed to be open to the public for worship and any one who alleges that a certain temple is private has to prove that fact.

We consider that a correct statement of the law is contained in *V. K. Kelu* v. *C. S. Siva Rama Pattar*[1], which is that there is no presumption that any particular temple is public or private, and whether it is public or private depends on the facts proved in each case. Now having considered the evidence on both sides we find that there are the following facts proved in the present case.

(1) This temple has been held by professed ascetics in succession from Gurus to chelas.

(2) The zamindari which belonged to the temple was purchased by the Gurus in the name of the deity.

(3) There are subscriptions received from the public to maintain the temple. These subscriptions do not follow any very definite rule as to what amount they are but it is shown by the evidence of several witnesses for the plaintiffs that merchants who import grain by river or by train into Dohrighat pay a small proportion of half a seer or more per maund. The defence witnesses admit that it is open to any one visiting the temple to make an offering.

(4) The public visiting the temple could perform Darshan. A certain amount of confusion has been introduced into the paper book by the translator at one place using the word "worship" as a translation of "pooja" and at another place using the word "worship" as the translation of "Darshan". "Pooja" is the ceremony performed by a pujari and "darshan" is the worship which members of the public render when they attend a temple. It is also admitted, as stated already, that members of the public attending the temple may make offerings (charahwa).

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[1] I. L. R. 1928 Mad. 879

(5) The property came to the defendant by his being a Chela of his Guru Mathura Das. It did not come to him by any deed of gift or will. The case therefore differs from those cases in which there was a definite deed creating a religious foundation of a private character. The mere fact that offerings were received in a case where there was a deed creating a private endowment would not in our opinion be sufficient to alter the private nature of the endowment. But in the present case there is no deed creating any private endowment. The evidence before us, in our opinion, shows that the endowment was a public endowment, and that this was a trust for the benefit of the public and therefore that Section 92 applies.

As to the right of the plaintiffs to bring the present suit they have established that they were in the habit of worshipping at this temple and of making offerings and of giving subscriptions. We consider that in virtue of these facts they are entitled to apply for the permission of the Legal Remembrancer which they have obtained and therefore they are entitled to maintain the suit under Section 92 C. P. C. There was ample evidence before the lower court of breaches of trust. At one period between 1909 and 1918 the defendant made transfers by mortgage deeds of the entire zamindari property of this temple. A suit was then brought against him with the permission of the Legal Remembrancer, and he entered into a compromise on December 8, 1920 by which he was removed from the management. He then went on pilgrimage. Jamuna Das who had been appointed manager died about 1923 and the defendant again took possession of the temple. Since 1923 the defendant is proved to have sold various groves and executed leases for seven years to various tenants. The only landed property left to the defendant is certain occupancy holdings and the patwari produced on behalf of the defendant stated that the occupancy holdings had been leased to sub-tenants for seven years on the terms that the sub-tenants paid Rs.31 to the zamindar and Rs.29 per annum to the defendant. The only income therefore from the endowed property is Rs.29 per annum. It is obvious that the temple must depend on offerings for its maintenance. We consider that the defendant has clearly wasted the property. The order of the learned District Judge removing the defendant from the management is correct. Accordingly we dismiss this appeal with costs.

Appeal dismissed

PRIVY COUNCIL

SORABJEE

versus

DWARKADAS RANCHHODDAS AND OTHERS*

CIVIL

1932

May 24

LORD THANKERTON
SIR JOHN WALLIS
SIR GEORGE LOWNDES

Transfer of Property Act (IV of 1882), Sec. 63 and Trusts Act (II of 1882), Sec. 90—Scope of—Suit for redemption—Occupancy rights acquired by mortgagee—Mortgagor claims them as accretions to suit mortgage—When entitled.

> Sec. 63 of the Transfer of Property Act cannot be read as entitling the mortgagor on redemption to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within Sec. 90 of the Trusts Act, 1882, that is to say, when he did not have any special advantage by reason of his position as mortgagee in acquiring them.
>
> Where in a suit for redemption the mortgagor claimed occupancy rights acquired by the mortgagee, who was also a co-sharer with him in the mauza, subsequent to the creation of the mortgage, as accretions to the suit mortgage, *held,* that it was incumbent on the mortgagor to show that the occupancy rights were acquired under such circumstances as to bring them within the provisions of Sec. 90, Trusts Act.

APPEAL from a decision of the Court of the Judicial Commissioner of the Central Provinces.

L. De'Gruyther, K.C. and *J. M. Parikh* for the appellant.

W. H. Upjohn, K.C. and *S. Hyam* for the respondents.

The following judgment was delivered by

Sir John Wallis

SIR JOHN WALLIS—This appeal was originally before the Board on February 12, 1932, when, upon a preliminary objection taken by the appearing respondents, their Lordships agreed humbly to advise His Majesty that the certificate of the Court of the Judicial Commissioner of the Central Provinces admitting the appeal was wrongly granted but that special leave to appeal ought to be granted to the appellant upon lodging a petition for that purpose. This petition was duly lodged, and their Lordships' report was approved by Order in Council on March 17, 1932.

The case, which comes here on appeal from a judgment and decree in second appeal, raises a question of some importance as to the right under the existing law in India of a mortgagor of proprietary rights to recover on redemption subordinate tenures acquired by the mortgagee during the subsistence of the mortgage. This question came before this Board in *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan*[1], before the enactment in 1882 of the Indian Trusts Act and the Transfer of Property Act. In that case the mortgagee of the proprietary rights of a talookdar had acquired during the continuance of the mortgage certain subordinate tenures in the taluq known as *birts,* and their Lordships found out the facts of that case that the mortgagee taking advantage of his position as *de facto* talookdar

*P. C. A. 2 of 1931

[1] 6 I. A. 145

had acquired the *birts* on very favourable terms and had allowed them to merge in the taluq, and that it would be inequitable to allow him on redemption to revive the *birts* for his own benefit. They accordingly held that the mortgagor was entitled to redeem the estate as then enjoyed by the mortgagee on paying the original mortgage money plus the purchase money of the *birts*. They at the same time made it clear that they were not prepared to affirm the proposition that every purchase of a sub-tenure by the mortgagee must be held to have been made for the benefit of the mortgagor. The judgment reads:—

> Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.
>
> It may well be that when the estate mortgaged is a zemindary in lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mokurreree istimrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurreree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the mokurreree.

At the close of their judgment their Lordships referred to the English decisions which they observed were only applicable because they were agreeable to general equity and good conscience, and said:—

> It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer*, [2 P. Wms. 511] as to the renewal of a term obtained by the mortgagee of the expired term, being, 'as coming from the same root,' subject to the same equity, has never been impeached.

The equitable principles applied by their Lordships in that case to acquisitions by a mortgagee have now been embodied by Section 90 of the Indian Trusts Act, 1882, in a wider rule dealing with acquisitions by tenants for life, co-owners, mortgagees and other qualified owners. The section is as follows:—

> 90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested

> in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.
>
> *Illustrations*
>
> (*a*) A, the tenant for life of leasehold property renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.
>
> (*b*) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.
>
> (*c*) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

It has, however, been suggested in an Indian case, *Ram Brich Narain Singh* v. *Ambika Prasad Singh*[2], which was cited for the appellant both below and here, that Section 63 of the Transfer of Property Act goes further than Section 90 of the Indian Trusts Act, and entitles the mortgagor on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. It would be strange indeed if these two measures, which were drafted by the Indian Law Commission in England and passed into law in the same session of the Indian Legislature, should be found to contain inconsistent provisions as to the same state of facts, but in their Lordships' opinion no such inconsistency is to be found. Sections 63 and 64 of the Transfer of Property Act are as follows:—

> 63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.
>
> Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.
>
> In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

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[2] 17 C. W. N. 586

> Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.
>
> 64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Section 64 may be said to give statutory effect to the rule in *Rakestraw* v. *Brewer*[3], which was referred to by their Lordships in the passage already cited, as it was apparently thought better to provide expressly for this particular acquisition by a mortgagee instead of leaving it to be governed by the general provisions of Section 90 of the Indian Trusts Act, but in their Lordships' opinion there is nothing inconsistent with that section in the provisions of Section 63 of the Transfer of Property Act as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word accession is not defined in the Act, but the section deals expressly with accessions which have been acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. Whether the term accession as used in this section should also be held to cover acquisitions which the mortgagee has made for his own benefit but is bound under Section 90 of the Indian Trusts Act to hold for the benefit of the mortgagor need not be decided. Section 90 itself provides for the mortgagor bearing the cost of the acquisition in such a case, but Section 63 goes somewhat further and contains as well an express provision as to profits arising from the accession where the mortgage is usufructuary. In the present case it is sufficient to say that their Lordships are clearly of opinion that Section 63 of the Transfer of Property Act cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within Section 90 of the Indian Trusts Act.

Their Lordships have thought right to make these observations because there would appear to have been much misconception on this subject in the present case with which they will now proceed to deal.

In November, 1908, one Rajaram mortgaged with possession his four annas proprietary share in mauza Khandwa Tarf Kunbi, together with numerous other properties to the predecessors of defendants 1 to 4. Two of these four one anna shares in this mauza were subsequently sold to the mortgagees in 1912; another was brought to sale in court auction and purchased by the fifth defendant, and the remaining one anna share was also brought to sale and acquired in 1918 from the auction purchaser by the plaintiff, who instituted the present suit for redemption in the Court of the Subordinate Judge of Khandwa on December 23, 1921.

Mauza Khandwa Tarf Kunbi is more than 4,000 acres in extent, but the present appeal only relates to two Survey Numbers 451 and 452 of

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[3] 2 P. Wms. 511

5½ and 3 acres respectively. The mortgagees were apparently anxious to acquire them on account of their proximity to the town of Khandwa, and are found to have erected a ginning press on one of them at a cost of Rs.8,000.

As regards Survey No. 452 the mortgagees in 1906, more than two years before the execution of Rajaram's mortgage in their favour, had obtained from his brother and co-sharer Govindram, who was also the owner of a four annas share in the mauza, a sale deed in which he purported as malguzar and lambardar to sell them the whole proprietary rights in this Survey Number. Subsequently to the date of the mortgage on October 8, 1910, they obtained a deed from the occupancy tenants by which the latter gave up their tenancy right for ever and surrendered it to the predecessors of defendants 1 to 4 as proprietors on receipt of Rs.2,135 on account of tenancy rights and improvements.

As regards Survey No. 451 the occupancy tenants on May 22, 1915, purchased from Rajaram's uncle Totaram the remaining co-sharer in the mauza his eight annas proprietary share in this Survey Number for a consideration supplied by the predecessors of defendants 1 to 4, in whose favour they executed on the following day a sale deed of the proprietary and tenancy rights in the Survey Number. The sale deed recited that they had formerly been occupancy tenants and had subsequently purchased the malikana or proprietary rights from Totaram.

In paragraph 10 of his rejoinder the plaintiff alleged that after the execution of the mortgage deed there had been accretions to the mortgaged property as shown in Schedule K filed therewith. In Schedule K the occupancy rights acquired in these two Survey Numbers subsequent to the creation of the mortgage were claimed as accretions to the mortgage, but as half the mortgagor's proprietary rights in the mauza had been acquired by the mortgagees subsequent to the mortgage, only half of each Survey Number was claimed as an accretion to the mortgage. "The defendants' possession over half of this field at least," it was alleged as regards each of these Survey Numbers, "must be deemed to be that of mortgagees as the acquisition thereby made was that of an occupancy holding." In other words the whole occupancy rights acquired by the mortgagees in these Survey Numbers were claimed as an accretion or accession to the mortgage, although the mortgage was only of Rajaram's four annas share in the mauza, and although the mortgagees had acquired Govindram's four annas share in Survey Number 452 and Totaram's eight annas share in Survey Number 451. This claim was the subject of issues 17 and 18.

> 17. Whether there have been accretions to the mortgaged property as shown in the plaintiff's Schedule K?
>
> 18. If so, are defendants 1 to 4 bound to deliver possession of the same to plaintiff on redemption and on what terms?

In the first Court the Subordinate Judge saw no ground for holding that the mortgagees as such had acquired the occupancy rights in these Survey Numbers. He accordingly disallowed the claim, but observed that the plaintiff's claim to share in this land would have to be determined in the partition suit which was then pending apparently between the co-sharers in the mauza, in which the plaintiff was entitled to intervene as the owner of a one anna share.

The judgment of the Subordinate Judge on this point was reversed by the District Judge of Nimar who held that defendants 1 to 4 must surrender half the land as claimed by the plaintiff and account for half the profits, but that the plaintiff would have to bear half the costs of acquisition. The suit was remanded to ascertain the amount of the profits and costs of acquisition, and when the case came back, a decree was passed ordering the plaintiff to be put in possession of half the Survey Numbers, the claims of the 5th defendant, who had also acquired a one anna share from the mortgagor but had not appeared in the suit, being apparently overlooked. The District Judge's reasons are not very clear, but he referred to *Ram Brich Narain Singh* v. *Ambika Prasad Singh*[1], and appears to have held on the authority of that decision, on which their Lordships have already commented, that, as the occupancy rights had been acquired by the predecessors of defendants 1 to 4 while they were mortgagees in possession of Rajaram's four annas share of the mauza, the mortgagor was entitled to them on redemption as an accession to the mortgaged property under Section 63 of the Transfer of Property Act. On a second appeal preferred by defendants 1 to 4 this contention was again put forward and was rightly rejected by the Judicial Commissioner of the Central Provinces who allowed the appeal and restored the judgment of the Subordinate Judge, holding that the surrenders of the respondents' occupancy rights had been obtained by the predecessors of defendants 1 to 4 as an accession to the proprietary interest which they claimed to have acquired in these Survey Numbers and not as mortgagees in possession of their mortgagor's four annas share.

In their Lordships' opinion these occupancy rights were acquired by the mortgagees of Rajaram's share, who were also co-sharers with him in the mauza, for their own benefit, and to give the plaintiff any claim to them as the owner of a one anna share in the mauza it was incumbent on him to show that they were acquired under such circumstances as to bring them within the provisions of Section 90 of the Indian Trusts Act. No such case was set up in paragraph 10 and Schedule K of the plaintiff's rejoinder in which these occupancy rights are claimed as accretions to the suit mortgage, no issues have been framed in regard to it and it has not been considered or decided in the lower courts.

In their Lordships' opinion the plaintiff's appeal fails and should be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the first three respondents' costs including their costs of the proceedings of February 12, 1932, and of the petition for special leave to appeal.

Appeal dismissed

[1] 17 C. W. N. 586

HIGH COURT

AMRAJ SINGH AND OTHERS (*Plaintiffs*)

versus

SHAMBHU SINGH AND OTHERS (*Defendants*)*

CIVIL

1932

July 8

SULAIMAN, C. J.
MUKERJI, J.
KING, J.

Hindu Law—Joint family property—Mortgaged for satisfying pre-emption decree —Neither "benefit of the estate" nor "legal necessity" proved—Mortgage unenforceable against family property mortgaged—Alienation by father— When unjustified.

Where two brothers mortgaged ancestral property for the sake of raising a loan for satisfying a pre-emption decree but it was not proved that the loan was raised for legal necessity or for discharging an antecedent debt or for the benefit of the estate, *held,* that the mortgage was not within the authority of the executants and that therefore it was unenforceable against the family property mortgaged.

Per SULAIMAN, C. J.—The money required for a new business started even by the father as the manager of the family, involving as it does a risk and liability on the minor members of the family, cannot justify an alienation.

Case-law discussed at length.

FIRST APPEAL from a decree of BABU CHARU DEB BANERJI, Subordinate Judge of Azamgarh.

The following is the Referring Order:—

SULAIMAN, C. J. and YOUNG, J.—This is a plaintiffs' appeal arising out of a suit No. 89 of 1927 which was for sale on the basis of a mortgage deed executed by the father of defendants 1 to 3 and by defendant No. 4.

It appears that the executants obtained a pre-emption decree conditional on payment of Rs.3,000. They appear to have had Rs.1,000 in their hands but stood in need of borrowing an additional sum of Rs.2,000 in order to deposit the decretal amount. This amount was borrowed under the mortgage deed in suit. The whole amount was deposited and possession of the pre-empted property was taken. This property is in the possession of the defendants.

The defendants pleaded that the mortgage deed was without legal necessity and was not binding on the other members of the family.

The learned Subordinate Judge following two cases of this Court has held that it is not open to a father governed by the Mitakshara Law to encumber joint ancestral property to acquire necessary funds to pre-empt other properties and has also held that it cannot be argued that there is a benefit by the loan because purchase by pre-emption by borrowing money is no benefit to the estate. In the view that there is "no legal necessity and no benefit of the estate" he has held that the loan cannot be binding on the joint ancestral property. There is no doubt that his finding is mainly influenced by the rulings which he has quoted.

The point urged in appeal is that the money borrowed by the father to pay the amount due under the pre-emption decree justified the alienation of the joint ancestral property as the transaction was for the benefit of the estate and has in effect benefited the family and that the defendants cannot keep the property so acquired and yet repudiate the loan taken for its acquisition.

On this point there is a clear conflict of opinion between the decision in *Nathu* v. *Kundan Lal,* 7 A. L. J. 182=I. L. R. 33 All. 242 and *Kapildeo* v. *Thakur Prasad,* 11 A. L. J. 961, on the one hand, and *Shankar Sahi* v. *Baichu Ram,* 23 A. L.

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*F. A. 501 of 1928

J. 204 and *Kishan Sahai* v. *Raghunath Singh*, 27 A. L. J. 110, on the other hand. The case relied on in the last two mentioned cases was that of *Inspector Singh* v. *Kharak Singh*, 26 A. L. J. 577, which was doubted in the case of *Rattan Chand* v. *Sri Thakur Ram Kishan Murarji*, 26 A. L. J. 777, and overruled on one point in the case of *Jagat Narain* v. *Mathura Das*, 26 A. L. J. 843. The case of *Niladri Sahu* v. *Mahant Chaturbhuj Das*, 53 I. A. 253 at 261 and 265 is also relied upon on behalf of the plaintiffs as showing that a benefit is sufficient even if there were no legal necessity.

We think that there is a conflict of opinion which requires to be set at rest one way or the other. We accordingly direct the case to be laid before the Chief Justice for the constitution of a larger Bench.

P. L. Banerji and *H. P. Sen* for the appellants.

No one appeared for the respondents.

The following judgments were delivered:—

Sulaiman, C. J.

SULAIMAN, C. J.—I concur in the conclusion that the mortgage deed in dispute not having been proved to have been for legal necessity or for the benefit of the family, cannot be held to be binding on the defendants.

It seems to me that the answer to the question is not capable of being stated broadly. On the one hand, it cannot be said that money required by the manager of a joint Hindu family in order to pay the pre-emption money and costs for the acquisition of fresh property is in all cases without legal necessity or benefit to the family estate, and is therefore always outside the authority of the father. Nor can it be laid down, on the other hand, that every manager is entitled to borrow money in order to acquire fresh property by pre-emption. The answer to the question must depend on the special circumstances of each case. Where a pre-emption claim is in reality in the nature of a speculation or is not in the best interests of the family, the action of the manager would be without justification. But there may, for instance, be a case where a rival proprietor wishing to become a co-sharer in the village and thereby causing considerable interference in the management of the family estate, purchases property when it is highly beneficial to the family and the estate, if not actually necessary, to exclude him from the village so as to avoid all future trouble; or there may be a case where a substantial share in the ancestral village has been sold very cheap and its acquisition will bring about a considerable improvement in the comfort and support of the family owning a small share in the village and a better enjoyment of the ancestral share. When satisfied that the acquisition was not speculative, but in the best interests of the family and for its benefit as well as for the benefit of the family estate, which an ordinary prudent manager would make, it would be open to a court to hold that the transaction is binding on the other members of the family, even though it is nothing but the raising of a loan on a mortgage of family property for the sake of satisfying the pre-emption decree.

A Full Bench of this Court in the case of *Jagat Narain* v. *Mathura Das*[1] considered the previous authorities and came to the conclusion that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of a defensive nature. It must be borne in mind that the same original texts have been differently in-

[1] I. L. R. 50 All. 969

terpreted under the Mitakshara and the Dayabhag Law, the former restricting the manager's power of alienation to a considerable extent, while the latter giving him almost full disposing power. The text of Brahaspati quoted in the Mitakshara, which allows a transfer of immovable property "during a season of distress, for the sake of the family, and specially for pious purposes," has been commented upon in the Mitakshara. The illustrations given by the commentator need not necessarily be exhaustive and may be illustrative only. They have been responsible for a considerable judge-made law based upon the pronouncements of their Lordships of the Privy Council made from time to time. Taking the words " for the sake of the family" literally, the expression may be even wider in scope than the words "for the benefit of the family." It is to be remembered that the manager of a joint Hindu family, particularly a father, is not merely like an agent of the other members of the family, but is a coparcener and has full power to manage the family property in the most beneficial manner as a prudent owner would do. He represents the family to the outside world, and authority for his actions is not always to be derived from the consent of the other members of the family, some of whom may be minors, and therefore incapable of giving a valid consent. The authority of the Full Bench in *Jagat Narain* v. *Mathura Das* is based on previous case-law, and is binding on us so long as it is not overruled by their Lordships of the Privy Council or dissented from by a larger Full Bench.

I do not think that there is anything in the recent case of the *Benares Bank, Ltd.* v. *Hari Narain*[2] which would compel us to hold that the above mentioned Full Bench of this Court has by implication been overruled. In that case the theka business started by the manager of the family was not an ancestral business. Their Lordships of the Privy Council laid down that the manager of a joint Hindu family has no power to impose upon a minor member of the family the risk and liability of a new business as started by him, and that a new business is not within the purview of the verses Nos. 27-29 of Chap. 1 of the Mitakshara, and it makes no difference that the manager starting the new business is the father himself. Their Lordships came to the conclusion that the balance of authority in India is in accordance with this view.

This pronouncement conclusively lays down that the money for a new business started even by the father as the manager of the family, involving as it does a risk and liability on the minor members of the family, cannot justify an alienation.

The business in that case was in the nature of taking contracts from the Public Works Department relating to buildings and also some plumber's business, which might have been more or less of a sporadic character and had an element of speculation in it. It had never been suggested on behalf of the Benares Bank that the business had been started for the benefit of the family or that it had been necessary for its support and maintenance, for instance, to save the family from starvation. There is nothing in the judgment of their Lordships of the Privy Council which necessarily goes against the view expressed by the Full Bench of this Court. I am, therefore, unable to hold that the authority of the Full Bench has been in any way shaken by this recent pronouncement.

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[2] [1932] A. L. J. 714

Coming to the facts of the case before us, no attempt was made on behalf of the defendants to show that the aquisition of the property by the right of pre-emption was necessary for the family or even that it was for the benefit of the family and the family estate. Both parties appear to have considered as if the question was purely one of law and not a mixed one of law and fact. The learned Subordinate Judge had to record a finding that there was "no legal necessity and no benefit of the estate." In the absence of any such proof, the claim must fail. I would accordingly dismiss the appeal.

Sulaiman, C. J.

Mukerji, J.

MUKERJI, J.—This case has been referred to the Full Bench. The facts briefly are as follows:—

Two brothers, Tulshi Prasad Singh and Deonath Singh, brought a suit for pre-emption, being suit No. 140 of 1917, against Tilakdhari Singh and others. The suit was decreed on condition of payment of Rs.3,000 as the purchase-money to the vendees. The brothers had no money except a sum of Rs.1,000 and they raised the balance of Rs.2,000 by mortgaging their ancestral property to some of the plaintiffs and predecessors of others in the suit out of which this appeal has arisen. Tulshi Prasad Singh having died, the present suit has been brought against his sons and Deonath Singh to recover the money by sale of the property hypothecated.

The defendants 1 to 3 are the minor sons of Tulshi Prasad Singh and their case is that for the purposes of paying the price of a pre-empted property their father or their uncle were not authorised by the Hindu Law to mortgage the joint family property and, therefore, the suit must fail.

The learned Subordinate Judge who heard the suit agreed to this contention and dismissed the suit, so far as it was for enforcement of the mortgage; but he gave a simple money decree against Deonath Singh on foot of the personal covenant contained in the mortgage-bond.

Deonath Singh has not appealed. The plaintiffs have filed this appeal and they contend that the mortgage was a prudent and beneficial one and should be upheld. There was another plea taken that the sons could not both retain the benefit acquired with the plaintiffs' money and at the same time refuse to pay the same. This plea cannot be substantiated on facts. It appears from the written statement of Deonath Singh and there is no evidence to the contrary that the property acquired by pre-emption has been lost to the family because of a suit brought by a minor member of the family of the vendors. The appeal came up for hearing before two learned Judges of this Court, and having regard to the conflict of decisions on the question of the power of a manager of a Hindu family to raise money on the security of joint family property for the purchase of new property they referred the whole case to a larger Bench.

The view which I have taken of the manager's authority to raise money in the circumstances stated above is contained in the judgment in *Kishen Sahai* v. *Raghunath Singh*[3] and *Inspector Singh* v. *Kharak Singh*[4].

[3] I. L. R. 51 All. 473

[4] I. L. R. 50 All. 776

As the point has been referred to a larger Bench so that the law on the point may be settled, I think it necessary for me to discuss the entire law on the point.

To get hold of the principle on which the appeal is to be decided, we must look to the Hindu Law; for the question is one of Hindu Law and Hindu Law alone. The constitution of a Hindu family with property and the powers of the father or the manager to mortgage the family property has been dealt with and stated by Vijnaneshwar in his book, the Mitakshara. I shall read the statement of the law made by Vijnaneshwar from the translation of Colebrooke.

In Chapter I, Section 1, Paragraph 27 Vijnaneshwar says:

> Therefore it is a settled point, that property in the paternal or ancestral (grand paternal) estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained: 'Though immovables or bipeds (this probably means slaves) have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made'.

The rule, therefore, is that the family property is for the support of those who are in existence, those who are in the womb and those who are not yet begotten, and, therefore, the property cannot be disposed of by the father without the consent of his sons. The same rule applies when the manager is not the father but say an uncle. He must have the consent of all other members of the family, in order to transfer the same, because they have a right in the property. This being the state of the law, it might work to the disadvantage of the family in cases where some of the members are minors and yet there is an urgency to raise money. An exception, therefore, is made and mentioned in the next Paragraph No. 28. It reads as follows:—

> An exception to it follows:—'Even a single individual may conclude a donation, mortgage, or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.'

This is a quotation made by the author of the Mitakshara from the Smriti of Brihaspati cited by Ratnagar. Having quoted the text, Vijnaneshwar proceeds to explain the meaning of the text quoted.

He says in Paragraph 28:

> The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so (minors) and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, *if a calamity affecting the whole family require it,* or *the support of the family render it necessary,* or *indispensable duties, such as the obsequies of the father or the like, make it unavoidable.*

The exception to the general rule which was mentioned in the text required explanation and what has gone above is the meaning put to it by Vijnaneshwar. The three conditions in which a single member is allowed to transfer the property are (1) a season of distress, (2) for the sake of the family and (3) pious purposes. Vijnaneshwar says that in the case of No. 1, there should be a calamity affecting whole family and the calamity cannot be averted without the transfer. His language is "if a calamity affecting the whole family require it". The second case (sake of the family) is explained by Vijnaneshwar as meaning that the support of the family renders it necessary to make the transfer. It will be noticed here that what has been translated as 'sake of the family' has been understood by Vijnaneshwar as meaning the support of the family and not the aggrandizement of it and not the adding of wealth to the family. The third case (pious purposes) has been understood by Vijnaneshwar as meaning indispensable duties such as the obsequies of the father or the like, duties which cannot be avoided. The making of a gift out of sheer charity may be a pious duty but that is not the sort of pious duty that Vijnaneshwar understands. The pious duty must be one that cannot be avoided. Such being the state of the Hindu Law, as explained by Vijnaneshwar, whose authority in this part of the country is paramount we have to see whether a purchase of property, or acquisition of property by pre-emption, which is the same thing only more costly and more speculative, on the security of the joint ancestral property comes within the exception. In an ordinary case of pre-emption, the purpose is neither the avoidance of a calamity nor support of the family nor performance of an indispensable duty like a Sradh. It has been argued that it may be that the person who has purchased the property is a very bad man with tyrannical habits and it might be feared that, if he was allowed to purchase the property, he might in course of time, swallow up the whole family property. If a case like that can be made out it is possible to say that the pre-emption would be an act to avoid a calamity which affects the whole family. The calamity must be one which affects the whole family. This cannot be forgotten. No such allegation has been made in this case and we need not consider such a hypothetical case.

On a bare reading of the Mitakshara, therefore, the mortgage in question must be held to be unjustified, and, therefore, not binding on the family property.

It appears that their Lordships of the Privy Council, in the case of *Hunoomanpersaud Pandey* v. *Mst. Babooee Munraj Koonweree*[5] considered the powers of the manager of an infant heir to charge the minor's estate. In that case the mother of the infant heir had made a mortgage and the validity of the mortgage was in question. Their Lordships laid down the extent of the power of the manager in the following well-known passage which will bear quotations:—

> The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual

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[5] 6 Moore's I. A. 393

> pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

This law was laid down as between a minor and his manager and has no direct reference to the conditions of the joint Hindu family in which there are certain minor members. But this very passage has been quoted from time to time as also covering the case of a joint family. It has been understood from this statement of the law, that it is only in the case of a necessity and necessity alone that the manager of a Hindu family in which there are minors can charge the estate. In discussing the liability of the sons for the father's debts, in the well-known case of *Brij Narain* v. *Mangal Prasad*[6] their Lordships of the Privy Council mentioned the somewhat illogical state of things, namely, the limited power of the father in charging the property and the unlimited liability of the sons to pay the father's antecedent debts. In discussing the situation their Lordships said, at page 101:

> On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and *without any compelling cause* so as to bind the reversioneries. He can bind it for necessity, the necessity being the necessity of the family . . . . .

It will be noticed that this is in accordance with the law as propounded by Mitakshara. The calamity should be one which affects the whole family. The rest of the discussion of their Lordships relates the liability of the son to pay his father's debt. In concluding the judgment their Lordships laid down the law in five propositions and the first one is:

> (1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity.

As the present case is not a case of a debt of a father, it is not necessary to consider the other propositions of law laid down by their Lordships. From this case we find that apart from the question of payment of father's debt, a father as the manager of the family can burden the estate only for *the purposes of necessity* and that necessity, to quote the language of their Lordships again at page 101, must be a "compelling cause" and the necessity must be a *necessity of the family*. It is difficult to believe that their Lordships of the Privy Council had not in their mind the rule laid down by the Mitakshara quoted in the beginning of the judgment. In their Lordships' opinion the test of a single member's authority to burden the family property is confined to the existence of "compelling necessity", which is a 'necessity of the whole family.' If we analyse the three cases in which Vijnaneshwar permits the manager to transfer immovable property belonging to himself and members of the joint family some of whom are minors, we shall find that the single test applied by their Lordships of the Privy Council in *Brij Narain's* case is enough. The 'compelling necessity of the whole family' will cover the case of *calamity*, will cover the case of *support of the family* and will cover the case of a *death in the family* and the *performance of the obsequial rites*. It has been urged that the statement of manager's power laid down by their Lordships of the Privy Council in *Hanoomanpersaud's*

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[6] I. L. R. 45 All. 95

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case gives wider powers to the manager and he can burde property in order to "confer benefit on the estate". Ther doubt that their Lordships do use the words "benefit to the passage quoted above from *Hanoomanpersaud's case.* But t to see what was in their Lordships' mind when they used t "the benefit to be conferred upon it." Did their Lordship benefit which was not a case of a necessity or was it the case pression "benefit to be conferred on the estate" was meant t valent of the words "for the sake of the family" to be found i translation in Paragraph 26, Chapter I, Section 1 of the Mi we suppose that the expression "benefit to be conferred" was a benefit which was not the kind of benefit expressed by t "for the sake of the family" (Paragraph 28 Mitakshara and w explained in Paragraph 29 by Vijnaneshwar) then there is a tween the statement of the law in *Hanoomanpersaud's* case a ment of the law contained in *Raj Brij Narain's case.* Their L fine the authority of the manager to a case of compelling n

In my opinion there is no conflict between *Hanoomanp* and *Raja Birj Narain's* case. The benefit to be conferred page 423 of the report in *Hanoomanpersaud's* case is a benefit character as has been described in the Mitakshara as "for th family" and which has been further explained in Mitakshar support of the family render it necessary." That this is so from the illustrations given by their Lordships themselves in *persaud's* case and in subsequent cases.

In *Hanoomanpersaud's* case the illustrations given by Council were "the actual pressure on the estate" and "the averted". These were really explained by the words tha namely, "or the benefit to be conferred upon it, in the partic is the thing to be regarded." According to my reading of their Lordships described the two instances quoted, namely, t and the "danger" as two instances where by their removal, be conferred on the estate.

This idea will be made clearer from a more recent cas their Lordships, nemely, *Palaniappa Chetty* v. *Sreemat De* In this case which was a case of a Mahant burdening the Ma their Lordships are reported to have said at page 718:

> It is impossible, their Lordships think, to give a precise d (benefit) applicable to all cases, and they do not attempt t preservation, however, of the estate from extinction, the d hostile litigation affecting it, the protection of it or portion or deterioration by inundations these and such *like things* w be benefit. The difficulty is to draw the line as to what are nections to be taken as benefits and what not.

It will be noticed that the three instances quoted by th were all cases where a danger was to be averted, which were *necessity.* The words "and such like things" used by their L templated that other instances of "benefit to the estate" were same nature as the three illustrations given. It is true, the

[7] I. L. R. 40 Mad. 709

stated, that it was difficult to draw the line, but with all respect, they were bound to say so, because it was humanly impossible to mention all cases of the necessity which may legitimately drive the manager to raise funds on the security either of the family property or of the Math property. But, in my opinion, there is nothing in the passage to indicate that their Lordships were contemplating any case in which benefit was to be conferred by adding more property to the Math or family, by alienating or by mortgaging the existing property.

In *Sanyasi Charan's* case[8] their Lordships of the Privy Council refused to hold that a minor member of a family was bound by the liabilities that arose out of a business started by the adult member of the family, although he was the manager of it. No doubt this was a case under the Dayabhaga Law, but the principle to be applied was the same. To take the case of a common illustration, can a man who has been appointed guardian to a minor by the District Judge attempt to acquire property by raising money on the security of the minor's property? Even if the District Judge's permission for the purpose were not necessary, on general principles, such a power will be denied to the manager.

In the latest pronouncement of their Lordships of the Privy Council the same view, as was taken in *Sanyasi Charan's* case, was reiterated. This is the case of *Benares Bank Limited* v. *Hari Narain*[9]. This was a case in which two adult members of a joint family in which there were minors started a business and, for that purpose, borrowed some money. Their Lordships said:

> Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan* v. *Krishna Dhan Banerji*, L. R. 49 I. A. 108. The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a member of the family the risk and liability of the new business started by him. That no doubt is a Dayabhag case, but there is no distinction in principle on this subject between a case under the Dayabhag and one under the Mitakshara. The power of a manager of a joint family governed by the Mitakshara Law to alienate immovable property belonging to the family is defined in verses 27 to 29 of Chapter I of the Mitakshara. The judgment of this Court in *Hanoomanpersaud Panday* v. *Mt. Babooee Koonweree* relied on by the Bank was founded apparently on those *verses*. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view.

This case is an express pronouncement that the law contained in *Hannoomanpersaud's* case is the same law as is laid down by the Mitakshara in verses 27 to 29 of Chapter I (Section 1) of the Mitakshara, and that, therefore, a starting of a new business by the managers cannot be regarded as coming within the three cases given by Mitakshara as the cases in which a single member of the family can alienate the joint family property.

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[8] I. L. R. 49 Cal. 56

[9] [1932] A. L. J. 714

This case, further, leaves no room to doubt what was meant by their Lordships of the Privy Council by the expression "benefit to be conferred on the estate" in *Hanoomanpersaud's* case. As I have said above, the five illustrations which their Lordships give, two in *Hanoomanpersaud's* case and three in the case of *Palaniappa Chetty* v. *Sreemat Devasikamony*[10], they all indicate cases of necessity or "compelling cause" or "necessity, the necessity being the necessity of the family", expressions used at page 101 in *Brij Narain's* case.

Examining then the case in view of the Hindu Law and the pronouncements of their Lordships of the Privy Council and also on general principles, it is clear that a case of raising money on the security of the joint family property for the purpose of acquiring fresh property cannot come within the three cases cited as 'cases of exception' in Paragraphs 28 to 29 of Chapter I, Section 1 of the Mitakshara.

I need hardly mention that the property being the property of several persons, one or two persons, who happened to be the adult members at the time, have no right to jeopardize it by a mortgage, especially when the raising of the money is not necessary for the support of the family or for avoidance of a calamity affecting the whole family or for performing the funerals of a deceased member of the family. If any adult member thinks that it would be conducive to the interests of the family or himself to acquire more property, he is at liberty to have a partition effected and he can proceed as he likes by raising money on the security of his own share. The funds which are regarded as the funds for the support of the living and the persons in the wombs of their mothers and those who are yet unbegotten cannot be utilised on the off-chance of doing good to the family.

It was argued that a self-acquisition might be made a part of the joint family, by the acquired property being thrown into the joint stock, and that, therefore, when that property has gone in to the joint stock, it should be open to the manager to raise money on the security of the family property in order to benefit the thing which has become now the joint family property. By way of illustration it is said, "suppose the father with minor sons starts a business and makes money; he can make what was his own separate business the family business by throwing that business into the common stock." But the business can be thrown into the common stock only in the sense that the father declares that it is no longer his separate property but it is the property of himself and his minor sons. We may assume that the consent which would be necessary to accept a property given by one to another may be supplied in this case of minor sons by the father himself. But this gift, by the method of throwing the business into the common stock, will not and should not allow the manager, even if he be the father, to utilise the joint family property, which, it must be remembered, is a fund for the support of the existing and yet-to-be-born members of the family. That this is so has now been clearly pronounced by their Lordships of the Privy Council in the case of *Benares Bank* v. *Hari Narain*.

Having then dealt with the case on the basis of Hindu Law, on the basis of Privy Council rulings and on the basis of general principles, let us

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[10] I. L. R. 40 Mad. 709

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look to the decisions of our High Court. I may mention here that no case of any other High Court has been cited to us.

Going to earlier cases, we find that in *Nathu* v. *Kundan*[11] a manager who was the father was allowed to mortgage the family property in order to pay the price of a pre-empted property on the ground that the pre-emption decree created a "debt" of the father. With all respect I am unable to accept this view. It is neither a debt nor an antecedent debt. The money had not been borrowed in any sense of the word. The liability had no doubt been contracted, but that was a liability which cannot be called a debt. The price which a man has to pay for a property agreed to be purchased is not a debt at all, at any rate till the property has already come into the hands of the purchaser and the price remains unpaid. In that case it might be said that the purchaser owes money, and, therefore, a debt to the seller. In the case of a pre-emption the property is to be obtained only on payment and if no payment is made, the property cannot be got. A similar view was taken in the case of *Bhup Singh* v. *Chedda Singh*[12]. The case is to be distinguished because there was a clear finding that the purchase was to be beneficial to the family and the mortgagee who had advanced the money had made such inquiries as would result in his holding a good mortgage. No such circumstances appear in this case. It is a simple case of pre-emption.

The view taken in *Nathu's* case and which had been followed in the case of *Kapildeo* v. *Thakur Prasad*[13] was dissented from in the case of *Chaturbhuj* v. *Govind Ram*[14]. The learned Judges held that the pre-emption money was not an antecedent debt and would not support a transfer of the family property.

The same view was taken in *Sankar Sahai* v. *Bechu Ram*[15] and it was remarked that the benefit to be conferred mentioned in *Hanoomanpersaud's* case was a benefit of a "defensive character." This view, taken in later cases, as regards pre-emption, was again taken by a Bench of this Court of which I was a member, in *Kishen Sahai* v. *Raghunath Singh*[16].

It was urged that the Full Bench decision in *Jagat Narain* v. *Mathura Das*[17] has really disapproved of the opinion that the benefit to the estate must be of a 'defensive' nature. As pointed out by me in the case of *Kishen Sahai* v. *Raghunath Singh*, the decision ultimately arrived at by the Full Bench on the facts of the case before them might have been arrived at without laying down that the "benefit to be conferred" need not be of a defensive character, for the facts brought the case within the purview of the decision of the case of *Sankar Sahai* v. *Bechu Ram* where it was laid down that the benefit was to be of a defensive character. The facts of the Full Bench case were that the property that was sold by the adult members of the family was situated 19 miles away from the home of the family and it was very difficult for them to manage the property successfully and to the benefit of the family. If the property was not yielding anything, we may say that the sale was made for the support of the family, for the property from its situation, did not support the

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[11] I. L. R. 33 All. 242

[12] I. L. R. 42 All. 597

[13] I. L. R. 36 All. 17

[14] I. L. R. 45 All. 407

[15] I. L. R. 47 All. 381

[16] I. L. R. 51 All. 473

[17] I. L. R. 50 All. 969

Mukerji, J.

family. However, without drawing this distinction, it must now be admitted that the authority of the Full Bench case has been entirely destroyed by reason of the decision in the case of the *Benares Bank* v. *Hari Narain.* The learned Judges of the Full Bench were requested to consider the law *as laid down in the Mitakshara,* but they refused to do so. At page 973 of the report the learned Judges are said to have remarked:

> We were invited to consider passages from the Mitakshara but their Lordships had those passages before them and they interpreted them in certain language and that language we must and do of course readily accept.

The interpretation referred to was the interpretation contained in *Hanoomanpersaud's* case. If the learned Judges had read the Mitakshara with the interpretation put on it by their Lordships of the Privy Council in *Hanoomanpersaud's* case, I have not the least doubt that they would have arrived at the same conclusion at which I have arrived. With all respect, it was not right to ignore the very source of the law, the Mitakshara, and to try to read the gloss although the gloss was put by their Lordships of the Privy Council as if it were the language of a statute. I have done my best to explain with reference to the Mitakshara what their Lordships meant by "benefit to be conferred", and now as their Lordships themselves have again interpreted the Mitakshara in the case of the *Benares Bank,* little room is left to doubt that their Lordships never meant to depart from the strict law laid down by Vijnaneshwar. In my opinion we should now formally overrule the case of *Jagat Narain* v. *Mathura Das.*

I hold that the mortgage in suit was not within the authority of the executants and that it is not enforceable against the family property mortgaged.

King, J.

KING, J.—I agree that the mortgage is not binding upon the joint family property.

In the first place, the loan was not taken to discharge an antecedent debt. The question of "antecedent debt" arises in this case, because the contesting defendants are the sons of Tulshi Prasad Singh, one of the mortgagors. The pre-emption decree gave to the pre-emptors the option of acquiring certain zamindari property upon payment of a certain sum of money within a specified time. The pre-emptors were not under any legal liability to pay the pre-emption money. Therefore it was not a debt. I agreed to the view taken on this point in *Chaturbhuj* v. *Govind Ram*[18] and in *Shankar Sahai* v. *Bechu Ram*[19] and in *Kishan Sahai* v. *Raghunath Singh*[20] and respectfully dissent from the decision in *Nathu* v. *Kundan Lal*[21]. The case of *Kapildeo* v. *Thakur Prasad*[22] is distinguishable as in that case the mortgagor had bound himself under penalty to deposit in court a certain sum of money by a certain date.

In the second place, it is not proved that the loan was taken for legal necessity. There is no allegation that the acquisition of the property, by exercising the right of pre-emption, was necessary for the support of the

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[18] I. L. R. 45 All. 407
[19] I. L. R. 47 All. 381
[20] I. L. R. 51 All. 473
[21] I. L. R. 33 All. 242
[22] I. L. R. 36 All. 17

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family; or that the would-be purchaser is an implacable and unscrupulous enemy of the family who would, by buying the property, be in a position to work mischief to the family and to imperil their enjoyment of their ancestral estate. I am not prepared to hold that the acquisition of new property, by pre-emption or otherwise, can in no circumstances be held to be justified by legal necessity. In *Chotkanu Lal* v. *Ganga Singh*[23] a bench of this court held, upon the facts of that case, that where a loan had been taken, upon a mortgage of joint family property, for the purpose of satisfying a pre-emption decree, the loan must be regarded as taken for legal necessity, because it was necessary to exercise the right of pre-emption in order to safeguard the interest of the pre-emptor's family. In the present case, however, no sort of necessity for the loan has been established.

In the third place, it is not proved that the loan was taken for the benefit of the estate. In certain circumstances it might be held that the acquisition of new property by pre-emption was a beneficial and purdent act such as would justify a mortgage of joint family property by the manager. But the facts showing that the transaction was beneficial and prudent must be proved. I cannot accede to the contention that the acquisition of new zamindari property, with money raised upon a mortgage, must necessarily benefit the estate. It might be prudent and beneficial to acquire certain property for Rs.1,000 but neither prudent nor beneficial to acquire the same property for Rs.3,000. Then again the property in question might have a special value to the family owing to its position. Its acquisition by the family might promote the profitable enjoyment of their ancestral estate, and its acquisition by an outsider, especially by a hostile outsider, might be harmful to the interests of the family. In the present case, no facts have been brought to our notice from which we could conclude that the acquisition of the new property, by borrowed money, was a prudent act and beneficial to the family.

Certain cases have been cited before us, e.g., *Tula Ram* v. *Tulshi Ram*[24], *Jado Singh* v. *Nathu Singh*[25] and *Jagat Narain* v. *Mathura Das*[26] in which it was held that an alienation of joint family property by a manager, for the purpose of buying new property, was valid and binding upon the estate. The reason in each case was that the transaction was prudent and beneficial to the estate or family. These decisions have no application to the facts of the present case.

If it had been found in the present case that the acquisition of the new property by pre-emption was "for the benefit of the estate" (in the plain and ordinary meaning of that expression) and such as a prudent owner would make in order to benefit the estate, then we should have had occasion to consider certain further important questions, e.g., whether the rule laid down in *Hanoomanpershaud Panday's* case, that a manager can charge the estate for the benefit of the estate (as well as "in case of need"), has been tacitly overruled or dissented from in *Birj Narain's* case; or whether the expression "for the benefit of the estate" should be given a very restricted meaning, so as to apply only to transaction of a "defen-

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[23] A. I. R. 1927 All. 219

[24] I. L. R. 42 All. 559

[25] I. L. R. 48 All. 593

[26] I. L. R. 50 All. 969

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King, J.

sive" nature, practically co-extensive only with transactions justifiable also by legal necessity.

But in the present case the trial court has found that the transaction was not for the benefit of the estate, and all the members of this Bench have concurred in that finding. We also agree that the loan was not taken for legal necessity or for discharging an antecedent debt. On these findings I think the appeal is concluded. The further questions, suggested above, do not arise and therefore I refrain from expressing any opinion on them. I would only add that I agree with Sulaiman, C. J. that the authority of the Full Bench ruling in *Jagat Narain* v. *Mathura Das*[27] has not been shaken by the decision of their Lordships of the Privy Council in the *Benares Bank Ltd.* v. *Hari Narain.* The two cases are clearly distinguishable upon the essential facts. In the latter case the loan was taken for starting a new business, and it was not even argued and presumably therefore it was not even arguable upon the facts that it was a prudent transaction, or for the benefit of the estate. In the Full Bench case the loan was taken for a totally different purpose, and it was held that the transaction was prudent and beneficial.

I agree that the appeal should be dismissed.

By the Court—We dismiss this appeal but without any order as to costs as no one appears for the respondents.

Appeal dismissed.

[27] I. L. R. 50 All. 969

Civil

1932

June 25

King, J.

PARMESHAR KURMI and another (*Plaintiffs*)

versus

BAKHTAWAR PANDE and others (*Defendants*)*

Court Fees Act (VII of 1870), Schedule I, Art. 5—Court-fee on application for review—Calculation—Basis of—Effect of U. P. Stamp Act, 1932.

The court-fee on the application for review must be calculated on the basis of the fee leviable on the memorandum of appeal according to the law in force when the memorandum was filed.

Review of judgment against the order of the Hon'ble Mr. Justice Mukerji and Mr. Justice Bennet.

Haribans Sahai and *B. Malik* for the applicants.

The following judgment was delivered by

King, J.

King, J.—This reference raises the question of the proper interpretation of Schedule I, Art. 5 of the Court fees Act, 1870.

The application for review of judgment was made on May 13, 1932. The judgment to be reviewed is dated February 16, 1932, and the memorandum of appeal, on which the judgment was passed, was filed on February 5, 1932.

The court-fee leviable on the application for review is governed by Art. 5 and is therefore "one-half of the fee leviable on the memorandum of appeal."

If the words are construed in their plain and ordinary meaning we must hold that the proper fee is one-half of the fee leviable on the memo-

*Stamp Ref. in S. A. 169 of 1930

randum of appeal which was filed on February 5, 1932, i.e., one-half of Rs.295. On this interpretation the proper court-fee has been paid.

The Court Fees Act has been amended in its application to the United Provinces by an amending Act which came into force on May 1, 1932. Under this amending Act the scale of *ad valorem* fees has been enhanced. In my opinion the amending Act does not affect the amount of fee leviable on the application for review. The memorandum of appeal, which determines the fee leviable on the application for review, was filed before the amending Act came into force. The question is what fee was leviable on the memorandum of appeal at the time when it was filed. This question is not affected by the subsequent commencement of the amending Act.

Precisely the same question arose in *Nandi Lal Agrani* v. *Jogendra Chandra*[1]. The question was fully discussed by the learned Judges who held that the fee on the application for review must be calculated on the basis of the fee leviable on the memorandum of appeal according to the law in force when the memorandum was filed. I agree to the reasoning and the conclusions of the learned Judges and hold that the proper court-fee has been paid.

[1] 28 Cal. W. C. 403

PRIVY COUNCIL

MOHAMMAD AFZAL KHAN (*Plaintiff*)

versus

ABDUL RAHMAN AND OTHERS (*Defendants*)*

Civil
1932
July 14
Lord Wright
Sir Lancelot Sanderson
Sir Dinshah Mulla

Co-sharers—Mortgage by one, of his undivided share—Subsequent partition between—Mortgage applies only to property allotted to mortgagor—Civil Procedure Code, Sec. 64—Partition of undivided property made through award—Subsequently filed in court—Not a private transfer.

> Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a definite portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. *Byjnath Lall* v. *Ramoodeen Chowdry,* [1874] L. R. 1 Ind. App. 106 *followed.* Such partition effected by an award made out of court which was subsequently filed in court and a decree passed thereon, does not amount to a private transfer within the meaning of Section 64 of the Code of Civil Procedure.

Appeal from a decision of the Court of the Judicial Commissioner of the North-West Frontier Province.

A. M. Dunne, K.C., Narasimham and *V. Shrinivas Rao* for the appellant.

L. De'Gruyther, K.C. and *J. M. Parikh* for the respondents.

*P. C. A. 102 of 1931

The following judgment was delivered by

SIR DINSHAH MULLA—The questions involved in this appeal relate to the effect of a partition of joint properties effected by a decree, where the decree is one made on an award, on a prior mortgage and a prior attachment of the share of one of the co-owners in some of the properties.

Haji Malik Rahman, a Mahommedan, died in or about 1910, leaving a will dated June 12, 1910, whereby he devised certain immovable properties to his son Malik Mohib Ali, who is the third respondent in this appeal, and his two grandsons Sardar Ali and Sabz Ali, in three equal shares. On the death of Haji Malik Rahman, the third respondent entered into possession of the properties and recovered the rents and profits thereof on behalf of the family. Sabz Ali died in 1914 leaving two children, who are the first and second respondents in this appeal, and on his death his one-third share in the above-mentioned properties passed to them. The first and second respondents were both minors at the date of their father's death and also at the date of the suit out of which the present appeal arises.

On April 26, 1923, the third respondent and his son Sardar Ali executed a mortgage of some of the properties in favour of the appellant to secure payment of Rs.1,00,000, lent and advanced to them by the appellant. The mortgage purported to be one with possession.

On the same day the appellant granted a lease of the mortgaged properties to the mortgagors at an annual rent of Rs.12,000.

Some time thereafter Sardar Ali died without leaving any issue, and on his death his one-third share passed to his father, the third respondent, as his heir. The third respondent thus became entitled to a two-thirds share in the properties, the remaining one-third being the share of the first and second respondents.

The rent under the lease fell into arrear, and the appellant obtained three decrees for arrears for various periods against the third respondent, and in execution of the decrees attached four immovable properties, being properties other than those comprised in the mortgage, but forming part of the properties bequeathed by the will of Haji Malik Rahman.

Subsequently, on August 19, 1926, Musammat Tajwar Sultan was appointed guardian of the person and property of the first and second respondents. Soon after her appointment she demanded their one-third share in all the properties from the third respondent. This was followed by a reference to arbitration on September 4, 1926, and an award was made on January 7, 1927. The third respondent made a statement before the arbitrators, but he did not disclose the mortgage to them. By their award the arbitrators awarded to the first and second respondents in lieu of their one-third share and the mesne profits thereof (1) some of the properties comprised in the mortgage, and (2) all the four properties attached as aforesaid. On February 10, 1927, a decree for partition was passed in terms of the award under Clause 21 of Schedule II of the Civil Procedure Code, and the first and second respondents were in execution of the decree put in possession of the properties allotted to them. It is upon the effect of this award and decree that the decision

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Sir Dinshah Mulla

of the questions in this appeal depends.

Subsequently an application was made on behalf of the first and second respondents under Order 21, Rule 58, of the Code, to release the four properties from attachment, and the attachment was raised by an order dated January 18, 1928.

Thereupon, on December 13, 1928, the appellant brought the suit out of which this appeal arises in the Court of the Subordinate Judge of Peshawar to establish his right to attach the two-thirds share of the third respondent in the four properties, and for a declaration that he was entitled to proceed against the mortgaged properties to the extent of the two-thirds share of the third respondent in them. The plaint stated that the arbitration proceedings were collusive, and that even if they were not, neither the award nor the decree made on it could affect the appellant's right under the mortgage or the attachment, as they both were of a date prior to the reference to arbitration. It would appear from the plaint that the appellant conceded that neither the mortgage nor the attachment was binding on the one-third share of the first and second respondents.

The Subordinate Judge held that the arbitration proceedings were collusive, and passed a decree for the appellant on November 22, 1929.

On appeal the Court of the Judicial Commissioner, North-West Frontier Province, considered that the suit was one under Order 21, Rule 63, of the Code, and that no claim in respect of the mortgage could be included in such a suit, and the claim was accordingly not entertained. As to the attachment they held that there was no evidence to show that the award was obtained by fraud, and that the order releasing the properties from attachment was therefore correct. Accordingly they reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. It is from this decree that the present appeal to His Majesty in Council has been brought.

Two contentions were raised on behalf of the appellant before their Lordships. The first was that where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and the properties so mortgaged are allotted on a partition by arbitration without the intervention of the Court to the other co-sharers, the partition, being subsequent in date to the mortgage, cannot affect the rights of the mortgagee to enforce his charge against the share of the mortgagor in the mortgaged properties. The second was that where the interest of one of several co-sharers in some of the properties held jointly by them is attached in execution of a decree against him, and those properties are subsequently allotted to the other co-sharers on a partition by arbitration without the intervention of the Court, a transfer by the judgment-debtor of the interest so attached to the other co-sharers is a private transfer within the meaning of Section 64 of the Civil Procedure Code, and therefore void as against the claim of the attaching creditor, even if the transfer was made pursuant to a decree passed on the award. It was not contended before their Lordships that the partition was unfair or that it was made with the object of defrauding the appellant.

The respondents abandoned before their Lordships the contention as to misjoinder of claims that had prevailed with the Appellate Court, and invited their Lordships to decide the question in respect of the mortgage on its merits.

As regards the first point, their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This was the view taken by the Board in *Baijnath Lall* v. *Ramoodeen Chowdry*[1]. In that case the partition was made by the Collector under Regulation XIX of 1814 (Bengal), and the mortgagee was seeking to enforce his remedy not against the properties mortgaged to him, but against the properties which had been allotted to the mortgagor in lieu of his undivided share; but the Board held that not only he had a right to do so, but that it was in the circumstances of the case his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. Their Lordships think that the principle enunciated in that case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents. The third respondent (the mortgagor) has not appeared before their Lordships, and their Lordships express no opinion as to any other rights which the appellant may have in respect of his mortgage.

It was brought to their Lordships' notice that on October 27, 1926, a suit had been brought by the appellant on the mortgage in the Court of the Subordinate Judge of Peshawar, and that a decree for money was passed in his favour on February 27, 1928, which was altered into a mortgage decree on January 29, 1931. No argument was addressed to their Lordships as to the effect of these proceedings on the present suit, and their Lordships express no opinion as to this either.

The second question falls to be decided under Section 64 of the Civil Procedure Code, which is as follows:—

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein contrary to such attachment, shall be void as against all claims enforceable under the attachment.

A decree for partition may be made (1) in a suit for partition heard and decided by the Court itself; or (2) it may be made on an award in a similar suit, where the matters in difference between the parties to the suit are referred to arbitration by an order of the Court made on the application of the parties; or (3) it may be made on an award, where

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[1] [1874] L. R. 1 Ind. App. 106

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Sir Dinshah Mulla

the matters in difference are referred to arbitration without the intervention of the Court, as in the present case.

It was not disputed before their Lordships that a transfer of property made pursuant to a decree in the first two cases was not a "private" transfer. But it was argued that a transfer made pursuant to a decree in the third case stands on a different footing, for the proceedings in that case originate not with a suit but with a private agreement to refer, and the transfer, therefore, must be regarded as a private transfer within the meaning of Section 64 and void as against the attaching creditor. Their Lordships are unable to accept this argument. They think that a transfer made pursuant to a decree in the third case is as much a transfer under an order of the Court as a transfer in the first two cases, and not a private transfer. As in the first two cases, so in the third, if the party against whom the decree is passed fails to transfer the property as required by the decree, the transfer may be enforced by proceedings in execution, and this is what actually happened in the present case. The third respondent did not deliver possession to the first and second respondents of the properties allotted to them under the decree until after execution had been taken out against him. Such a transfer cannot be said to be a private transfer within the meaning of Section 64, because the initial step which led eventually to the decree was not a suit for partition, but an agreement to refer the question of partition to arbitration. Their Lordships, therefore, consider that the appellant is not entitled to proceed in execution against the properties allotted to the first and second respondents.

In the result, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the first and second respondents before this Board.

Appeal dismissed

Ram Singh Mehra—Solicitor for the appellant.
T. L. Wilson and Co.—Solicitors for the respondents.

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1932

June 21

Lord Thankerton
Sir John Wallis
Sir George Lowndes

LASA DIN (*Plaintiff*)
versus
GULAB KUNWAR AND OTHERS (*Defendants*)*

Limitation Act, Art. 132—Mortgage deed—Stipulated period—Money becomes due after expiry of.

A mortgage deed provided that the principal sum would be paid within 6 years and the stipulated interest every year and further that in case of default in punctual payment of interest the mortgagee shall, within the expiry of the stipulated period of 6 years, have power to realise the entire mortgage money and the remaining interest and compound interest due to him in a lump sum through court by sale of the mortgage property. There was default in payment of interest, but the mortgagee did not avail himself of the option given to him. He sued upon the mortgage after 12 years from the date of such default but within 12 years from the date of the expiry of the stipulated period of six years. *Held,* that

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*P. C. A. 63 of 1931

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the suit was within time. Money became due within the meaning of Article 132 only after the expiry of six years. *Gaya Din* v. *Jhamman Lal,* I. L. R. 37 All. 400 and *Shib Dayal* v. *Meharban,* I. L. R. 45 All. 27 *overruled.*

APPEAL from a decision of the Chief Court of Oudh at Lucknow.

J. M. Parikh for the appellant.

The other side was not represented.

The following judgment was delivered by

Sir George Lowndes

SIR GEORGE LOWNDES—The only question in this appeal is as to the date upon which the principal money became due under a mortgage of certain immovable property in the Lucknow District. Upon this hangs an important question of limitation, and the issue of the appeal.

The mortgage is dated July 26, 1912, and purports to be for six years from that date. Apart, therefore, from the provisions of a particular clause in the deed, to be presently referred to, the mortgage money would have become due on July 26, 1918, and under Art. 132 of the first schedule to the Limitation Act, 1908, the mortgagee would have a further 12 years in which to bring his suit. The article runs as follows:—

Description of suit	Period of limitation	Time from which period begins to run
132.—To enforce payment of money charged upon immovable property.	Twelve years.	When the money sued for becomes due.

The appellant is the mortgagee. He brought a suit praying for a mortgage decree in the usual form on February 28, 1928, i.e., within 12 years from July 26, 1918. He joined as defendants the widow of the mortgagor, who was then dead, and certain puisne encumbrancers, who alone defended the suit. They are respondents to this appeal, but have not been represented before the Board.

The main defence was limitation. The Subordinate Judge of Lucknow, in whose Court the suit was instituted, held that it was out of time, and this decision was affirmed on appeal, first by the District Judge and then by the Chief Court of Oudh. The appellant comes before the Board upon special leave. Other issues raised at the hearing of the suit in the Court of the Subordinate Judge have not been tried.

By the mortgage deed the mortgagor covenanted to pay interest yearly at 12 per cent, and that if the interest for any year was not paid, it should be added to the principal and carry interest at the same rate. Then followed the clause upon which the defence was founded:—

> In case of default, the said creditor shall, at all times, within and after the expiry of the stipulated period of six years aforesaid, have the power to realise the entire mortgage money and the remaining interest and compound interest due to him, in a lump sum, through Court, by attachment and sale of the said mortgaged share, as well as from my person and all other kind of my property, both movable and immovable,

> together with costs of Court, and I, my heirs, relations and representatives shall have no occasion for objection and refusal; that the aforesaid rate of interest, fixed by me, shall stand within and after the stipulated period and after the decree till payment of the entire demand hereunder and that I shall at no time demand reduction in interest.

The mortgagor defaulted in the payment of interest for the first year, and it was contended for the defendants that immediately upon this default the principal moneys became due within the meaning of the article of the Limitation Act set out above, and consequently that the statutory period of 12 years had expired before the institution of the suit. The question their Lordships have to determine is whether this view, upon which the judgments under appeal are all based, is correct.

Clauses of this nature in mortgage deeds have been before the Indian Courts in many cases, and there has been a considerable divergence of judicial opinion as to their effect upon limitation. The Chief Court of Oudh, following a majority decision of the Allahabad Full Bench in 1915, had more than once held that in such cases time ran against the mortgagee from the date of the first default, and the judgments in the present case add little to the elucidation of this problem. The Subordinate Judge thought it clear that the clause gave the mortgagee an option either to sue at once or to wait till the expiry of the mortgage term, but he held himself concluded by authority on the question of limitation. The District Judge thought there was no option, and that the mortgagee "was bound to sue" immediately upon the default. In the Chief Court, Srivastava, J. noted the conflict of authority, and certain observations of this Board in a recent case, which seemed to throw doubt upon the soundness of the Allahabad decision, but thought it his duty to adhere to the decisions of his own Court so long as they were not definitely overruled. Wazir Hasan, J. agreed, but expressed himself rather more confidently on the principle involved. In his opinion, the right of the mortgagee to enforce payment on default made the principal money immediately payable within the meaning of Section 60 of the Transfer of Property Act, 1882, and therefore entitled the mortgagor to redeem regardless of the six years' term.

The principal authority in favour of the view taken by the Chief Court is the Full Bench case already referred to, *Gaya Din* v. *Jhumman Lal*[1], in which the opinions of Richards, C. J. and Tudball, J. prevailed over that of Banerji, J. The gist of the majority judgments was that the money became "due" as soon as it could be legally demanded, i.e., upon the first default. The Chief Justice fortified himself by extracts from the judgments of the Court of Appeal in this country in *Reeves* v. *Butcher*[2], which he seems to have regarded as decisive. Banerji, J. took the opposite view. He thought the clause in question was clearly inserted for the benefit of the creditor, and that it was at his option to treat the money as being immediately due or not. He referred to previous Allahabad decisions which seem to support his argument, and in particular to a dictum of this Board in a case decided under the Limitation Act XIV of 1859, which will be noted presently.

[1] I. L. R. 37 All. 400

[2] [1891] 2 Q. B. 509

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Gaya Din's case seems to have been doubted in subseqı the Allahabad Court, but was affirmed by another Full Ber *Shib Dayal* v. *Meharban*[3].

The authority of these cases is, however, in their Lordsh weakened by a more recent decision of the same High C *Husain* v. *Chatar Bhuj*[4], in which Sir Grimwood Mears, C. J refused to extend the principle beyond the limits of the d Their Lordships think that if, under a clause of this nature, money "becomes due" within the meaning of Art. 132 imme default by the mortgagor in payment of interest or of an i must equally become due upon the breach of any other condit a similar provision is attached.

Turning now to the other High Courts, their Lordships fi decision of 1896, which adopts the same line of reasoning a *Sitab Chand Nahar* v. *Hyder Malla*[5]. It has been suggested t Court ten years later in *Rup Narain* v. *Gopi Nath*[6], followe principle, which would favour the appellant, but this decisi with reference to another article of the Limitation Act, Lordships think, of no assistance in the present case. *Sitab* was no doubt decided under Act XV of 1877, but the wordi ticle in that Act was the same as in the Act of 1908.

No authority has been cited from Bombay*, but the H Madras (*Narna* v. *Ammani Amma*[7]), following the judgmen J. in the first of the Allahabad Full Bench cases, and the H Patna (*Ganga Bishun* v. *Lala Raghunath*[8]), have taken t view.

Similar questions have been discussed on two occasion Board, but in neither case was it necessary to decide the p fairly definite indications were given in each of the view th inclined to take.

In *Juneswar Dass* v. *Mahabeer Singh*,[9] a case falling un of 1859, a similar argument was put forward for the appe which has prevailed in the Oudh Courts and Allahabad, th based upon the application of a six years' period of limit decision was against the appellant on the ground that th twelve years and not six. But Sir Montague Smith, who judgment of the Board, after expressing himself to this effect,

> Their Lordships must not be supposed, in coming to th give any countenance to the argument of Mr. Arath appellant] that this suit would have been barred if the lin years under cl. 16 had been applicable to it. They th construction of this bond that there would be good reaso

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[3] I. L. R. 45 All. 27

[4] I. L. R. 50 All. 328

[5] I. L. R. 24 Cal. 281

[6] 11 Cal. W. N. 903

[7] I L. R. 39 Mad. 981

[8] I. L. R. 10 Patna 173

[9] L. R. 3 I. A. 1

*There appears to have been a case in Bombay, not in the authorised reports in Court followed *Gaya Din's* case but the judgment adds nothing to the reasoning *Laxman Naik* v. *Chanbasapagowda*, All Ind. Rep. 1923, (Bom.).

†NOTE.—A fuller report of the arguments appears in the Calcutta Report, I.

> that the cause of action arose within six years before the commencement of the suit.

It is, their Lordships think, worth noticing that this case was not referred to in *Sitab Chand Nahar* v. *Hyder Malla* (*supra*). The dictum cited was, however, much relied upon by Banerji, J. in his dissenting judgment in *Gaya Din* v. *Jhuman Lal.*

The question came up for consideration again before the Board, half a century later: *Pancham* v. *Ansar Husain*[10]. In this case the Allahabad High Court had, following the decision in *Gaya Din's* case, dismissed a mortgagees' suit as out of time, it not having been brought within twelve years of the mortgagor's default in payment of an instalment, which gave the mortgagees the right (as in the present case), without waiting for the expiry of the stipulated period, to enforce their security.

The judgment of the Board was delivered by Lord Blanesburgh, and the material portion of it runs as follows:—

> Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din* v. *Jhumman Lal,* I. L. R. 37 A. 400, the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees and even, it would appear, against their desire, operates, *eo instanti,* to make the money secured by the mortgage 'become due,' so that all right of action in respect of the security is finally barred twelve years later, that is, in the present case, on February 21, 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Art. 132 of schedule to the Indian Act—a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.
>
> Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasised and perhaps extended as it has been by a later Full Bench decision to the same effect: see *Shib Dayal* v. *Meharban,* I. L. R. 45 A. 27. Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be, this Board should finally pronounce not only upon the question wehther the principle of the two Allahabad decisions above referred to is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents can, as they think, regardless of the general question, be decided on its own special circumstances, which, apparently, the High Court was not concerned to note.

The judgment then proceeds to deal with the "special circumstances" upon which the actual decision turned; they have no relevance to the present case.

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[10] L. R. 53 I. A. 187

It is no doubt true that the question now before the Board was advisedly left open for future discussion, but the considerations referred to by Lord Blanesburgh are of great weight, and it is difficult to find an answer to them. They clearly affected the decision in the latest Allahabad case, but though the judgment in *Pancham's* case was cited in the Chief Court of Oudh, the learned Judges of that Court would make no further attempt at the solution of the problem.

Under these circumstances, it is a matter of great regret to their Lordships that they should now have to pronounce upon these important and difficult questions without the assistance of counsel for the respondents. But the case has been placed before them very fully and with conspicuous fairness by Mr. Parikh, who appeared for the appellant, and they have given their most anxious consideration to all the judgments which have been referred to.

Their Lordships think that no valid distinction can be drawn between the material provisions of the deed in the present case and those upon which the judgments in the Allahabad cases were founded, and that the question to be decided is one of principle.

There can be no doubt that, as pointed out by Lord Blanesburgh, a proviso of this nature is inserted in a mortgage deed "exclusively for the benefit of the mortgagees," and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words, by the breach of his contract—the mortgage money becomes immediately "due," it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and "*eo instanti,*" as Lord Blanesburgh says, he is entitled to redeem. If the principal money is "due," and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognised by Wazir Hasan, J. in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default: they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not "become due" within the meaning of Art. 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him.

Their Lordships are not greatly oppressed by the authority of *Reeves* v. *Butcher* (*supra*). It is, they think, always dangerous to apply English decisions to the construction of an Indian Act. The clause there under consideration differed widely from that now before their Lordships, and indeed from the clauses with which the Allahabad Court had to deal; the question for decision would have fallen in India, not under Art. 132, but under Art. 75, which is in very special terms; and Section 3 of the

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statute of James, with which the Court was concerned, made the time to run, not from the date when the money became due, but from the date when the cause of action arose. If in the Indian cases the question were "When did the mortgagee's cause of action arise?"—i.e., when did he first become entitled to sue for the relief claimed by his suit—their Lordships think that there might be much to be said in support of the Allahabad decisions. Judged by the Indian criterion, "when the money sued for became due," upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong, and that they should have held that the appellant's suit was within time.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decrees of all the Oudh Courts should be set aside; and that the suit should be remitted to the Court of the Subordinate Judge for trial of the other issues which have not been decided. The respondents 2-6 must pay the costs of the appellant in both the District Court and the Chief Court, and before this Board. All other costs of the suit will be dealt with upon the further trial.

Appeal allowed

T. L. Wilson and Co.—Solicitors for the appellant.

SHIBA PRASAD SINGH (*Defendant*)
versus
PRAYAG KUMARI DEBI AND OTHERS (*Plaintiffs*)*

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April 7
Lord Blanesburgh
Lord Thankerton
Lord Salvesen
Sir John Wallis
Sir Dinshah Mulla

Hindu Law—Impartible estate—Ancestral—Junior members of family—Right of survivorship for purposes of succession—Separation from, how effected—Incorporation of other acquired with impartible estate—Possible and how effected—Incorporation of movables.

In the case of ordinary joint family property the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility and so also the third. To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility and still remains. To this extent therefore the estate still retains its character of joint family property and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exists, the birth-right of the senior member to take by survivorship still remains. This right is not mere *spes successionis* but a right which is capable of being renounced and surrendered. In order to establish that a family governed by Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied on the part of the junior members of the family to renounce their right of succession to the estate. Such a renunciation is not to be presumed merely from mere separation in food and worship.

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*P. C. A. 7 of 1930

On a question whether a member of a joint family has incorporated his self-acquired property with the joint family property, the crucial test is intention and the intention may be expressed by the blending of income or in some other way. It may be done by declaring expressly or impliedly his intention to do so. On the same principle a member of a joint family who is the holder of an impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate. By so doing he expresses his intention to alter the course of devolution of the self-acquired property. Such incorporation of the self-acquired property will follow the impartible property under the law and be heritable by the rule of primogeniture. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom; but where a Raj is an estate granted by the Crown, its boundaries cannot be enlarged by any additions being made to it so as to make it descend under the law by the rule of primogeniture. Movable property cannot however form accretion to an ancestral impartible Raj, nor can even the income of such an estate be an accretion to the estate. The income when received is the absolute property of the owner of the impartible estate. It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate.

Case-law discussed at length.

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal.

L. DeGruyther, K.C., A. M. Dunne, K.C., J. M. Parikh and *Gupta* for the appellant.

W. Upjohn, K.C. and *B. Dube, K.C.* for the respondents.

The following judgment was delivered by

Sir Dinshah Mulla

SIR DINSHAH MULLA—The questions involved in these appeals relate to the right of succession to an estate known as the Jheria Raj, situated in the district of Manbhum, and other property, movable and immovable, left by Raja Durga Prasad.

The suit out of which the appeals arise was instituted by the widows of Raja Durga Prasad in the Court of the Subordinate Judge of the 24-Perganas against Shiba Prasad Singh, a distant agnatic relation of the Raja, to recover the estate and other property. On November 3, 1921, the Subordinate Judge passed a decree whereby he allowed the suit in part and dismissed it as to the rest. Both parties appealed to the High Court at Calcutta, and the High Court by its decree dated August 17, 1925, allowed the appeals in part. From this decree of the High Court both parties have appealed to His Majesty in Council.

The parties are governed by the Mitakshara School of Hindu law. The Raj is ancient and ancestral, and it is impartible by custom, and succession to it is governed by the rule of lineal primogeniture. The last holder of the estate was Raja Durga Prasad, who died childless on March 7, 1916, leaving three widows and Shiba Prasad Singh, his second cousin.

The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below:—

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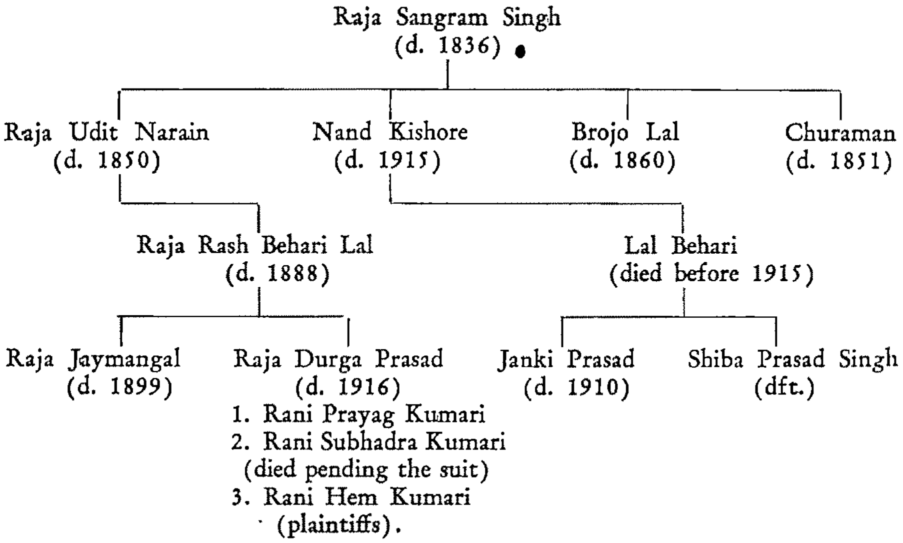
Raja Sangram Singh
(d. 1836)
Raja Udit Narain
(d. 1850)
Nand Kishore
(d. 1915)
Brojo Lal
(d. 1860)
Churaman
(d. 1851)
Raja Rash Behari Lal
(d. 1888)
Lal Behari
(died before 1915)
Raja Jaymangal
(d. 1899)
Raja Durga Prasad
(d. 1916)
1. Rani Prayag Kumari
2. Rani Subhadra Kumari
(died pending the suit)
3. Rani Hem Kumari
(plaintiffs).
Janki Prasad
(d. 1910)
Shiba Prasad Singh
(dft.)

Raja Sangram Singh died in 1836, leaving four sons. The Raj then devolved successively on Raja Udit Narain, Raja Rash Behari Lal, Raja Jaymangal, and Raja Durga Prasad. Shiba Prasad Singh is the great-grandson of Raja Sangram Singh.

On August 27, 1915, Raja Durga Prasad made a will whereby he purported to dispose of some of the properties in dispute. The will is governed by the Hindu Wills Act, 1870. Several sections of the Indian Succession Act, 1865, are thereby made applicable to wills governed by the Act. Amongst them is Section 187, which provides that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration with the will . . . annexed." No executor has been appointed under the will of Raja Durga Prasad nor have any letters of administration with the will annexed been obtained by any person. None of the parties, however, to this litigation seeks to establish any right as a legatee under the will. On the contrary, both parties claimed in the Courts in India, and they claim here, on the footing of intestacy. Their Lordships have been assured by counsel in the case that no person other than the parties to these appeals is interested in the succession to any of the properties in dispute. The will, it may be observed, had been held to be genuine by both the Courts in India.

After the death of the late Raja, Shiba Prasad Singh entered into possession of the estate and other properties. Shortly afterwards disputes arose between him and the widows, and on August 5, 1916, three *bantannamas* were executed, one by each widow, whereby for the consideration mentioned in those writings they acknowledged Shiba Prasad Singh as the rightful successor of the late Raja, and relinquished their claim as the heirs of their husband to all properties left by him.

On March 6, 1919, the present suit was brought by the three widows against Shiba Prasad Singh. In their plaint they stated that Raja Udit

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Narain had separaed from his brothers, that they as the heirs of their husband were entitled to succeed to the Raj and all other properties left by him, that the *bantannamas* were obtained by Shiba Prasad Singh by fraud and undue influence, that he had wrongfully taken possession of the Raj and the properties, and they claimed possession and other reliefs. As regards the Raj it was also alleged that if all the three widows together were not entitled to it, at least the senior widow was. The widows are hereinafter referred to as the plaintiffs and Shiba Prasad Singh as the defendant.

The properties in dispute are described in two schedules annexed to the plaint, being Schedule *ka* and Schedule *kha,* which their Lordships were told correspond to the Schedules *ka* and *kha* annexed to the decree of the Subordinate Judge. Schedule *ka* consists of seven items. Schedule *kha* contains a number of items and sub-items. It will be convenient to group these properties under the following heads:—

(1)	The impartible estate or Raj	Sch. *ka,* 1.
(2)	Immovable properties acquired by Raja Rash Behari Lal, the father and Raja Jaymangal, the brother, of the late Raja, and come to his hands	Sch. *ka,* 2-7.
(3)	Immovable properties acquired by the late Raja .	Sch. *kha,* 1-8.
(4)	Improvements on the Raj estate .	Sch. *kha,* 9-19.
(5)	Jewellery	Sch. *kha,* 20 (1-23).
(6)	Furnishings and equipments of the palace, etc. .	Sch. *kha,* 20 (24-83), etc.
(7)	Cash and deposits in banks .	Sch. *kha,* 21.

Besides the above, the plaintiffs claimed all other properties, both movable and immovable, left by the late Raja, which might on inquiry be found to have come to the hands of the defendant.

The defendant by his written statement denied that the *bantannamas* were obtained by him by fraud or undue influence. He also denied that Raja Udit Narain had separated from his brothers, and alleged that he and the late Raja were, at the time of the Raja's death, members of a joint undivided family, and he claimed the Raj by survivorship. He based his claim to the other properties on a family custom, according to which, it was alleged, all accumulations and acquisitions made by the Raja for the time being passed to his successor together with the Raj. He also claimed those properties on the alternative ground that they had been incorporated with the Raj. There was a further plea that females were excluded by custom from succession to this Raj.

The Subordinate Judge found that the *bantannamas* were obtained by the defendant by fraud and undue influence, and they were set aside. He also found that the two customs alleged by the defendant were not proved. On the issue whether the family was joint, he found that no separation had taken place, and that the defendant and the late Raja were members of a joint family at the time of the Raja's death. All these findings were affirmed by the High Court on appeal.

It is necessary, however, to state here a point of difference between the two Courts as regards the issue as to jointness. One of the elements considered by both the Courts in determining that issue was whether the two branches of the family were joint in worship. The Subordinate Judge found that they were. The High Court, differing from him, found that they were not, but they held that this in itself was not sufficient to constitute a complete separation, and the family, therefore, was still joint.

On his finding that the family was joint, the Subordinate Judge awarded to the defendant the impartible estate [Schedule *ka,* 1], on the ground that he was entitled to it by survivorship, and the improvements on the estate [Schedule *kha,* 9-19], on the ground that they formed part and parcel of the estate. He also awarded to the defendant the self-acquisitions of Raja Rash Behari Lal and Raja Jaymangal [Schedule *ka,* 2-7], on the ground that they were incorporated with the impartible estate. As to the properties acquired by the late Raja [Schedule *kha,* 1-8], he held that they had not been incorporated with the impartible estate, and he awarded them to the plaintiffs. This part of the decree was affirmed by the High Court, but as to items 3 to 7 of Schedule *ka* on different grounds. The High Court, while agreeing with the Subordinate Judge that item 2 of Schedule *ka* was incorporated with the estate, held that items 3 to 7 were not. They then proceeded to deal with the whole group of items 2 to 7, and said:—

> But properties Nos. 2 to 7 of Schedule *ka* were either the *ancestral* properties or properties which devolved upon Raja Durga Prasad on Raja Jaymangal's death, and we do not think they can be claimed by the plaintiffs as the self-acquisitions of Raja Durga Prasad. If Telo and the other properties which were acquired by Raja Jaymangal were not incorporated with the estate, they would devolve upon his [Raja Jaimangal's] widow, Rani Chalur Kumari, and not upon the plaintiffs. We accordingly agree with the Court below so far as properties 2 to 7 of Schedule *ka* are concerned.

As to the movables, the Subordinate Judge held that the plaintiffs were entitled to all the jewellery, cash and deposits in banks. He also awarded the greater part of sub-items 24 to 83 of item 20 of Schedule *kha* to the plaintiffs. He held that the defendant was also entitled to retain some furniture and other articles. Dealing with this part of the case, he said:—

> Plaintiffs are certainly not entitled to the furniture in the European guest house, Dheiya pleasure house, Raja's Khash Cutcherry, Sadar Cutcherry of the Raj estate, and Purulia bungalow. I also do not allow the claim for electric light, *punkhas* and machineries, etc., in the Rajbari, as they would follow the estate.

This part of the decree was affirmed by the High Court subject to certain variations as to sub-items 24 to 83.

The Subordinate Judge had not dealt with the plaintiffs' claim to the rents, royalties and other monies which had accrued in the lifetime of the late Raja, but had been realised by the defendant after his death. The High Court held that these belonged to the plaintiffs.

The High Court also directed an inquiry as to all other movable and immovable property that might have been left by the late Raja and had come to the defendant's hands, and ordered that it should be delivered to the plaintiffs.

From this decree of the High Court both parties have appealed to His Majesty in Council. The defendant is the appellant in the first two appeals (Nos. 71 and 72 of 1925), and the plaintiffs are the appellants in the third appeal (No. 79 of 1925).

The main contention of the plaintiffs before their Lordships was that the Courts below had erred in holding that the family was joint. They maintained that the findings of the two Courts in India on the issue as to jointness were not concurrent, and that the facts as found by them did not establish that the family was joint, but, on the contrary, that there was a separation; if so, they claimed that they as the heirs of their husband were entitled to the Raj and all other properties.

The defendant relied on what he alleged were the concurrent findings of the Courts below in his favour as to jointness, and urged that if he was entitled to the impartible property as a member of the joint family, he was also entitled to the other properties, both movable and immovable, on the ground either that they passed with the Raj by the family custom alleged by him or they had been incorporated with the impartible estate. Failing these, he maintained that he was entitled at the least to the furnishings and equipments of the palace and other buildings on another ground. This and other subsidiary questions raised by him will be referred to later.

The defendant accepted the concurrent findings against him as to the *bantannamas* and as to the two customs that had been pleaded by him. Eliminating these matters, the principal questions that remain for their Lordships' consideration are as follows:—

First, whether the late Raja and the defendant were, at the time of the Raja's death, members of a joint undivided Hindu family.

Second, whether the holder of an impartible estate has the power to incorporate other properties belonging to him with the estate. And, if so,

Third, whether any such properties had in fact been incorporated with the estate, and, if so, which?

First, as to whether the family was joint. The rules as to what constitutes separation in the case of an ordinary joint family are well established by the decisions of the Board. Generally speaking, "the normal condition of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption": *Tipperah case*[1], at p. 540. Separation from commensality and joint worship does not necessarily effect a division of a joint undivided Hindu family. Such a separation may be due to various causes, and the family may yet continue joint in estate: *Suraj Narain* v. *Ikbal Narain*[2]. To constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family: *Girja Bai* v. *Sadashiv-Dundiraj*[3]; *Kawal Nain* v. *Prabhu Lal*[4].

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[1] [1869] 12 Moo. I. A. 523

[2] [1816] L. R. 43 I. A. 151

[3] [1912] L. R. 40 I. A. 40, at 46

[4] [1917] L. R. 44 I. A. 159

Similar rules have been applied by the Board in the case of impartible estates. Thus in *Chowdhry Chintamun Singh* v. *Mussamat Nowlukho Konwari*[5], Sir J. Colvile, in discussing whether a document operated as a separation of a joint family in respect of an ancestral impartible estate, said (p. 271):—

> "There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or to transfer any right or contingent right of property which they might have,"

and it was held that the family had not separated in respect of that estate. A similar test was applied in *Jagadamba* v. *Narain Singh*,[6] where their Lordships said:—

> The cases of *Girja Bai* v. *Sadashiv Dhanjiraj* and *Kawal Nain* v. *Prabhu Lal* [both cited above] are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. The latter case illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate; and, further, that there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking.

The latest case on the subject is *Konammal* v. *Annadana*,[7] a case from Madras. In that case their Lordships, after observing that it had been established by the judgment of the Board in *Baijnath Prasad Singh* v. *Tej Bali Singh*,[8] that an impartible estate must be considered as the joint property of the family for the purposes of succession, and after referring to some of the earlier authorities, said as follows:—

> Those authorities, in their Lordships' opinion, go far to support the inference deduced by Ramesam, J. from an examination of the cases that in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention, expressed or implied, on behalf of the junior members of the family to give up their chance of succession to the impartible estate.

In the present case it was admitted for the plaintiffs that there was no evidence of any intention on the part of the junior members of the family to renounce their right of succession to the Raj. The only argument, therefore, open to the plaintiffs was that in the case of an impartible estate a separation merely in food and worship was sufficient to effect a severance of the joint status of the family. But this position could not be maintained in the face of the decision in *Baijnath's* case, as understood by the Board in *Konammal* v. *Annadana.* It was accordingly argued, relying upon *Sartaj Kuari* v. *Deoraj Kuari*,[9] that in the case of an impartible estate there was no co-ownership and therefore no jointness in estate; that *Baijnath's* case did not decide that there was co-ownership even for the purposes of succession; that the interest of a junior member, if any, was only a *spes successionis,* and that there was, therefore, nothing in the case of an impartible estate for the junior members to renounce.

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[5] [1875] L. R. 2 I. A. 263

[6] [1923] L. R. 50 I. A 1

[7] [1927] L. R. 55 I. A. 114

[8] [1921] L. R. 48 I. A. 195

[9] [1888] L. R. 15 I. A. 51

The decisions prior in date to *Baijnath's* case, so far as they are material for the present purpose, fall to be divided into two classes, namely, (1) those relating to succession to an impartible estate, and (2) those relating to other rights in such estate. The first class begins with the *Shivagunga*[10] case in 1863. The question in that case was one of succession to an impartible *zemindary,* the rival claimants being the representatives of a widow and those of the nephews of the last holder. The actual decision proceeded on the ground that the *zemindary* was self-acquired property, but the judgment contains the following passages:—

> The *zamindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may therefore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence, if the *Zemindar,* at the time of his death, and his nephews were members of an undivided Hindu family, and the *zemindary,* though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar,* at the time of his death, was separate in estate from his brother's family, the *zamindary* ought to have passed to one of his widows, and, failing his widows, to a daughter, or descendant of a daughter, preferably to nephews, following the course of succession which the law prescribes for separate estate.

The *Shivagunga* case was governed by the Mitakshara law, and the principle enunciated above was followed by the Board in subsequent Mitakshara cases, where it was held that the selection of a successor in the case of an ancestral impartible estate descendible by primogeniture was to be determined by survivorship.

The second class of cases begins with *Sartaj Kuari* v. *Deoraj Kuari,* decided in 1888 (*supra*). In that case the holder of an ancestral impartible estate executed a deed of gift of part of his estate in favour of his younger wife. A suit was brought by the son by his elder wife for a declaration that the estate being ancestral, the Raja had no power to alienate any part of it. The High Court of Allahabad held that the Raja had no power to alienate, but the Board reversed the High Court and upheld the gift. The decision proceeded on the ground that the inability of the father under the general law of the Mitakshara to alienate an ancestral estate arises from the proprietary right which the sons acquire at birth in such an estate, and that this right is so connected with the right to a partition that, where that right does not exist, as where the estate is impartible, the proprietary right falls with it. The *Shivagunga* case and the other cases following it were distinguished on the ground that the question in all those cases was one of succession, and not of alienation, and that all that was decided in those cases was "that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family." The decision in *Sartaj Kuari's* case was followed in the *first Pittapur*[11] case, where the right of the

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[10] 9 Moo. I. A. 543

[11] [1899] L. R. 26 I. A. 83

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last holder to alienate the estate by will was upheld, and in the *second Pittapur*[12] case, where the right of the junior members of the family to maintenance out of the estate (except by custom) was negatived. Here ends the second class of cases.

Then came *Baijnath's* case in 1921. The contest was as to succession to an ancestral impartible estate. The parties were governed by the Mitakshara law and the family was joint. If the rule of survivorship applicable to ancestral property were applied, the respondent would be entitled to succeed; on the other hand, if the rules of succession to separate property were applied, the appellants would be entitled to succeed. It was argued for the appellants before the Board that *Sartaj Kuari's* case had established that there was no coparcenary in an impartible estate, that that decision was logically extended to the question of maintenance in the *second Pittapur* case, and that it should be equally logically extended to succession; in other words, that the estate should descend, not as coparcenary, but as separate property, But this argument was not accepted, and it was held that the estate being the ancestral property of the joint family, the successor was to be designated by survivorship. The earlier decisions were examined at great length by the Board, and *Sartaj Kuari's* case was distinguished on the ground that "the right of the other members that was being considered [in that case] was a presently existing right. The chance which each member might have of a succession emerging in his favour was obviously outside the sphere of inquiry." Similar observations were made as to the *second Pittapur* case. It was also observed that it would have been possible to decide *Sartaj Kuari's* case differently if the theory had been accepted that impartibility, being a creature of custom, though incompatible with the right of partition, yet left the general law as to restraint against alienations as it was. Their Lordships consider that the judgment in *Baijnath's* case reaffirmed the earlier decisions of the Board as to succession to an impartible estate.

The question again arose, though in a different form, in *Protap Chandra Deo* v. *Jagadish Chandra Deo*[13] in 1927. In that case the last holder of an ancestral impartible estate died leaving a will whereby he bequeathed the Raj to the respondent. The case was on all fours with the *first Pittapur* case, where the right to alienate such an estate by will was recognised. But it was argued on behalf of the appellant that the will was inoperative, and this was put upon the ground that the judgments of the Board in *Sartaj Kuari's* case and the *first Pittapur* case had proceeded on the view that there was no co-ownership and therefore no right of survivorship in an impartible estate, that that view was inconsistent with *Baijnath's* case, which decided that there was a real right of survivorship and no right, therefore, to alienate by will, and that it was open to the Board to choose between the two lines of decision, and that the decision in *Baijnath's* case was correct in Hindu law. But the Board held that there was no inconsistency between the two lines of decisions, and the will was upheld.

The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the *Tipperah*[14] case: "Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case and the *first Pittapur* case; and so also the third as held in the *second Pittapur* case. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath's* case. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no evidence in this case of any such intention. The plaintiffs, therefore, have failed to prove separation, and the defendant is entitled to succeed to the impartible estate. Being entitled to the estate, he is also entitled to the improvements on the estate, being the immovable properties specified in items 9 to 19 of Schedule *Kha*. These improvements, in fact, form part of the impartible estate.

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[12] [1918] L. R. 45 I. A. 148

[13] L. R. 54 I. A. 289

[14] 12 Moo. I. A. 523 at 542

The second question is whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him. Questions of incorporation have been dealt with in several decisions of the Board, but the competency of incorporation was not challenged in any of them. The point, however, was raised in a Madras case which is referred to later. The question now under consideration embraces all other properties in dispute, and it is one of wide importance. It may be as well to consider first what was actually decided in the cases referred to.

The first of them is *Srimati Rani Parbati Kumari Debi* v. *Jagadish Chunder Dhadal*[15]. The contest there was a regards succession to an ancestral impartible estate and 4 *mouzahs* that had been purchased on behalf of the last holder out of the savings of the estate. It was contended that the *mouzahs* had been incorporated with the estate and therefore passed with the estate. It was in evidence that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate. In dealing with this part of the case, the Board said:—

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[15] [1902] L. R. 29 I. A. 83

> Their Lordships do not find in these meagre facts adequate grounds for holding that the Raja intended to incorporate the four *mouzahs* with the ancestral estate for the purposes of his succession. The four *mauzahs* must therefore follow the rule of the Mitakshara as to self-acquired property.

The next case is *Janki Pershad Singh* v. *Dwarka Pershad Singh*[16]. This was a case under the Oudh Estates Act, 1869. The properties alleged to have been incorporated were all immovable properties. In dealing with the question of incorporation, their Lordships said:—

> As has been pointed out by this Board in the case of *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhadal,* the question whether properties acquired by an owner become part of the ancestral estate for the purposes of his succession depends on his intention to incorporate the acquisitions with the original estate.

It was held upon the facts of the case that the evidence was not sufficient to establish such an intention.

Similar observations were made in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[17]. Here again the properties were immovable.

The last case cited before their Lordships was *Rani Jagadamba Kumari* v. *Wazir Narain Singh*[18]. In that case the properties alleged to have been incorporated consisted partly of movables and partly of immovables, and had all been acquired by the late Raja out of the income of the Raj. The facts relied upon to show that there was an intention to incorporate were not very different from those in the first case cited above. The High Court of Calcutta held that the whole of the property so acquired, except certain Government promissory notes, represented an accretion to the estate and descended with it. On appeal, the Board held that no part of the property constituted an accretion to the estate. Their Lordships observed that the income of an ancestral impartible estate was the absolute property of the owner of the estate, and not an accretion to the estate, as in the case of an ordinary joint family estate. Referring to the judgment of the High Court, the Board said:—

> It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the *corpus,* forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of the joint family property; but no such considerations necessarily apply to the income from impartible property . Whether it be possible in any circumstances to treat movable property as an accretion to a landed estate of this character is a matter not arising for decision In both *Janki Pershad Singh* v. *Dwarka Pershad Singh* and *Murtaza Husain Khan* v. *Mohomed Yasin Ali Khan,* the addition of family property to the original raj is considered. Both these cases dealt with property other than movable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired pro-

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[16] [1913] L. R. 40 I. A. 170

[17] [1916] L. R. 43 I. A. 269, 281-282

[18] [1923] L. R. 50 I. A. 1

perties, whether the *mauzas*, mortgages or other personal estate, as part of the original Raj.

The actual point of the decision in the above case was that where the estate is impartible, no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does not decide that if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property.

The power of incorporation now under consideration has also been recognised in several cases in India: *Lakshmipattu* v. *Kandasami*[19]; *Ramasami* v. *Sundaralingasami*[20]; *Sabajit Partap* v. *Indarjit Pertap*[21]; *Gurusami* v. *Pandia Chinna*[22]. The first of these cases was decided in 1893.

The arguments advanced on behalf of the plaintiffs may now be considered. First, it was said that the estate in this case is one of the estates within Bengal Regulations 11 of 1793 and 10 of 1800, and that there are indications in those Regulations that no addition could be made to those estates. Their Lordships think that neither of these Regulations contains any such indication.

Next, it was argued that there was no principle of law on which the power to incorporate could be supported.

The Mitakshara recognises two modes of devolution according to the nature of the property. Ancestral or joint family property devolves by survivorship; self-acquired property descends to the heirs of the last owner in the order prescribed by the law. The Hindu law, however, enables persons governed by that law to alter the course of devolution of their property from one channel into another by declaring, expressly or impliedly, their intention to do so. Thus, if a member of a joint family declares his intention to separate from the other members, there is, as already stated, an immediate separation, and his undivided interest in the joint family property will on his death pass not to the surviving members of the family, but to his heirs. Similarly, a Hindu possessing self-acquired property may incorporate it with the joint family property, in which case it will pass on his death not to his heirs, but to the surviving members of the family. The material text of the Mitakshara on this subject is as follows:—"Among unseparated brothers, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place: and a double share is not allotted to the acquirer" (Mit., ch. i. sec. 4, verse 31). This verse means that if a member of a joint family augments joint family property, whatever may be the mode of augmentation, the property which goes to augment the joint family property becomes part of the joint family property, and he is entitled on a partition to an equal share with the other members of the family, and not to a double share as in some other cases dealt with in the preceding verses. This is the verse on which the whole doctrine of merger of estates by the blending of income is founded: *Gooro*-

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[19] [1893] 16 Mad. 54

[20] [1894] 17 Mad. 22 at 444

[21] [1905] 27 All. 203

[22] [1921] 44 Mad. 1

churn Doss v. *Goluckmoney Dossee*[23].

If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property: *Rajani Kanta Pal* v. *Joga Mohan Pal*[24]. But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartible estate mixes the income of his self-acquired property with the income of the estate. Blending of income, however, is not the only mode of indicating the intention to incorporate. A member of a joint family may possess self-acquired property which yields no income for the time being, as where it is land not yet brought into cultivation. If he desires to incorporate such property with the joint family property, it may be done by declaring, expressly or impliedly, his intention to do so. The crucial test in all such cases is intention, and the intention may be expressed by the blending of income or in some other way. On the same principle a member of a joint family, who is the holder of an ancestral impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate; by so doing he expresses his intention to alter the course of devolution of the self-acquired property. This, their Lordships think, he is entitled to do, though the ancestral estate is impartible. All that can be said against it is that he may alienate the self-acquired property the moment after the declaration of his intention to incorporate. It is true that he can alienate the property, but that is not because the property still retains the character of self-acquired property, but because on incorporation with the impartible estate it is impressed with all the incidents of that estate, one of which is that he can alienate it at his pleasure. The mere fact, however, that he may alienate the property after incorporation does not conclude the matter, for he may not alienate it at all. Surely, then the property will pass not as his separate property, but by survivorship as joint property—devolution by survivorship being another incident of an impartible estate. The fact is that when self-acquired property is incorporated with an ordinary joint family estate, the property so incorporated is impressed with all the incidents which attach to an ordinary joint family estate; and when self-acquired property is incorporated with an ancestral impartible estate, the property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate. The mere possibility, therefore, of the holder alienating the property after incorporation is no reason for denying to him the power which the Hindu law gives him of changing the mode of descent to his property. Nor is there anything in that rule of law which is inconsistent with the custom of impartibility. Apart, therefore, from the question of succession by primogeniture presently to be considered, their Lordships are of opinion that the holder of an impartible estate is entitled to incorporate other properties belonging to him with that estate.

Lastly, it was argued that the holder of an impartible estate cannot so incorporate his self-acquisitions with the estate as to make them inheritable by the rule of primogeniture. In support of this argument two passages were cited from the *Tagore case*[25], namely, (1) "A private individual, who

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[23] [1843] 1 Fulton 165 at 173-174

[24] [1923] L. R. 50 I. A. 173 at 178

[25] L. R. Sup., Vol. 47 at 65

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attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and the gift must fail, and the inheritance takes place as the law directs"; and, (2), "Upon this point it is unnecessary to repeat what has already been said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, differing from that described by the law of the land." Reliance was also placed upon a passage in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*[26], which is as follows:—"The Crown has in British India power to grant or to transfer lands, and by the grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon such lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case." In that case a *taluq* had been granted by the Crown to a Hindu under a *sanad*, subject to descent by primogeniture, and it was held that the grantee could not incorporate other lands with lands comprised in the *taluq*. This decision was followed in a recent case, *Nawab Mirza Mohammad* v. *Nawab Fakr Jahan Begam*[27].

On the authority of the above rulings it was argued that to allow the holder of an impartible Raj to incorporate his self-acquisitions with the Raj would be to allow him to impose upon the self-acquisitions a line of descent at variance with the ordinary law applicable to his case. Their Lordships do not think that the principle of the above decisions applies to the present case. The Raj has not been granted by the Crown, nor has any line of descent been prescribed by any *sanad*. It is an ancient ancestral estate. It is impartible by custom. It descends by the rule of primogeniture by a family custom. The family is joint. The parties are governed by the Mitakshara School of Hindu law. Under that law ancestral property devolves by survivorship to all surviving members of the joint family. In the present case the estate devolves not on all, but only on one member of the family, and that is by virtue of the family custom.

A Hindu family, no doubt, cannot by agreement between its members make a custom for itself of succession to family property at variance with the ordinary law. But where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law. The rule of succession in such a case is recognised by the State as part of the law of the family, though it is no more than the result of a course of conduct of individual subjects of the State constituting the family. "Under the Hindu system of law, clear proof of usage," even if it be a family usage, "will outweigh the written text of the law": *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*[28].

Had the Raj been an estate granted by the Crown under a *sanad* subject to descent by primogeniture, as was the *taluq* in the *Rajendra Bahadur* case, the boundaries as defined by the *sanad* could not have been enlarged by any Raja, nor could he have added other properties to it so as to make them descendable by the rule of primogeniture. But the Raj here is not held under any *sanad*. It is impartible by custom, and it descends by primogeniture by custom. The boundaries, therefore, of such an estate, if they could be circumscribed at all, could only be circumscribed by statute or custom. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom. There is no question of any statute here. Nor is there any evidence of any custom excluding such a power. If so, there is no reason why the Raja could not enlarge the Raj by adding other properties to it. He is not by so doing creating another and a separate estate distinct from the Raj itself. He is not assuming to legislate, nor is he creating another Jheria Raj or any other Raj. If other properties are added to the Raj estate, they will not form a new estate, but will be an accretion to the Raj estate, and will pass, on the death intestate of the last holder, as one entity with that estate. To such a case the rule in the *Tagore* case does not apply nor the rule in *Rajendra Bahadur's* case. A similar conclusion was reached by the High Court of Madras in *Gurusami* v. *Pandia Chinna* already referred to.

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[26] [1918] L. R. 45 I. A. 134, 143

[27] P. C. Appeals Nos. 131 and 132 of 1929

[28] [1868] 12 Moo. I. A. 397 at 436

None of these considerations, however, apply to movable property. Such property, their Lordships think, cannot form an accretion to an ancestral impartible estate. The income even of such an estate is not an accretion to the estate. As was said by the Board in *Jagadamba Kumari* v. *Narain Singh* (*supra*), "the income when received is the absolute property of the owner of the impartible estate." It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate.

The conclusion to which their Lordships have come on this part of the case is that while immovable property can be incorporated with an impartible estate, movable property cannot.

This leads to the consideration of the third question, whether there was an incorporation in fact. The movables having been excluded, the enquiry under this head is confined to immovable properties only. These are properties that were acquired by Raja Rash Behari Lal and Raja Jaymangal, being items 2 to 7 of Schedule *ka*, and those acquired by the late Raja, being items 1 to 8 of Schedule *kha*.

Considerable evidence, both oral and documentary, was produced before the Subordinate Judge on this part of the case. The defendant also relied upon the will of the late Raja as evidence of past incorporation. Both the Courts in India held that there was no indication in the will of any past incorporation. The Subordinate Judge held upon other evidence in the case that items 2 to 7 of Schedule *ka* were incorporated with the estate, and awarded them to the defendant. The High Court found that item 2 only was incorporated, but items 3 to 7 were not. These they awarded to the defendant upon other grounds already stated. Those are legal grounds founded upon facts unconnected with incorporation. In the view which their Lordships take of this branch of the case, it is unnecessary to consider whether they are good grounds. All that their Lordships need say is that they are highly debatable grounds.

Both Courts concurred in holding that items 1 to 8 of Schedule *kha* were not incorporated with the estate, and they awarded them to the plaintiffs.

It was argued on behalf of the defendant before their Lordships that the will contained unmistakable indications of a past incorporation with the impartible estate of all immovable properties which the late Raja possessed at the date of the will, and reliance was placed on the second paragraph of the will. That paragraph is in these terms:—

> The entire Parganas, Jheria and Jainagar, in the district of Manbhum, are my ancestral *zamindaries* in respect of which revenue is payable to Government, and besides these I have other immovable properties in Manbhum and other districts. Whoever will be my heir on my death, shall get the said properties, and it is not necessary to make any direction with regard to them. But six annas of the diamonds and other jewelleries, gold and silver, etc., mentioned in the schedule hereto, which I have, and those which I shall purchase hereafter besides these, and all cash moneys, notes, gold and silver, etc., which will be there in my own *Tehbil* or in the Bank of Bengal or any other bank at the time of my death, shall form part of my *zamindary*, and whoever will get the *zemindary* at any time shall possess and enjoy the same, and my wives (those who will be living at the time of my death) shall get the remaining ten annas of the said diamonds, and other jewelleries, the notes, cash moneys, silver and gold, etc., in equal shares, and they shall have absolute right of ownership thereto, that is to say, they shall be competent to give away and sell the same at their pleasure and no one shall ever be competent to object thereto.

The opening sentence of the above passage relates to the Jheria Raj and other immovable properties. As to all these the Raja says, "Whoever will be my heir on my death shall get the said properties, and it is not necessary to make any direction with regard to them." He then goes on to say: "*But* six annas of the diamonds and other jewelleries," etc. In other words, as their Lordships read it, the Raja says that it is not necessary to give any testamentary directions as to the immovable properties: they will go as a matter of course to the next heir to the Raj; *but* it is necessary to give such directions as to diamonds and other jewellery, etc. This, their Lordships think, is the only reasonable interpretation that can be put upon those words. They indicate that the Raja had, before he made this document, treated the immovable properties as part of the Raj. The word "but" brings into contrast the immovable properties, as to which he says it is not necessary to give any directions, with diamonds and other jewellery, as to which he proceeds to give testamentary directions. The words "shall get the said properties" in this part of the document are not, in their Lordships' view, words of disposition; they are equivalent to "will get the said properties." The only inference that can be drawn from this part of the document is that the Raja had treated the immovable properties which he then possessed as part of the Raj and that they were incorporated with the Raj estate. Their Lordships may add, to prevent any misconception, that had they considered on the construction of the document that the passage relating to immovable properties contained a testamentary disposition of those properties, their Lordships could not have given any effect to it, as the document has not been proved as a will.

For the reasons stated above, their Lordships are of opinion that the defendant is entitled not only to items 2 to 7 of Schedule *ka*, but also to items 1 to 8 of Schedule *kha*, and that the Courts in India were wrong in rejecting his claim as to the latter items.

The Hight Court by its decree has directed an enquiry as to whether the late Raja left any other immovable properties acquired by him, and ordered that if any such be found, the defendant should deliver them to the plaintiffs. In view of the opinion already expressed by their Lordships and having regard to the terms of the will, this part of the decree must be varied by declaring that such of these properties as might have been acquired by the late Raja on or before the date of the will will pass to the defendant, but those acquired after that date will pass to the plaintiffs, unless it is shown by the defendant that they were added by the late Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant.

Their Lordships will now turn to the subsidiary questions raised by the defendant in regard to movables and to accounts.

The defendant recovered after the death of the late Raja rents, royalties and other monies that had accrued due to the Raja in his lifetime. The decree of the Subordinate Judge is silent as to these items. The High Court, on appeal, awarded them to the plaintiffs. As to these items, the defendant urged before their Lordships that no claim for them was made in the plaint, and that even if it was, the Court of the Subordinate Judge who tried the case had no jurisdiction to entertain the claim. On the question of jurisdiction it was argued that the suit was essentially one for the recovery of immovable property within the meaning of Section 16 of the Code of Civil Procedure, and that no cause of action in respect of the rents, royalties and other monies could be joined with a claim for such property without the leave of the Court in view of the provisions of Order 2, Rule 4, of Schedule I to the Code. The material part of that rule is as follows: "No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except . . . (c) claims in which the relief sought is based on the same cause of action."

Their Lordships think that both these contentions must fail. The claim is sufficiently covered by the plaint, and it was fully considered by the High Court. As to jurisdiction, their Lordships are of opinion that the cause of action in respect of the rents, royalties and other items was the same as that in respect of the immovable properties, namely, wrongful withholding of possession by the defendant, and that the case falls under clause (*c*) of rule 4.

One other matter on which there is controversy between the parties is as to an item of Rs.48,249-3-9, alleged to have been paid by the defendant to the plaintiffs at the time of the execution of the *bantannamas.* The *bantannamas* were executed on August 5, 1916. Two schedules are attached to each *bantannama,* Schedule I purporting to be a list of jewellery, cash and deposits in banks left by the late Raja, and Schedule 2 showing the shares allotted to each party. All three *bantannamas,* including the schedules, are similar in terms. It appears from Schedule 2 that eight items of jewellery, Rs.448,400-4-0 out of the deposits in banks, and Rs.112,249-3-9 out of the cash were allotted to the plaintiffs. From the last item a sum of Rs.64,000 was deducted, which left

Rs.48,249-3-9 to be paid to the plaintiffs, and it is this item which is now in dispute. As to the Rs.64,000, it was stated in the *bantannamas* that this money was in a safe which was in the possession of the plaintiffs, and that it had been agreed between the parties that the plaintiff should retain it and that it should be deducted out of the plaintiffs' share in the cash. As to the deposits, it was arranged that they should be divided when received from the banks.

The defendant alleged that the jewellery that came to the plaintiffs' share was made over to them in the morning of August 5, 1916, and that the sum of Rs.48,249|3|9 was paid to them in the evening of that day. The plaintiffs denied receipt of any jewellery or cash. They also denied that the safe contained Rs.64,000 or any other sum. A vast mass of evidence, both oral and documentary, was recorded by the Subordinate Judge on this branch of the case. The Subordinate Judge prefaces his judgment by characterising all oral evidence in the case as "untruthful or biased," except the evidence of Colonel Brown, who, however, did not depose to any of the facts now in dispute. The Subordinate Judge then says: "I shall not rely upon oral evidence unless it is corroborated by documentary evidence, or unless under the circumstances disclosed in the particular matter under investigation it seems to be natural and probable." He found that no jewellery was given to the plaintiffs nor was there any sum of Rs.64,000 in the safe, as alleged by the defendant. As to the item of Rs.48,249-3-9, however, he found that it was paid to the plaintiffs. On appeal, the High Court, while agreeing with the Subordinate Judge as to the findings in respect of jewellery and Rs.64,000, differed from him on the finding as to the Rs.48,249-3-9, and found that the amount was not paid. The defendant contends that this finding of the High Court is erroneous.

It is in evidence that the *bantannamas* were executed by the plaintiffs behind a *purdah* in a room in the *Andar-mehal,* and that the only person amongst those present who had access to the plaintiffs was Pran Krishna, a brother-in-law of the second plaintiff. The defendant's case is that Rs.48,000 was paid in currency notes of Rs.1,000 each, and that the balance of Rs.249-3-9 was paid partly in small notes and partly in cash, that he gave the notes and the cash to Pran Krishna, when the *bantannamas* were executed, for payment to the plaintiffs, and that Pran Krishna paid the whole amount to the plaintiffs behind the *purdah.* Pran Krishna was not called as a witness; nor is the fact of payment endorsed by the Sub-Registrar, who was present at the time, on the *bantannamas,* probably because the money was not paid in his presence, nor was any admission of receipt of consideration made in his presence.

It has been the practice of this Raj for several years past to keep a register of currency notes. This register contains entries of notes with their numbers received by the Raja from banks against cheques drawn by him, and entries also of payment out of notes and their numbers. The entries in the register relating to the 48 notes alleged to have been handed over to the plaintiffs were exhibited at the trial of the case.

It appears that certain properties belonging to one Sinha had been sold in execution of a mortgage decree obtained by T. Lal and S. Lal

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against him in the Court at Bhagalpur. The mortgagor raised money by selling the properties to Thakur Prasad, a son of a sister of the third plaintiff. The sale deed was executed on October 26, 1916, and the purchase money, which consisted of currency notes, was paid to the pleader of the decree-holders. These notes were sent by the decree-holders to the Benares Bank at Bhagalpur and they were credited to their account with the bank. It appears from the register of the bank that 26 of these notes bear the same numbers as 26 out of the 48 notes in the Raja's register. The halves of five of these notes, which are preserved in the Currency Office, purport to bear the signature of the third plaintiff on the back. It was admitted by the first plaintiff, who was examined on commission, that the third plaintiff sent a lac of rupees in currency notes with a messenger from Jheria for payment of the purchase money on behalf of Thakur Prasad. Behari Lal De, a *Tehsildar* in the employ of the Jheria Raj, deposed that the signature on each of the five halves was the signature of the third plaintiff. The third plaintiff did not give evidence in the case.

The plaintiffs being *Purdahnashin* ladies, the onus was on the defendant to prove the payment, but the identity of 26 notes having been established, and the signature on five of them having been sworn to as being the signature of the third plaintiff, the burden shifted upon the plaintiffs, and it was then for them to show that these notes came into the hands of the third plaintiff, not in the way alleged by the defendant, but in some other way, and that the signature on the five notes was not her signature. But no adequate explanation is forthcoming as to the identity of the notes, nor is there any denial of the signatures by the third plaintiff. It appears to their Lordships that the evidence of the *Tehsildar,* standing uncontradicted as it does, is fatal to the plaintiffs' case. The only criticism made against it was that he, having admitted that he had never seen the plaintiffs in the *Andar-mehal,* could not have seen the third plaintiff sign, and he could not therefore know her signature. But a signature may be proved in other ways, and that is what was done in this case. As to the identity of the notes, it was argued that the share of the third plaintiff being one-third, she could not have received, even if the 48 notes had been handed over to the plaintiffs, more than 16 notes, while the notes alleged to bear the same numbers were no less than 26. As against that, however, there is this fact, that no less than five halves have been deposed to as bearing her signature, and she has not denied her signature. It was also urged, on the strength of the evidence of the first plaintiff and that of Mukhdeshwar Baral, a Mohurrir, that the plaintiffs used to get from the Raja's treasury large notes in exchange for small notes, and small notes in exchange for large notes. But there is no evidence that any of the notes which bear the signature of the third plaintiff were so obtained. In fact, the plaintiffs are confronted at every point of their case with the signature of the third plaintiff on the five halves. Such being the evidence, their Lordships find themselves unable to agree with the finding of the High Court as to the item of Rs.48,249-3-9, and they agree with the Subordinate Judge that the amount must be taken to have been paid.

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The defendant also claims credit for the expenses of the funeral and *sradh* ceremonies of the late Raja and for all monies paid by him to the plaintiffs since the death of the Raja. Particulars of this claim appear in part in paragraph XIX of the petition for leave to appeal to His Majesty in Council, and more fully in ground No. 30 of the grounds of appeal. Ground No. 30 is in these terms:—

> For that in any case this Honourable Court should have held that the defendant is entitled to get credit for the expenses of the funeral and *Sradh* of late Raja Durga Prasad Singh and for all his debts and liabilities paid by him and also for all monies paid to the plaintiffs in cash since the death of their husband under whatever denomination such payments may have been made, including the sum of Rs.50,000 paid on March 16, 1920, and the aggregate sum of Rs.44,000 (made up of Rs.900) a month paid from August 5, 1916, to the middle of October, 1916, and Rs.1,500 a month paid from January 28, 1920, to March 27, 1921.

This was also a ground of appeal to the High Court. The High Court allowed the defendant's claim in respect of the debts and liabilities of the late Raja, but no directions have been given in respect of the other claims.

As to the expenses of the funeral and *sradh* ceremonies, the defendant contended before their Lordships that if the movables left by the late Raja were awarded to the plaintiffs, those expenses should be borne by them. On the other hand, it was urged for the plaintiffs that if the defendant's claim to succeed to the Raj was allowed, he as the successor to the Raj was bound by custom to perform those ceremonies. These are questions of fact on which no evidence appears to have been led by the defendant before the trial Judge. Their Lordships are therefore unable to entertain this claim at this stage.

The facts as to the defendant's claim for monies alleged to have been paid by him to the plaintiffs appear to be as follows:—Shortly after the institution of this suit the plaintiffs applied for the appointment of a receiver. The application terminated in a compromise, and on January 28, 1920, the parties filed a petition containing the terms of the compromise. Paragraph 4 of the petition is as follows:—

> Defendant to pay month by month to each of the plaintiffs Rs.500 (Rupees five hundred) on account of maintenance from the date hereof. This without prejudice to the rights of the parties as to the amount of maintenance or otherwise *which may be ultimately payable to the plaintiffs.*

Paragraph 9 is in these terms:—

> The defendant will advance to the plaintiffs Rupees two lacs and fifty thousand out of the money withdrawn by him from the Bank of Bengal in part payment of their dues. Defendant will further pay to the plaintiffs a further sum of Rupees fifty thousand on account of arrears of maintenance, but it is expressly agreed between the parties that this amount will be subject to adjustment *when and if the rate of maintenance is ascertained by Court.*

The decree of the Subordinate Judge directs that credit should be given to the defendant for Rs.2,50,000, but no directions are given in the decree either of the Subordinate Judge or of the High Court in regard to the item of Rs.50,000 or the payments alleged to have been made by the defendant of Rs.300 per month to each plaintiff under the terms of the *bantannamas* or of Rs.500 per month under the terms of the compromise.

It is clear that the *bantannamas* having been set aside, the defendant is entitled *prima facie* to a refund of all payments made by him under them. It appears, however, from the judgment of the High Court that the plaintiffs applied to the Court to remand the case to the trial Judge to determine what maintenance they were entitled to, but the defendant objected on the ground that the plaintiffs could not have both the property and maintenance, and the High Court refuse to direct any inquiry and left the question of maintenance to be decided in a separate suit.

It does not appear, at least from the judgment, that the defendant at that time asked the High Court to make any order as regards the payments alleged to have been made by him to the plaintiffs. It may be that the High Court intended to leave this question also open. However that may be, their Lordships see no reason why the defendant's claim should not be considered in the present proceedings, and why, if the plaintiff's claim maintenance in addition to the properties awarded to them, their case also should not be considered together with the plaintiffs' claim. A separate suit would involve a repetition of a good many facts already recorded in this suit.

The only question that remains to be considered is as to some of the movables, being the furniture, furnishings and equipments of the palace and other buildings situated in the Manbhum district and elsewhere. The Subordinate Judge, as already stated, awarded to the defendant the furniture in the *cutcherries* and four other buildings on the ground that "they would follow the estate." This decision was affirmed by the High Court on appeal. As regards sub-items 24 to 83 of item 20 of schedule *kha,* the Subordinate Judge awarded the greater part thereof to the plaintiffs. This part of the decree was varied by the High Court to some extent. No reasons are given by either Court in support of its view.

The claim made by the defendant to the movables on the ground that they were incorporated with the impartible estate has failed; and so also the claim based on the ground that all property, whether movable or immovable, left by the last holder passed to the next succeeding Raja by a family custom. The defendant having failed on both these grounds, the movables in question should pass to the plaintiffs in the ordinary course of succession, unless the defendant can establish his claim to them on some other ground. The only ground urged on his behalf was that the very conception of a Raj involved that the Raj should carry with it all such furniture, furnishings and equipments as were necessary for the support of the dignity of the Raja and the gaddi and such as were provided for use and service with the palace and the land and buildings connected with it. Their Lordships are unable to adopt this view. The question is purely one of fact, and there is no evidence on the record to support the claim. The claim could possibly have been founded on custom, but no such custom was alleged or proved. Their Lordships think that the Courts in India were wrong in awarding any of the furniture, furnishings and equipments to the defendant, and that they should all pass to the plaintiffs.

In the result, their Lordships will humbly advise His Majesty that the appeals preferred both by the plaintiffs (No. 79 of 1925) and by the defendant (Nos. 71 and 72 of 1925) should be allowed in part, and that the decree of the High Court be affirmed subject to the following directions and modifications:—

(1) That it should be declared that the defendant, and not the plaintiffs, is entitled to the immovable properties specified in items 1 to 8 of Schedule *kha* annexed to the decree of the Subordinate Judge.

(2) That it should be declared that if as a result of the inquiry directed by the High Court by their decree it be found that Raja Durga Prasad left any immovable properties other than those specified in Schedules *ka* and *kha* annexed to the decree of the Subordinate Judge, the defendant shall be entitled to such of them as were acquired on or before the date of the Raja's will dated August 27, 1915, and that the plaintiffs shall be entitled to such of them as were acquired after that date, unless it is shown by the defendant that they were added by the Raja to the impartible estate with the intention of incorporating them with that estate, in which case such of them as were so added will pass to the defendant; and that there should be an inquiry to ascertain whether any of them were so incorporated.

(3) That it should be declared that the defendant is entitled to credit for Rs.48,249-3-9, with interest thereon at the rate of 6 per cent per annum from August 5, 1916, and that this amount should be deducted from the amount payable by the defendant to the plaintiffs as provided by the decree of the Subordinate Judge.

(4) That it should be declared that the plaintiffs are entitled to all the furniture, furnishings and equipments left by Raja Durga Prasad, and that the defendant should be directed to deliver them to the plaintiffs, or to pay the value thereof as determined by the High Court.

(5) That the case be remitted to the High Court.

(*i*) To inquire into and determine the matters specified in clause (2) above;

(*ii*) To determine whether the defendant is entitled to credit for the amounts, or any of them, alleged to have been paid by him to the plaintiffs, and referred to in ground No. 30 of the grounds of appeal in his petition (No. 71 of 1925) for leave to appeal to His Majesty in Council (other than the expenses of the funeral and *sradh* ceremonies of Raja Durga Prasad), and to determine also any claim that may be made by the plaintiffs in respect of maintenance; and

(*iii*) To give effect to the above declarations and directions.

The plaintiffs will pay one-third of the defendant's costs of all the three appeals. The costs of further proceedings in India will be dealt with by the High Court.

On November 2, 1922, an Order in Council was made disposing of two appeals, being appeals Nos. 2 and 3 of 1922, preferred by the defendant from an order of the High Court dated February 9, 1922. As to the costs of these two appeals, liberty was reserved to the parties to apply to His Majesty in Council after the determination of the appeals from the decree of the Subordinate Judge which were then pending in the High Court. The plaintiffs will also pay one-third of the defendant's costs of those appeals.

Appeal allowed in part.

Stanley, Johnson and Allen—Solicitors for the appellant.
Watkins and Hunter—Solicitors for the respondents.

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HIGH COURT

BHOLA UMAR AND AFTER HIS DEATH MT. PURKI (*Defendant*)
versus
KAUSILLA AND OTHERS (*Plaintiffs*)*

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July 8
SULAIMAN, C. J.
MUKERJI, J.
KING, J.

Hindu Widow's Remarriage Act (XV of 1856), Sec. 2—Meaning and scope of—Widow remarrying in accordance with custom of her caste—No forfeiture of her rights in the estate of her first husband—Hindu Law—Widow Remarriage—Mere proof of custom—Insufficient to involve forfeiture—Proof of custom of such forfeiture necessary.

Section 2 of the Hindu Widows' Remarriage Act (XV of 1856) does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture of the Hindu widow's estate on remarriage under the Act in such a case.

The proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu Law. It would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency. *Har Saran* v. *Nandi,* I. L. R. 11 All. 330, *Matungini Gupta* v. *Ram Rutton Roy,* I. L. R. 19 Cal. 289, *Ganga Pershad Sahu* v. *Jhalo,* I. L. R. 38 Cal. 862, *Vithu* v. *Gobinda,* I. L. R. 22 Bom. 321, *Vitta* v. *Chatakondu,* I. L. R. 41 Mad. 1078, *Mt. Parji* v. *Mangta,* 1930 A. I. R. Lah. 1028 and *Santla Bewa* v. *Badaswari Dasi,* I. L. R. 50 Cal. 727 *referred to* and *discussed* by MUKERJI, J.

FIRST APPEAL from a decree of BABU CHATUR BEHARILAL, First Additional Subordinate Judge of Jaunpur.

The following is the Referring Order:—

PULLAN AND NIAMATULLAH, JJ.—The principal plaintiff in this suit is Mst. Kausilla, a Hindu widow of the Umar Bania caste, who has contracted a second marriage. She sued to recover the property of her first husband from the possession of members of her first husband's family, and her suit has been decreed on the basis of a long course of rulings by Division Benches of this Court commencing with the case reported in 11 All. 300, *Har Saran Das* v. *Nandi.* The view taken in that judgment was that Act XV of 1856, the Hindu Widow Remarriage Act, was not intended to place under disability persons who could remarry a second time before the Act was passed, and consequently a widow who did not by any custom forfeit her interest in her first husband's property by remarriage before the passing of the Act was not affected by the operation of the Act. This judgment was followed in the case of *Ranjit* v. *Radha Rani,* reported in 20 All. 476, and in that judgment reference is made to other decisions which have been unreported, and a reported case, *Dharam Das* v. *Nand Lal Singh* in Weekly Notes, 1889, p. 78. The Judges in the case of *Ranjit* v. *Radha* accepted the view of law stated in the earlier cases, and held that those decisions formed a consistent *cursus curiae* of the Court. From that time onwards this High Court has followed on the lines laid down in that judgment, and on at least two occasions a Division Bench has refused to refer the matter to a larger Bench on the ground that it was proper to abide by the previous decisions of this Court. One of us was a member of a Bench which received such an application in the case of a second appeal *Mangat* v. *Bharto*, reported in 49 All. 203. It is true that this has been the position taken by several Benches of this Court during a long period of years, but at least three Judges have indicated that they are personally not in agreement with the view of law taken by the Allahabad High Court, and prefer the view taken by the Full Benches of the Bombay, Madras and Calcutta High Courts which are directly opposed to the view taken by this Court. This Bench is of the opinion that if the Allahabad view is to be maintained it should at least have the support of a reasoned judgment of a Full Bench considering the law as laid down in the Full Bench decisions of the other High Courts, and we do not think that we should adhere so rigidly to the principle of *stare decisis* that we should close our eyes to the decisions of all other High Courts in India which interpret an Act of the legislature in a contrary sense to that adopted previously by this Court.

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*F. A. 523 of 1928

We accordingly recommend to the Hon'ble the Chief Justice that this appeal may be laid before a larger Bench for determination of the following question:—

Does a Hindu widow who remarries in accordance with a custom of her caste forfeit thereby her rights in the estate of her first husband?

B. E. O'Conor and *Ram Nama Prasad* for the appellant.

P. L. Banerji, R. K. Malaviya, Shiva Prasad Sinha, Kedar Nath Sinha and *Lakshmi Saran* for the respondents.

The following judgments were delivered:—

Sulaiman, C. J.

SULAIMAN, C. J.—There has undoubtedly been considerable controversy as to whether Act XV of 1856 was applicable to all Hindu widows or not. The Allahabad High Court from the very beginning has laid down that the Act does not apply to such Hindu widows as were entitled under their custom to remarry and who were not bound to take advantage of the Act. Opinion in the other High Courts has considerably varied, and the Allahabad view has been openly dissented from. But it appears that with the lapse of time opinion in the other High Courts, particularly the Madras High Court, has come round towards the view of this Court, at least so far as the applicability of the Act is concerned.

The Judges who have held that all widows are governed by the provisions of Section 2 of the Act, have based their view on the wide language of that section. It reads:

> All rights and interests which any widow may have in her deceased husband's property shall upon her remarriage cease and determine as if she had then died.

If the section were to be taken in its widest scope, it would have to be conceded that the provision of law applies to any widow whatsoever. It would then include not only all Hindu widows, but even Christian and Muslim widows. Such a construction of the section would lead to

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absurdity. It is, therefore, impossible to say that Section 2 of the Act can be interpreted without reference to the other provisions of the Act and without reference to the preamble. Were it possible to interpret Section 2 standing by itself and independently of everything else, there might have been some force in saying that it applied to all Hindu widows. But we are forced to restrict its scope so as to exclude at least Christian, Muslim, Parsi or Buddhist widows. In order, therefore, to find out the true scope of the section, one is compelled to look to the provisions of that Act contained in Section 1, as well as to the preamble. No doubt a preamble can never control or restrict the substantive provisions of an Act. It merely supplies a key to the interpretation of those sections. But where there is an ambiguity in the sections or where there is any doubt as to the true scope of the provisions of that enactment, the preamble may be of some guidance.

The Act was professedly passed with the object of removing all legal obstacles to the marriage of Hindu widows. The preamble stated that it was known that Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting, whereas many Hindus believed that this imputed legal incapacity, although in accordance with established custom, was not in accordance with the precepts of their religion, and desired that the law should no longer prevent those Hindu widows who may be so minded from adopting a different custom. The Act was intended to relieve all such Hindus from this legal incapacity complained of and to remove all legal obstacles to the marriage of Hindu widows.

It is, therefore, obvious that the legislature recognised that there were certain exceptions to the general practice of widows not being allowed to remarry. Obviously the intention of the legislature was to remove the legal obstacles in the way of remarriage, and not to impose another penalty or restriction on those who did not stand in need of any legislation. It is, therefore, most unlikely that the legislature would have intended to deprive Hindu widows who by the custom of their caste were entitled to remarry and to retain the property of their husbands from holding the estate. The object of the Act professedly was to enable those widows, who were incapacitated from marrying, to remarry. But as it was considered that remarriage, where it is not allowed by custom, should not disturb the relations of the deceased husband or their estate, there was an express provision made in Section 2 that all their rights and interests in the deceased husband's property shall cease and determine.

The Allahabad High Court has accordingly held that the Act could never have been intended to apply and did not apply to those Hindu widows who by the custom of their caste had independently of the Act a right to remarry. The point does not appear to have been emphasised in any of the previous cases, nor does it appear to have been refuted in cases taking the contrary view, that there is no option but to restrict the scope of Section 2. That section cannot apply to all widows. It can only apply to a particular class of widows for whom the Act was intended. To ascertain that class one is compelled to look to the preamble, which shows that that class of widows consisted of those who were incapable of contracting a second valid marriage. This obstacle in their way was removed and their children were declared by enactment to be legitimate. The Act was intended to render remarriage valid and to legalise the legitimacy of children. It conferred a benefit on those who could not remarry, but at the same time imposed a restriction on them. It was not intended to deprive those, who already possessed the right to remarry, of whatever rights they enjoyed in their deceased husband's properties.

The cases of the various High Courts have been considered at length by Mukerji, J., and it is unnecessary for me to cover the same ground. The Madras High Court proceeded on an assumption of prevalence of a custom of forfeiture on remarriage which is not true so far as those provinces are concerned. In most cases where a custom of remarriage was established, the right to retain the estate was also put forward and upheld. Indeed no case has been brought to our notice where a custom to remarry was established and yet the widow was held not to be entitled to retain the estate of her deceased husband. The later view in Calcutta appears to be based more on the supposed principles of Hindu Law than on the provisions of the Act. In Madras, this is the opinion of the majority of the learned Judges in the Full Bench case of *Vitta Fayaramma* v. *Chatakondu Sivayya*[1]. But in these cases it was simply taken for granted that the Hindu law enforces a forfeiture of the estate, and there appears to be neither any elaborate discussion of the point, nor direct reference to any authorities. The main argument appears to be that because in the Hindu conception of marital relations a wife is considered to be half the body of her husband and the surviving widow remains that half, she cannot retain his estate after remarriage. There is also the supposition that a widow can hold the estate only till her widowhood, and as she ceases to be the surviving half of the body of her husband on her remarriage and cannot thereafter confer spiritual benefit on his soul, she must give up the estate. The notion that a widow is the surviving half of her deceased husband has been called by Sir Seshagari Iyer in the Full Bench of the Madras High Court referred to above as "picturesque metaphor". Certainly this principle is not the sole basis of her right to succession to his estate. Similarly when an unchaste widow, who could hardly be imagined to confer spiritual benefit on her deceased husband to whose marital relations she is disloyal, does not cease to hold the estate, the conferment of the spiritual benefit cannot be the indispensible condition for the retention of the estate. The question was thoroughly examined by their Lordships of the Privy Council in the leading case of *Moniram Kolita* v. *Keri Kolitani*[2] when considering the question of unchastity, their Lordships had to examine the text of Vrihat Manu and of Catyayana, two verses of which are as follows:—

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[1] I. L. R. 41 Mad. 1078

[2] I. L. R. 5 Cal. 776

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Sulaiman, C. J.

> (1) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share. (2) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.

Their Lordships distinctly ruled that these texts related to the right of succession to the estate and not to its retention, and that the conditions of "keeping unsullied her husband's bed", "preserving in religious observances" and "abiding with her venerable protector" were not conditions precedent to the continuance of the widow's estate, and that even if any or all of these conditions were broken, no forfeiture was involved. The right to hold the estate of her husband is based on distinct texts, and the notion of her being a half of her husband's body has in no text cited before us been made the sole basis for the continuance of her estate.

It is to be admitted that there is no express text which lays down that a forfeiture of the Hindu widow's estate will follow upon her remarriage; nor is there any text which expressly says that her right to hold the estate will terminate on her death or on remarriage. On the other hand, the verse of Catyayana quoted above allows her to enjoy the property until her death, and the heirs are to take it only after her. It has been suggested that the idea of a Hindu widow retaining her property is incompatible with the conception of Hindu Law. But when once the estate has vested in her, there can be no forfeiture unless there is a clear authority for that view, and forfeiture cannot be inferred because of some notional view deducible from some supposed principle underlying the Hindu law of succession. When it is now well settled that unchastity does not involve any forfeiture, it would *prima facie* follow that remarriage would not. It would be putting a premium on unchastity to hold that she can retain the property so long as she remains notoriously unchaste, but the moment she remarries she will forfeit it. The expression "widow's estate" is an English expression and does not imply that the estate continues so long as she continues to be a widow. In one sense she still remains the widow of her deceased husband, even after her remarriage. Th expression in Hindu Law for "widow's estate" is "stridhan", which would literally mean "woman's estate", and not necessarily widow's estate. It would be offering an inducement to a widow to be immoral if she were told that she would be in a worse position by validly remarrying than by living in open adultery. A change of religion like a discontinuance of chastity involves no forfeiture. There seems to be no good reason for holding that a remarriage recognised by law does so. In the absence of an express text, the Hindu law should be interpreted so as not to cause a shock to one's moral conscience. Obviously the strict Hindu law never contemplated a remarriage for the higher classes. The rules laid down, therefore, do not provide for remarriages. In the eye of the pure Hindu law remarriage was hardly anything better than concubinage. When remarriage was not recognized it was tantamount to unchastity. In this view of the matter her position should not be any worse than if she were unchaste. Undoubtedly the estate vests in her on the death of her separated husband dying issueless. The burden is on the party who alleges it to

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show that there is some well settled rule of law which divests her of her estate. In the absence of any authority to the contrary, her widow's estate must continue. If the Act does not apply, then her estate continues even though she remarries under the custom which allows it.

When nothing more than a mere custom of remarriage is established, there is no presumption that under the Hindu law she forfeits the estate. The party who is alleging that there has been a forfeiture must establish a further incident of the custom that forfeiture is a necessary consequence. Where such additional custom is established, she would of course lose the estate, if she were claiming it under the Act; and she would also lose it if she were claiming the right to remarry under the custom. But where nothing more is established than a mere right to remarry under a custom, it cannot be presumed that forfeiture is a necessary consequence. The burden to prove a custom involving forfeiture is on the party asserting it, and in the absence of such proof it must be held that she could remarry and retain the estate and would not forfeit it. Of course no custom can be established which would override the provisions of a statutory enactment, but where the Act does not apply at all, custom being a part of the Hindu law, must override the general principles of that law. But a party must go the whole length of proving the full custom on which he relies. By establishing only one part of it, he cannot ask the court to infer the other. I would, therefore, have no hesitation in saying that unless it is affirmatively established that in addition to the custom of remarriage there is the further custom of forfeiture of the husband's estate, she is entitled to retain the estate even after remarriage and till her death.

I should like to add that even if I had not been independently convinced of the correctness of the view which has prevailed in this Court, I would have felt bound by the long course of unanimous decisions which have been given here. So far as these provinces are concerned, people have acted upon the belief that in the absence of any custom to the contrary, a widow who is entitled to remarry under the custom of her caste, does not forfeit her estate. Many a title would be upset if this interpretation of the law were to be reversed. There must be many transferees of property who have purchased it in the expectation that their right would continue at least till the death of the widow, who would lose it by her voluntary act of remarriage. It would be extremely dangerous to shake the authority of long established decided cases of this Court, which not being manifestly erroneous, have stood for a long period of time unchallenged in this Court and have been always followed. Affecting rights in property they must be treated as having passed into the accepted law of these provinces. Of course where decisions are directly contrary to a statute, it is the duty of a Full Bench to overrule the precious decision even though they might have stood for a very long time. But where the Act is at least ambiguous and the Court does not feel absolutely able to overrule them, it would be unsafe to disturb the course of rulings. No doubt these decisions have been questioned in some of the other High Courts in India, but even there the opinion has varied and in recent times has been converging to the view taken in this

Court. The reversion of the estate on remarriage would alter the course of succession and would let the property go to a different individual. Many a reversioner must have refrained from suing immediately on her remarriage in the expectation that succession would open out later on her death. The rulings of this Court must have affected diverse contracts and dealings between man and man. On the principle of *stare decisis* it is our clear duty to adhere to those rulings so long as the legislature does not intervene or their Lordships of the Privy Council do not rule that they are wrong.

Sulaiman, C. J.

Mukerji, J.

MUKERJI, J.—The following point has been referred for decision to the Full Bench, namely:

> Does a Hindu widow who remarries in accordance with a custom of her caste forfeit thereby her rights in the estate of her first husband.

I take it that in this case the Hindu widow contracted a valid marriage and the marriage was in accordance with and recognised by her caste, and would be recognised by the Courts as a valid marriage.

The question put to us does not say whether we have to consider the question on the basis of Act XV of 1856 (The Hindu Widows' Remarriage Act) or whether we should consider it from the point of view of the Hindu law. In certain cases decided by Courts other than this Court, it has been held that where a Hindu widow remarries validly according to the custom of her caste, she does not forfeit her late husband's estate under the Act (Act XV of 1856) but she does forfeit it under the Hindu Law. As the question put to us is not restricted, we shall have to consider it from both points of view.

To start with, I proceed to consider the question with reference to Act XV of 1856. The Hindu Widows' Remarriage Act of 1856 contains a rather long preamble which indicates that conflicting opinions were held in Hindu society as to the validity of Hindu widows' marriage, and on account of there being some uncertainty about the view that might be taken in the Courts about the validity or otherwise of such marriages, the Governor-General in Council was approached to pass a law legalising such marriages. The preamble is rather long but is very important in order to find out whether the Act was meant or not to apply to the case of those Hindus among whom a custom sanctioned the validity of a widow marriage.

Before I read the preamble I must express my agreement with the opinion which has been expressed from time to time that if there be a conflict between the preamble and the Act itself, the preamble cannot govern the Act. In such cases of conflict, it must be taken that the Legislature in framing the Act has failed to achieve its object and therefore the language of the Act must prevail over the wishes of the Legislature, as expressed in the preamble. As an example I may cite the case of the Mohammadan Waqf Act of 1916 in which there was a conflict between the preamble and the Act; the preamble professed to give the waqf a retrospective effect but the body of the Act failed to convey that idea and it was held that in spite of the preamble, the Act had no retrospective effect. The preamble runs thus:—

> Whereas it is known that, by the law as administered in the Civil Courts as established in the territories in the possession and under the Government

> of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the off-springs of such widws by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the Civil Law administered by the courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted as follows:

The preamble notes that there are certain exceptions to the rule that the marriages of Hindu widows were held to be illegal and not sanctioned by the Shastras. The preamble then says that it is just to relieve "all such Hindus from this legal incapacity of which they complain" and the Act proceeds to remove the legal obstacles to the marriages of Hindu widows. It is clear therefore that the Legislature wanted to give relief only to such Hindus as complained of their incapacity to contract for their widows a marriage. The Act therefore is an enabling Act and was never meant to create a disability where none existed. But, as I have said, if the body of the Act does create a disability which may not have been intended, that disability will have to be recognised.

Now let us read the Act itself.

The first section legalises the marriages of Hindu widows. It is in most general terms and nothing turns upon the language of this section. The section mentions the history of the Legislation by pointing out that certain Hindus did hold that a widow marriage was against the true interpretation of Hindu Law, while others held that it was in accordance with Hindu Law.

The second section is in most general language and lays down that whenever a widow contracts a second marriage she would forfeit all her right to maintenance or inheritance from or in her late husband's property. If this section were read literally, it would apply to widows who were not Hindus but were Mohammedans or Christians, in fact, to all widows within British India. This could hardly have been intended and therefore this section must be read as being controlled by the preamble. If we have once to bring in the preamble to read the section, should we not see what was the object of the Act as expressed in the preamble? The preamble recognised that there are exceptions where a widow marriage was regarded to be valid and those cases did not require any relief. It follows, therefore, that the Act was meant to apply only to the cases of those Hindus among whom a widow marriage was not permitted by the caste but as regards whom it was contended that although the caste did not permit such a marriage the Shastras permitted it. If we thus read Section 2 and the preamble together, we shall find that there is no conflict between the preamble and Section 2. On the other hand, the preamble helps us to find out the true application of Section 2. Thus read, Section 2, in my opinion, applies only to cases where the custom of the caste does not permit of a valid widow marriage.

It is not difficult to see that the rule of forfeiture or loss of the right of maintenance was enacted by way of a compromise between extreme views. One party contended that a widow marriage was permitted by the Hindu law and another party contended that it was not so permitted and if allowed would create dissension and trouble in the family. The rule therefore was laid down that the widow of a caste where remarriage was not customary may have personally the benefit of the Act but she must cease to have anything to do with her late husband's property so that feuds and disturbances in the family affairs and the property may be avoided.

Whether this be or not the real object and genesis of the rule, it seems to me clear, as already stated, that Section 2 does not apply to the cases of widows who have a right to remarry and who are entitled to remarry validly under the rules of their castes.

Now let us consider the authorities of cases decided in other High Courts.

The learned Judges who have made the reference mentioned some cases, beginning with the case of *Har Saran* v. *Nandi*[3]. Upto this date, for a space over 40 years, this Court has consistently held the view that Section 2 of the Hindu Widows' Remarriage Act did not apply to the case of a widow whose remarriage was permitted by her caste. The cases are numerous and at least 11 reported cases have been cited before us. These are:—*Har Saran* v. *Nandi*, *Ranjit* v. *Radha Ram*[4], *Khuddo* v. *Durga Prashad*[5], *Gajadhar* v. *Kausilla*[6], *Mula* v. *Partab*[7], *Mangat* v. *Bharto*[8], *Ramdeo* v. *Kishendei*,[9] [1925] A. I. R. All. 440, [1930] A. L. J. 1439, I. L. R. 35 All. 466 and 12 A. L. J. 196.

We have been told that the other High Courts have taken a different view. The cases that have been cited before us are numerous and all the cases do not require any detailed discussion. Thus I propose to examine only the more important ones.

In *Akora Suth* v. *Boreani*,[10] a Hindu died leaving a widow, a minor son and a daughter. The son succeeded under the Hindu Law and he died subsequently. Before the son died the widow had married again and on the death of the son claimed the inheritance as the mother. It was held that the suit was maintainable. It appears that there was a difference of opinion between the Judges who heard the case first and there was a Letters Patent Appeal. Sir Barnes Peacock, the Chief Justice, in deciding the Letters Patent Appeal expressed the opinion that the object of the Act was to remove all legal obstacles to the marriage of Hindu widows. In this case when the widow remarried she was not possessed either of her son's property or of her husband's property and therefore she had nothing to forfeit and Section 2 was no bar to her succeeding to the son's estate on the latter's death. This case, therefore, is not in point and does not deal with the question of any remarriage under caste rules and forfeiting property already inherited. Unless there is a discussion of the question it cannot be said that the case is an authority for the proposition which he did not consider and expressly decide.

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[3] I. L. R. 11 All. 330

[4] I. L. R. 20 All. 476

[5] I. L. R. 29 All. 122

[6] I. L. R. 31 All. 161

[7] I. L. R. 32 All. 489

[8] I. L. R. 49 All. 203

[9] 32 I. C. 338

[10] 2 Beng. L. R. 199

The next case that I consider is that of *Matungini Gupta* v. *Ram Rutton Roy*[11]. This case does not consider the position of a widow who married according to the custom of the caste. It was a case where a widow declared that she was not a Hindu and remarried under the Special Marriage Act (Act III of 1872). It was held by the majority of the Full Bench that she forfeited her interest in her first husband's property. The dissenting Judge Prinsep held that the Act applied only to those Hindus who remarried as Hindus and under the Hindu Law. We have nothing to do with the controversy that was raised in that case. When the case was before the Division Bench, Wilson, J. expressed the opinion that if he had to decide the case under the principles of Hindu Law and without reference to express legislative enactments, he would be disposed to hold that widow's estate was determined by her marrying a second time and he thought that this would not in any way be inconsistent with what was held by the Privy Council in the case of *Moniram Kolita* v. *Keri Kolitani*[12]. This dictum has been very much relied upon on the second question which I shall have to consider and I will consider it later on. I may however point out here that the lady who remarried was a lady of a twice born class being a Viadya by caste and in Bengal a widow of her caste could not validly remarry according to the popular notions. This case therefore is no authority for the point before us.

The next case from Calcutta is the case of *Rasul Jehan Begam* v. *Ram Surun Singh*[13]. This is a two Judge case and it was held by the learned Judges that a Hindu widow on remarriage forfeited the estate inherited from her former husband although according to custom prevailing in her caste a remarriage was permissible. At page 584 the learned Judges remarked that the question whether a widow in whose caste remarriage was permitted lost her late husband's property owing to remarriage did not properly arise before them but they said that if it was necessary, they were prepared to follow the Madras case of *Murugayi* v. *Niramakali*[14]. In that case the view was taken which was approved of by Wilson, J. in the case already considered, *Matungini Gupta* v. *Ram Rutton Roy,* that a widow took her husband's property as the surviving portion of her husband and when she remarried, it could not be supposed that the law which her caste followed would permit the remarried widow retaining the property. This point was decided, if it was decided at all, on the basis of Hindu Law and not on the basis of Act XV of 1856. In concluding the judgment the learned Judges said that their attention had been drawn to the case of *Har Saran* v. *Nandi* of the Allahabad High Court, (already referred to) to the effect that a widow belonging to a caste in which remarriage is permitted did not upon her remarriage forfeit her interest and Section 2 of Act XV of 1856 did not apply. Having said so, they further remarked that it appeared to the Judges that the true position of a Hindu widow inheriting the estate of her husband was not considered in that (Allahabad) case. It follows that the learned Judges

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[11] I. L. R. 19 Cal. 289 (F.B.)

[12] I. L. R. 5 Cal. 776

[13] I. L. R. 22 Cal. 589

[14] I. L. R. 1 Mad. 226

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decided the case on what they supposed were the principles of Hindu Law and not on Act XV of 1856.

The next case is of *Ganga Pershad Sahu* v. *Jhalo*[15]. This was a case relating to the right of guardianship of a widow who had remarried according to her caste rules. The Judges had to construe Section 2 of Act XV of 1856 and held that the Act did not apply. At the bottom of page 870 the learned Judges accepted the second contention of the counsel for the lady and quoted the case of *Parekh Ranchor* v. *Vakhat*[16] in support of their case. The learned Judges however remarked that the forfeiture of her first husband's property would take place under the Hindu Law. This case therefore does not support the view that there would be a forfeiture under the Act.

In *Mohammad Umar* v. *Mt. Man Kuer*[17] their Lordships professed to follow the case of *Rasul Jehan Begam* v. *Ram Surun Singh*[18] and held that whether Act XV of 1856 applied or not, there would be a forfeiture under the Hindu Law, *see* top of page 918 per Sanderson Chief Justice. The same view was expressed by the other Judge. This case therefore does not support the view that the Act applies.

The case of *Santala Bewa* v. *Badaswari Dasi*[19] was the case of a widow belonging to a caste who had recently adopted the Hindu customs, being an originally non-Hindu of aboriginal tribe; yet it was held that the widow forfeited her first husband's property under the Hindu Law. At page 735 the learned Judges remarked that in their opinion the case was governed by the ordinary Hindu Law and they further said that Section 2 contemplated the case of any widow including the widow of a class among which remarriages are allowed. The case does not discuss any principle, does not discuss the language of the Act and follows what are supposed to be the earlier cases of the Court. I have already pointed out that some restriction will have to be placed on the word "A widow" in Section 2 of Act XV of 1856, for it would, otherwise, cover the case of a Mohammedan widow or a Christian widow who, nobody would contend, came within its true meaning.

As a summary of the Galcutta cases we find that the consensus of opinion is that Hindu Law governs even those among whom a widow remarriage is permitted and there would be a forfeiture under the Hindu law whether the Act of 1856 applied or not. There is no discussion anywhere as to the effect of the preamble and the effect of the recognition by the Legislature that there were certain exceptions in which a widow's marriage was regarded as valid.

Now let us look to the Bombay cases. They are not many that were cited before us. In *Parekh Ranchor* v. *Vakhat*[20] which has already been cited in connection with a Calcutta case it was held that Section 3 of the Act did not apply to the case of a widow who had remarried.

The next case is the Full Bench case, *Vithu* v. *Gobinda*[21]. Will all respect the authority of this case is very much vitiated by the large assumption that was made that throughout India the practice prevailed that a widow of a caste among whom remarriage was allowed forfeited her first husband's property. This fact, it was further assumed, was known to the Legislature and was acted upon in framing the Act. We may however point out that in none of the reported cases coming before this Court the plea was ever raised that the widow claiming the inheritance of her first husband had forfeited, as a matter of custom, her husband's property. This case in 22 Bom. 321 goes to the full length of supporting the contention that Act XV of 1856 applies. One of the learned Judges pointed out that the preamble was at variance with the body of the Act and therefore must give way to the latter. I have already discussed the point and pointed out that such was not the case.

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[15] I. L. R. 38 Cal. 862

[16] I. L. R. 11 Bom. 119

[17] I. L. R. 21 Cal. W. N. 906

[18] I. L. R. 22 Cal. 589

[19] I. L. R. 50 Cal. 727

[20] I. L. R. 11 Bom. 119

[21] I. L. R. 22 Bom. 321

Coming to Madras the case of *Murugayi* v. *Viramakali*[22] is based on the view of the Hindu law that a widow on remarriage forfeits her first husband's property. The matter came before a Full Bench in *Vitta* v. *Chatakondu*[23]. Three learned Judges took part in this case and there is no unanimity on any point decided. In this case a Hindu widow had become a Mohammedan and had remarried as a Mohammedan. It was held by two learned judges, Seshagiri Ayyar, J. dissenting, that the claimant forfeited her right under the Hindu Law. The two other learned Judges held that Act XV of 1856 did not apply, the third learned Judge being of a contrary opinion. Seshagiri Ayyar, J. was of opinion that neither the Hindu Law applied nor Section 2 of Act XV applied and there was no forfeiture. It can hardly be said that the Madras view is that Section 2 of Act XV of 1856 is applicable to the case before us. The question of custom does not seem to have been discussed in this case. In a later case of *Gajapali Naida* v. *Teevammal*[24] a learned single Judge held that Section 2 applied even where remarriage was permitted by the caste.

Coming to the Lahore High Court only one case has been cited before us, namely, the case of *Mt. Parji* v. *Mangta*[25]. It appears to have been held there that the Act did not apply in the circumstances of the case like this but there would be a forfeiture unless a contrary custom was proved.

In Patna the view seems to have been held that Section 2 applied to all cases of Hindu widows' remarriages even if remarriage of a widow was permitted by the caste. In this case the widow had become a Mohammedan and had then remarried. The learned Judges remarked that it was a matter of first impression and that the decisions in Calcutta, Madras and Bombay were unanimous that a Hindu widow lost her property. As pointed out in this judgment as to the decisions in Calcutta, Madras and Bombay, it cannot be said that the three High Courts are unanimous that the Act applied. In the Madras Full Bench case two learned judges held that the Act did not apply. In the Calcutta Full Bench case of *Matungini Gupta* v. *Ram Rutton Roy*[26] there is no unanimity and in Bombay, *Vithu* v. *Gobinda*[27], the Act was held to be applicable because it was based on an alleged custom believed to have been universal in the whole of India. Then the learned Judge who delivered the judgment of the Bench agreed

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[22] I. L. R. 1 Mad. 226

[23] I. L. R. 41 Mad. 1078

[24] A. I. R. 1929, Mad. 765

[25] [1930] A. I. R. Lah. 1028

[26] I. L. R. 19 Cal. 289

[27] I. L. R. 22 Bom. 321

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with the majority of the judges in the Calcutta Full Bench case and held that Section 2 applied. But he mainly based his judgment on the Hindu Law. He said

> even if this interpretation (of Section 2 of Act XV of 1856) be wrong —in such circumstances we are relegated in coming to a decision to the general rule of Hindu law.

The learned judge does not discuss the effect of a custom and indeed it was not a case relating to a custom.

I have tried to show above that on an independent reading of Act XV of 1856 it is difficult to say that Section 2 applies to the case before us. I would decide accordingly and answer the question in the negative so far as Act XV of 1856 is concerned.

Now I turn to the question of Hindu law. I have read the judgments of the various High Courts which deal with the Hindu law as affecting forfeiture of the widows' property and I am afraid I cannot concur with the view taken. The main argument advanced is this, a widow inherits because she is one-half of the body of her husband, and if she remarries, she ceases to be one-half of her husband's body and, therefore, forfeit the right of inheritance. Nothing can be more fallacious, with all respect, than this argument when applied to the case of people who permit the remarriage of their widows. If these people believed that a wife was one-half of the body of her husband and on the death of her husband one-half of his body survives in the widow, how could they possibly have allowed the widow to remarry, how could possibly one, who was one-half of one man's body, have become the one-half of another man's body by second marriage? If a true rule of Hindu law be that a widow inherits because of being one-half of her husband's body, then a widow's marriage cannot possibly be legal under the Hindu law. Yet not only is there a considerable body of opinion which regards the remarriage of a widow valid according to the Hindu Shastras, but also there is a considerable body of people who are supposed to be within the fold of the Hindu religion and yet they permit widow marriages. It must follow that those people who allow their widows to make a valid remarriage never believe in the doctrine that a wife is a one-half of the body of the husband and that the widow survives the husband as one-half of his body.

If we look at the discussion in the Mitakshara, for example, as to the right of a wife to inherit, we shall see how difficult the struggle of the author of the Mitakshara was in granting a right of inheritance to the widow. In the Mitakshara as translated by Colebrooke, Chapter 2, Section 1, Paragraphs 5 to 29 are devoted to discussions of the conflicting texts and the conclusion is drawn in Paragraph 30 that a chaste wife inherits. Thereafter the author discusses the question whether the widow inherits only a portion just enough for her maintenance or the whole of the husband's property. A further discussion and struggle commences and in the last Paragraph 39, the conclusion is drawn as follows:

> Therefore it is a settled rule that a wedded wife being chaste takes the whole estate of a man who being separated from his co-heirs and not subsequently united with them dies leaving no male issue.

Vijnaneswar does not even quote, much less does he consider the text of Brihaspati quoted by Jimut Vahana in Dayabhag (Chap. XI, Sec. 1, Para. 2) which says that a wife inherits because she is one-half of her husband's body. In view of this discussion of what are all regarded as sacred but conflicting texts, how can you say that this is the particular reason why a widow is permitted under the Hindu law to inherit and because that rule is broken in the case of a remarriage, the widow must forfeit what she has lawfully inherited? The Calcutta cases deal with Jimut Vahana's commentary on the Daya Bhag, and even there you will find a discussion of the contradictory texts, some laying down the right of a widow to inherit and others denying it. The author of the Daya Bhagh devotes no less than 66 paragraphs to the discussion and in Paragraph 67 says: "Thus has the widow's right of succession been explained". *See* Chapter XI of Daya Bhagh (translation) as published by V. Kalyano Ram Iyer and Co., edition of 1911 with introduction by Mr. Setlur. The man would indeed be bold who would say that the only reason why a wife inherits under the Hindu law on the death of her husband, is that she is one-half of her late husband's body. That no doubt is one of the reasons given by Jimut Vahan when he held that the widow should inherit. I have already pointed out that there was a considerable body of opinion against the right of a widow to inherit.

The fact of the matter is that Hindu law was a growing set of rules and at any particular time, the practice of a particular body of people residing at a particular place generally determined the character of the law. It is for this reason that so many schools of law have arisen, although each school of law holds in veneration the same sacred laws known as Smirthis.

It is a matter of history and it is well known that the Hindu religion holds within its fold many people who have never had in any sense of the term, anything to do with the Aryan civilization. When the (Hindu) Aryans came to India and conquered the aboriginal races and spread their dominion, they naturally drew within their folds many of the aboriginal tribes who gradually out of sheer veneration started following some of the customs and manners of the Aryan races. The Aryan races never admitted most of these people entirely into their own folds and kept them apart by calling them shudras, as persons belonging to the fourth class. It was only the privilege of the first three classes, the Brahmans, the Kshatrias and Vaishias to read the Shastras and the sacred laws and to abide by them. The duties of the Shudras as laid down by Manu was to serve the three higher classes. Chapter 1, Verse 91. Indeed Manu himself says in the clearest terms that his laws were meant mostly for the benefit of the three regenerate or higher classes and not for the shudras. The Vedic rights were meant for the three higher castes alone who were known as twice born ones. In Chapter 2, Sl. 24, Manu states that the twice born people were to make their home within a particular area known as Arya Varta or 'the country of the Aryans' but the Shudra was allowed to adopt any country as his home. From Sl. 26, Chapter 2 commence the rules for the purification of a child of the Dwija or twice born class and the rules that fully relate to the duties of the twice born. You may read through the whole of Manu and you will find that although in the beginning of his Smirthi he says that he is laying down the rules for all the four castes, he concerns himself with only the three higher castes and only distantly with the Shudras.

This being the case, it is not correct that the fine reasons which have been advanced from time to time by the sages as the basis of the Hindu law apply equally to the Shudras, simply because the latter call themselves Hindus.

As I have already observed, if we follow one of the reasons given by the founder of the Bengal school for the right of a widow to inherit, namely, her being one-half of her husband's body, she can never remarry and her remarriage cannot be valid. Thus it is clear that the caste which allows a widow to remarry does not recognise the reason given by some of the Rishis for the right of inheritance of a widow and therefore it is not right to say that as those reasons fail in the case of a remarriage, there should be a forfeiture. The castes amongst whom widow remarriage is recognised are mostly treated as Shudras and you cannot apply the fine reasonings of the Rishis for deducing the logical result of the acts of those who are practically beyond the closed precincts of the laws for the three twice born castes. Gautama in Chapter XI, Sloks 19 and 20 says that the administration of justice shall be regulated by the Vedas, the Institutes of the Sacred Law, the Angas, the Uppavedas and the Puran. The laws of the country, castes, and families, which are not opposed to these sacred records have also authority. Cultivators, traders, herdsmen, money-lenders and artisans have authority to lay down rules for their respective classes—*See* page 25 of Ghose's Hindu Law, third edition Vol. 1. Again there is a text of Vyasa quoted in Vyavahara Mayukha which runs as follows (*see* the same book, page 35):—

> The custom of traders, artisans, etc. and those who earn their livelihood by means of agriculture or the stage are not capable of being ascertained by others. Disputes among them should be decided by those of their own class.

I think I have said enough to establish that even the framers of the Hindu law never professed to lay down rules for those who were never really within the narrow fold of the three regenerate classes.

In the case of *Santla Bewa* v. *Badaswari Dassi*[28] the dispute was among Rajbansis and they were originally non-Aryans belonging to Kooch Behar and a non-Hindu aboriginal tribe. It was because they had outwardly adopted Hinduism as their religion the strict Hindu law was applied to them by the two learned Judges of the Calcutta High Court and on the ground of oneness of the husband and wife's body a widow was deprived of what she had inherited from her first husband. With all respect this was not administering the law of the parties before the court but the law of a different people. Mr. T. N. Mittra in his Tagore Law Lectures delivered as early as 1879 on Hindu Widows (at page 214) makes the following observations:

> I have been considering up to this time the marriage of widows as authorised by Act XV of 1856. There are however certain classes of Hindus among whom the marriage of a widow was allowed by custom. These I

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[28] I. L. R. 50 Cal 727

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take it will be governed by the custom on the subject rather than by Act XV of 1856, as among them the remarriage of the widow owes its origin to custom so the incidents connected with that marriage must be governed by the same custom.

This opinion implies that there can be no forfeiture unless there is a custom to that effect.

Loss of caste or ostracism for society or community for acts which bring on "degradation" under the Hindu Law, cannot now involve loss of property (Act XXI of 1850).

Under no system of law other than the strict Hindu law, as the orthodox Hindus understand it, it is possible to say that a widow who has inherited some property from her husband should forfeit it, because of her remarriage. No Mohammedan, no Christian can think of it. Therefore it cannot be said that it is a matter of natural justice that a widow on remarriage should forfeit the property of her first husband. Unless therefore we have got most cogent reasons or a clear rule of law, for ordering a forfeiture, we must not do so. On the other hand, the widow is authorised to hold her inheritance for her life, by the following text of Katyayana. It has been held by the Privy Council that the injunction that she shall maintain chastity was only a direction the breach of which did not entail a forfeiture, see the case of *Moniram Kolita* v. *Keri Kolitani*[20] (quoted in Sarkar's Hindu Law, 6th Ed., p. 613).

There is yet another ground for holding in favour of the widow. Assuming that the strict rule of Hindu law applies to a caste which does not recognise the strict Hindu Law in that case, the remarriage of a widow can only be regarded as an immoral act. The orthodox Hindus would not recognise the marriage as valid although the caste people may recognise it as valid and although the British Indian Courts may regard it as valid. It has been held by their Lordships of the Privy Council that a widow who has once inherited her husband's property does not forfeit it by reason of her subsequent immorality. The widow after inheritance may lead openly the life of a common prostitute yet she may not forfeit her property under the Hindu Law as interpreted by their Lordships of the Privy Council. Yet it is said that if instead of leading the life of a common prostitute, the widow should remarry and thereby lead what the world generally regards as a moral life, must it follow that she should forfeit her first husband's property? The orthodox Hindu, as I have said, does not regard the marriage as valid, to him it is no marriage; then why should the marriage be regarded as anything worse than the grossest immorality? Can it be an act of justice to say that living as the wife of one single man would be followed by a punishment, while the grossest immorality cannot be? It was argued that this may be so but such was the Hindu Law.

I as a Hindu Judge refuse to believe that such is the Hindu Law. I emphatically deny that such is the Hindu Law. The Hindu Law lays down not at one place, but at many places, that the Shashtras can never be interpreted apart from dictates of conscience and reason. In Chapter 2, Sl. 12, Manu says:—which when translated would mean "the Vedas, the Smirthi, good conduct and the dictates of one's own conscience are called by the wise the four sources of dharma. Dharma is nothing but good law. In Sanskrit the word 'dharma' is the proper rendering for the word law. Again Brihaspati says:—

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[20] I. L. R. 5 Cal. 776

(*See* Ghosh's Hindu Law 3rd Ed., p. 1034) which when translated means "do not arrive at a conclusion by merely discussing the Shastra or following its letter for if you follow the law or the shastras without recourse to reasons, you incur thereby a sin." Again Narada says:—

Ch. IV, Sec. 40 quoted by Ghosh in his Hindu Law, 3rd Ed., p. 1030. This means that where the texts of Shastras are conflicting, one should apply one's own reason. In the teeth of these injunctions to follow your conscience and your reasons, are you justified in saying that it is the Hindu Law that the grossest immorality would not entail a forfeiture of property and yet a remarriage would?

The only answer can be an emphatic negative.

For the reasons given above I hold strongly that under the Hindu Law as strictly interpreted or as liberally interpreted, there can be no forfeiture and the answer to the question must be in the negative.

King, J.

KING, J.—The chief question for our determination is whether a Hindu widow, who remarries in accordance with the custom of her caste, forfeits thereby her rights in the estate of her first husband under Section 2 of the Hindu Widows Remarriage Act, 1856. In other words, the question is whether Section 2 of Act XV of 1856 applies to a Hindu widow, who can remarry in accordance with the custom of her caste.

The language of Section 2 is certainly very wide, and if the section is read alone, without regard to the preamble and to the other sections of the Act, it would undoubtedly apply to the present case. Section 2 purports to lay down a general rule that all rights and interests which "any widow" may have in her deceased husband's property shall upon her remarriage cease and determine, as if she had then died. The words "any widow" would not only cover the case of a Hindu widow who is authorised by custom to remarry, but would also apply to a Christian or Muslim widow who had never been a Hindu at any time. I think it could not be seriously argued that a woman who has been a Muslim from her childhood and who married a Muslim husband who died in her life-time would forfeit all rights in her deceased husband's property under Section 2 of the Hindu Widows Remarriage Act if she married again. It is clear therefore that the wide language of Section 2 must be controlled and restricted with reference to the preamble and to the provisions of the Act as a whole. The only question is how far should the language be restricted. The object and the scope of the Act can be ascertained from the preamble. The Act is described as "an Act to remove all legal obstacles to the marriage of Hindu widows". It is further explained that by the law administered in the civil courts, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and as many Hindus believe that this imputed legal incapacity is not in accordance with a true interpretation of the precepts of their religion, and as it is just to relieve all such Hindus from this legal incapacity of which they complain and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and the public welfare, therefore the Act has been passed. It is clear therefore that the Legislature intended to remove all legal obstacles to the marriage of Hindu widows. It could not have been intended to apply to Christian widows or Muslim widows who were able to remarry without taking advantage of the provisions of the Act. For the same reason I think the Act could not have been intended to apply to Hindu widows who were able to remarry in accordance with the custom of their caste without taking advantage of the provisions of this Act. Sections 1 and 2 seem to be closely connected and enact that a Hindu widow who is not permitted by custom or by any interpretation of Hindu Law to remarry may nevertheless remarry, but if she does so she must forfeit all rights and interests in her deceased husband's property. In other words, I think Section 2 applies only to those Hindu widows who would not have been able to remarry if the Act had not been passed, and does not apply to Hindu widows who can remarry in accordance with the custom, quite apart from any thing contained in the Act. The act is an enabling Act for the benefit of Hindu widows who would not otherwise be allowed to remarry, and I think it could not have been the intention of the legislature to impose a penalty of forfeiture upon Hindu widows who can remarry in accordance with the custom and who need not rely upon the provisions of the Act to validate their remarriage. The Act was intended to remove legal obstacles to the marriage of Hindu widows and not to impose liability upon widows who could remarry apart from the provisions of the Act.

This interpretation of Section 2 of the Act has been consistently adopted by the Allahabad High Court in a long series of decisions beginning with *Harsaran Das* v. *Nandi*[80]. Certain judges have expressed doubts regarding the correctness of this interpretation, but the current of authority has consistently been followed.

There has been a difference of opinion between the judges of the Calcutta High Court on this point. The most important case is *Matungini Gupta* v. *Ram Ratan Roy*[81] which was decided by a Full Bench. In that case a Hindu widow married a second husband not a Hindu, in the form provided by Act III of 1872. The majority of the Full Bench held that by her second marriage, she forfeited her interest in her first husband's estate under Section 2 of Act XV of 1856. The ruling is not directly applicable to the question now under consideration because it did not deal with the case of a Hindu widow who remarried in accordance with the custom of her caste. The learned judges however had to consider the meaning and scope of Section 2 of Act XV of 1856 and some of their observations are applicable to the present question. Wilson Judge in his referring order (at page 294) holds that Section 2 refers to any widow falling within the class to which the Act applies and (at page 293) he holds that the Act applies to Hindu widows other than those who could, without the aid of the Act, remarry according to the custom of their caste. His view is therefore that Section 2 does not apply to a Hindu widow who could remarry without the aid of the Act according to the custom

[80] I. L. R. 11 All. 330

[81] I. L. R. 19 Cal. 289

of her caste. .Banerji judge (on page 296) holds that the words "any widow" in Section 2 must be taken to mean any widow to whom the Act applies and for whom it was intended. It is doubtful whether he would have held the section to apply to a Hindu widow who could marry according to the custom of her caste, as it could hardly be held that the Act was intended for such a widow. The majority of the Full Bench interpreted Section 2 in a wider sense and held that the section applied to all persons who being Hindus become widows. According to that interpretation Section 2 would no doubt apply to a Hindu widow who is entitled to remarry according to the custom of her caste, but it must be remembered that the learned judges were not directly concerned with that question. Prinsep Judge dissented from the opinion of the majority and held that Section 2 was limited only to the cases provided for by the Act, namely, Hindu widows remarrying the Hindus under Hindu law *as provided by that Act.* In his view, therefore, Section 2 would not apply to a Hindu widow remarrying according to custom without the aid of the Act. It will be seen therefore that there was a conflict of opinion between the learned judges on the point whether Section 2 would be applicable to a Hindu widow who could remarry without the aid of the Act.

In *Rasul Jahan Begum* v. *Ram Saran Singh*[32] it was held that a Hindu widow on remarriage forfeits the estate inherited from her former husband although according to custom prevailing in her caste a remarriage is permissible. This decision is based upon the general principles of Hindu Law and not upon Section 2 of Act XV of 1856. It is true that at the end of the judgment their Lordships referred to *Har Saran Das* v. *Nandi* and dissented from it, but they did not expressly dissent from the view that Section 2 of the Act does not apply. Their opinion seems to have been that whether Section 2 applies or not a Hindu widow upon her remarriage forfeits her interest in her deceased husband's estate under the general principles of Hindu Law.

In *Ganga Prasad Sahu* v. *Jhalo*[33] the learned judges appear to agree with the Bombay High Court in holding that Section 3 of Act XV of 1856 has no application to a case where the widow belongs to a caste in which remarriage is permitted the object of the statute being to enable widows, who were unable to marry previously, to remarry, the statute ought to be considered as a whole, and such of its provisions as impose a disability ought not to be applied to cases where it is needless for the parties to seek the benefit of the provisions which recognise the right of a widow to remarry. They proceed to point out however, that even if Section 2 does not apply to such a case the same result might follow from an application of the fundamental rules of Hindu Law.

In *Santola Bewa* v. *Badaswari Dasi*[34] it was held that a Rajbansi widow after remarriage forfeits her deceased husband's estate even though there is a custom of remarriage in her caste. The learned judges held that Section 2 of the Act includes even a widow of a caste in which remarriages are permitted by caste custom. In support of their view they state that it is a fact that in almost all castes in which a remarriage is allowed by

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[32] I. L. R. 22 Cal. 589

[33] I. L. R. 38 Cal. 862

[34] I. L. R. 50 Cal. 727

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custom such marriages are followed by forfeiture of the first husband's estate. No authority is given for the statement of fact and there is reason to doubt as I shall presently show whether the alleged custom of forfeiture of the first husband's estate is by any means so universal as alleged.

The earlier view of the Bombay High Court in *Parekh Ranchor* v. *Bai Vakhat*[35] was that Section 3 of Act XV of 1856 has no application to the case of a widow belonging to a caste in which remarriage is permitted. If Section 3 does not apply to such a case, I think it would follow that Section 2 would also not apply. In the later Full Bench case *Virthu* v. *Govinda*[36] the contrary view was taken, and it was expressly held that under Section 2 a Hindu widow belonging to a caste in which remarriage has always been allowed who has inherited property from her son, forfeits by remarriage her interest in such property. In discussing the interpretation of Act XV of 1856 it was admitted that the preamble to the Act was at variance with its enacting clauses. The preamble evidently favoured the view that the Act was not intended for all classes of Hindu widows, whereas the enacting clauses are as wide and general as they can be. Their Lordships observed that the variation between the preamble and the enacting clauses was not the result of any oversight, but that the legislature deliberately used the more general words in Section 2 of the Act, because it was found that while the custom of prohibiting remarriage obtained in certain castes, and did not obtain in others, in the matter of forfeiture by the widow of all interest in her first husband's estate, there was no such divergence. They referred to certain researches into the customs of castes in the Bombay Dekhan which indicated that there was not a single caste in which any custom to the contrary prevailed. Hence their Lordships concluded that Section 2 was only declaring by statute what was already a universal practice. With due respect to their Lordships I do not think it can safely be inferred that even if the legislature knew that among the tribes or castes of the Bombay Dekhan a custom was in force that a Hindu widow should forfeit her rights in her husband's estate upon her remarriage, this would furnish an adequate ground for enacting by a statute applicable to the whole of British India, the rule that forfeiture of interest in her deceased husband's estate must be a necessary consequence of the remarriage of every Hindu widow whatever the custom of her tribe or caste may be. The Bombay Dekhan is only a small part of British India and it appears that the rule of forfeiture is by no means universal in this province at least among those castes in which widows are permitted to remarry. In most of the long series of cases decided by the Allahabad High Court the plea was never raised, in cases where a custom of remarriage was admitted, that remarriage entailed forfeiture of interests in her deceased husband's estate. If forfeiture of such interests was a necessary incident of the custom of remarriage it is inconceivable that such a customary incident should not have been pleaded. In *Ranjit* v. *Radha Rani*[37] a custom of forfeiture upon remarriage was alleged, but it was held to have been disproved upon the evidence. In *Mangat* v. *Bharto*[38] it was held that when a widow re-

[35] I. L. R. 11 Bom. 119 at 130

[36] 22 Bom. 321

[37] I. L. R. 20 All. 476

[38] I. L. R. 49 All. 203

married according to custom then it was customary for her to retain her interest in her deceased husband's estate. The same custom, of retaining her interest in her deceased husband's estate, was proved in *Mst. Ramdei* v. *Mst. Kishen Dei*[39]. In *Narpat* v. *Janka*[40] it was held that forfeiture was not one of legal incidents of the custom under which an Ahir widow is allowed to remarry. It appears, therefore, from an examination of the cases on this point in the United Provinces that where the custom of remarriage has been admitted or proved, then the custom of forfeiture has usually not been even pleaded as a legal incident of the custom of remarriage; when it has been pleaded it has never been proved and in some cases a contrary custom has been proved affirmatively. In my opinion therefore it is erroneous to assume that in cases where Hindu widows are allowed by custom to remarry forfeiture of interests in their deceased husband's estate is universally recognised as a legal incident of the custom of remarriage. It cannot therefore be safely inferred that the legislature when enacting Section 2 of Act XV of 1856 in very wide terms were only giving statutory sanction to a universal custom. The authority of the Bombay and Calcutta rulings is weakened by their reliance upon an erroneous assumption.

There has been some difference of opinion in the Madras High Court on the question whether Section 2 would apply to a case of this sort. The most important case is *Vitta Tayaramma* v. *Chata Kondu Sivayya*[41]. This dealt with a case where a Hindu widow became a Mohammedan and married a Mohammedan husband, so it is not directly in point. But the views expressed by the judges on the applicability of Section 2 have some bearing upon the question before us. Phillips, J. (at page 1080) held that Section 2 was applicable to the facts of that case. Krishnan, J. took a contrary view. He remarked that having regard to the scope and objection of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. He came to the conclusion that the words "remarriage" in Section 2 referred only to a remarriage under the Act and not to any remarriage whatsoever. He clearly held that Section 2 would not apply to the case of a Hindu widow who is permitted by custom to remarry, and he dissented from the reasoning in the Bombay Full Bench case in the following words:

> With all deference I am to follow this method of interpretation, nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on remarriage is so universal in India as is stated. If there are castes which allow widows to remarry and keep their estates at the same time (and I am not sure there are not any) I can see no reason to think that the legislature in enacting Act XV of 1856 intended to interfere with the rights of such widow.

I emphatically endorse these remarks. Wallis, J. thought that Section 2 is wide enough to cover the case of any Hindu widow remarrying, whether or not the marriage would otherwise be prohibited by any custom or interpretation of Hindu Law. The other two learned judges, Oldfield, J. and Sheshagiri Ayyar, J., both held that Section 2 would not apply to the facts of the case before them and the remarks of Oldfield, J. would also clearly apply to the case of a Hindu widow permitted by custom to remarry.

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[39] 32 I. C. 338

[40] 24 O. C. 11

[41] I. L. R. 41 Mad. 1078

In view of this conflict of opinion it cannot be said that the Madras High Court are committed to the view that Section 2 applies to Hindu widows permitted by custom to remarry.

The Lahore High Court in *Mst. Parji* v. *Mongta*[42] held that the Act does not apply to the case of a Hindu widow who remarries according to the custom of her caste. The Patna High Court in *Mst. Suraj Jote Kuar* v. *Mst. Attar Kumari*[43] took the contrary view following the Calcutta High Court in *Matungini Gupta* v. *Ram Rutton Roy*[44]. The Judicial Commissioner's court and Chief Court of Oudh have consistently taken the view that Section 2 would not apply to a case of this sort. I may refer to *Narpat* v. *Janka*[45], *Bhagwan Din* v. *Indrani*[46] and *Ram Lal* v. *Mst. Jwala*[47].

In spite of the fact that certain judges of certain other High Courts have taken a contrary view I think the long series of Allahabad rulings which take the view that Section 2 of the Act does not apply to the case of a widow who is permitted to remarry by the custom of her caste, are correct. There is no adequate ground for upsetting the law which has been settled by judicial authority in this province.

A further question arises whether the widow upon her remarriage would not forfeit her interest in her deceased husband's estate under the general principles of Hindu Law even if she did not do so under Section 2 of Act XV of 1856.

It appears to me that the general principles of strict Hindu law could not be properly applicable to a caste in which a custom of remarriage is admitted. If the members of the caste recognise the remarriage of a widow as valid then it follows that they do not accept the theories of orthodox Hinduism which would make a legal remarriage impossible. If such theories are rejected by the caste for the purpose of permitting remarriage, it seems illogical to invoke the very same theories for the purpose of holding that if the widow does remarry, then she must forfeit her rights in her deceased husband's estate. Mukerji, J. has dealt with this aspect of the case at length, and I need only say that I concur in the view which he has expressed. In my opinion if there is a recognised custom permitting a widow to remarry then there must also be a custom either of retention of interests or forfeiture of interests in her deceased husband's estate. Retention or forfeiture of interests is merely a legal incident of the custom of remarriage, and in cases where a Hindu widow's right to remarry is governed by the custom of her caste, then I think the question of retention or forfeiture of her interests in her deceased husband's estate must also be governed by custom. Unless a custom of forfeiture is proved, then the widow would retain the interests which have vested in her.

[42] A. I. R. 1930, Lah. 1023

[43] I. L. R. 1 Pat. 706

[44] 19 Cal. 289

[45] 24 Oudh Cases 11

[46] 24 O. C. 297

[47] I. L. R. 3 Luck. 610

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My answer to the reference is: "No, unless a custom is proved whereby the widow forfeits her rights in the estate of her first husband in consequence of her remarriage."

BY THE COURT—In our opinion Section 2 Act XV of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture of the Hindu widow's estate on remarriage under the Act in such a case.

We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency.

Let our answer to the reference be sent to the Bench concerned.

Reference answered

PRIVY COUNCIL

THE AUSTRALIAN INVESTMENT TRUST, LIMITED
versus
THE STRAND AND PITT STREET PROPERTIES, LIMITED*

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July 7

LORD TOMLIN
LORD THANKERTON
LORD MACMILLAN
LORD WRIGHT
SIR JOHN WALLIS

Company—Shares—Agreement to pay commission or discount for subscription of—Illegal—Agreement to underwrite—Payment of commission or discount—Illegal.

An agreement by a company to pay commission to a person in consideration of his subscribing *in praesenti* for a definite number of shares in the company's capital would be *ultra vires* the company. The law enacts that every member who takes shares in the company in return for cash shall either pay or become liable to contribute their full nominal value and an arrangement whereby he is allowed a rebate or discount on the amount payable by him for the shares for which he agreed to subscribe is illegal. An agreement to underwrite under which a party agrees to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public, stands on the same footing and a payment of any commission or discount as a consideration for an agreement to underwrite is illegal and not binding on the company. *Ooregum Gold Mining Co. of India* v. *Roper,* [1892] A. C. 125 *followed. Re Licensed Victuallers' Mutual Trading Association ex. p. Audain,* 42 Ch. D. I. *distinguished.*

APPEAL from a decision of the Supreme Court of New South Wales.

G. T. Simonds and *J. H. Stamp* for the appellants.

F. D. Merton, K.C. and *G. A. Rink* for the respondents.

The following judgment was delivered by

Lord Tomlin

LORD TOMLIN—This is an appeal brought pursuant to leave granted by the Supreme Court of New South Wales from an order dated April 9, 1931, of that Court in its equitable jurisdiction (Long Innes, J.), allowing the respondents' demurrer to the appellants' statement of claim in the action.

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*P. C. A. 116 of 1931

In the action the appellants are seeking to have the share register of the respondents rectified by the deletion therefrom of the name of the appellants as the holders of 16,308 shares of £1 in the capital of the respondents.

The question at issue is whether an underwriting agreement made on April 15, 1929, and subsequently adopted by the respondents pursuant to which the shares in question were allotted to the appellants is, as the appellants allege, *ultra vires* the respondents.

Both parties to the appeal are companies limited by shares incorporated in New South Wales under the provisions of the New South Wales Companies Acts, 1899 to 1918.

The New South Wales Companies Acts, 1899 to 1918, contain no provision expressly authorising the payment of underwriting commissions such as that first introduced in England by Section 8 of the Companies Act, 1900, and now embodied in Section 43 of the Companies Act, 1929, and both sides agree that the law applicable in New South Wales to the question involved in this appeal can be treated as identical with that which prevailed in England before Section 8 of the Companies Act, 1900, came into operation.

It is upon a consideration of the English law as it stood before Section 8 of the Companies Act, 1900, came into operation, that the learned judge in the Court below reached his conclusion, and that their Lordships have now to determine the appeal.

The facts as appearing in the statement of claim demurred to are in effect as hereinafter stated.

On April 15, 1929, by means of two letters the first from the appellants to one Keith Williams as trustee for a company then about to be formed and registered and the other from Keith Williams to the appellants an agreement for the underwriting by the appellants of a proposed issue of capital of the proposed company was entered into.

The first of such letters was as follows:—

> STRAND & PITT STREET PROPERTIES LIMITED
>
> (A Company about to be formed and registered under the provisions of the New South Wales Companies Acts 1899—1918 and herein referred to as 'the Company'.)
>
> CAPITAL: £250,000 Shares of £1 each.
>
> To KEITH WILLIAMS, Esquire,
> 17, O'Connell Street,
> Sydney, N. S. W.
> (as Trustee for the Company).
>
> Sir,
>
> 1. With reference to the proposal to offer one hundred and seventy-five thousand ordinary shares in the Company to the public for subscription at One pound per share and for the considerations hereinafter mentioned THE AUSTRALIAN INVESTMENT TRUST LIMITED a Company formed and incorporated under the New South Wales Companies Acts and carrying on business at Sydney aforesaid (hereinafter referred to as 'the Trust') hereby underwrites the whole of the said One hundred and seventy-five thousand shares so to be offered with a right to make a firm and irrevocable application for sixty thousand of such shares.

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Lord Tomlin

2. The Trust's application and subscription are to be on the terms of the Company's prospectus to be finally settled and issued PROVIDED ALWAYS that it shall be issued within sixty days from the date hereof and that such Prospectus as finally settled and issued does not differ in any material particular from the draft prospectus as now published a copy of which is annexed hereto and signed by Frederick John Leslie Dunlop on behalf of the trust.

3. The Trust's firm application for sixty thousand shares or any part thereof if and when made is to be viewed as marked in relief of its underwriting and in respect to such underwriting the Trust or its nominee is not to be allotted any greater number of shares than the number which it has underwritten.

4. All applications which may be initialled by or for the Trust and (subject to that which is hereinafter mentioned) approved by you and sent in by the Trust to you or to the Company prior to the time fixed by the prospectus for closing the list of subscribers are to be applied primarily in relief of the Trust's underwriting and shall not be reckoned as subscriptions by the public ALWAYS PROVIDED that prior to such closing due notice is given to you by the Trust that it requires such initialled applications to be so applied as in relief of its own application.

5. All such applications as are mentioned in the last preceding paragraph shall be approved and accepted by the Company provided that they are presented on a form of application approved by the Company that the applicants are responsible persons and that the applications are accompanied by application moneys according to the terms of the Prospectus. In the event of any dispute arising as to whether any applicant is a responsible person every applicant shall be deemed to be a responsible person if any Bank be of opinion that such applicant is a responsible person or company to take up the number of shares applied for.

6. The Trust hereby irrevocably, authorises you or the company by any one of its officers in the name or on behalf of the Trust to sign and put in an application in the form referred to in the Prospectus as published for the number of shares underwritten by the Trust and to take an allotment in its name in respect thereof and the Trust hereby agrees to pay to the Company the application and allotment moneys immediately after receiving notice of allotment.

7. Subject as hereinafter mentioned the Company shall within fourteen days after it shall have become entitled to commence business pay to the Trust a commission in cash of one shilling per share on the shares hereby underwritten including those firmly applied for by it but no commission is payable until the application moneys payable on the shares have been paid to the company and notice of allotment given to the applicant.

8. No allotment to the Trust is to be made before the expiration of seven days after the first issue of the prospectus.

9. The obligations of the Trust hereunder are to hold good notwithstanding any variation between the draft prospectus annexed hereto and the prospectus as finally settled and published provided that the amount of the capital of the Company namely two hundred and fifty thousand pounds divided into two hundred and fifty thousand shares of one pound each is not altered and that the terms of subscription namely five shillings per share on application five shillings per share on allotment and the balance in calls of not more than five shillings per share at intervals of not less than three months are not altered and provided further that such

prospectus as finally settled and published does not differ in any material particular from the draft prospectus attached hereto.

10. You are to be at liberty on behalf of the Trust to concur with the Company in making a contract under which the Company is to take your place for the purposes hereof and thereupon you will be released from any liability hereunder.

11. Any notice to the Trust may be served by sending the same by post addressed to the Trust at the address under stated and shall be deemed to be served on the day following that on which it is posted.

Be so good as to notify the Trust of your Acceptance of this proposal.

Dated this fifteenth day of April, 1929.

THE AUSTRALIAN INVESTMENT TRUST, LIMITED

Signature: F. J. L. Dunlop, Managing Director.
Address: Brook House, 17, O'Connell St., Sydney.

The second letter was as follows:—

ACCEPTANCE OF UNDERWRITING PROPOSAL.
STRAND AND PITT STREET PROPERTIES LIMITED.

(A Company about to be formed and registered under the provisions of the New South Wales Companies Acts 1889—1918.)

CAPITAL: £250,000 in 250,000 Shares of £1 each.

THE AUSTRALIAN INVESTMENT TRUST, LIMITED,
17, O'Connell Street,
Sydney.

Dear Sirs,

Referring to your letter to me of the Fifteenth day of April 1929 proposing to underwrite One hundred and seventy-five thousand ordinary shares of One pound each in the above named company I HEREBY as Trustee for the Company Strand and Pitt Street Properties Limited AGREE to accept same upon the footing and subject to the conditions referred to in your said letter.

Dated the Fifteenth day of April, 1929.

KEITH WILLIAMS,
Trustee for the proposed Company.

The respondents (the Company contemplated by the letters of April 15, 1929) were duly incorporated on April 23, 1929, with a capital of £250,000 divided into 250,000 shares of £1 each.

A prospectus was issued offering 175,000 shares for public subscription. This prospectus which presumably was substantially identical with the draft prospectus copy of which was annexed to the first letter of April 15, 1929, contained (*inter alia*) the following passages:—

UNDERWRITING AGREEMENTS

A copy of the underwriting agreement dated Fifteenth of April 1929 between Keith Williams as trustee for Strand and Pitt Street Properties Limited of the one part and The Australian Investment Trust Limited of the other part may be inspected at the offices of Messrs. Alfred Rofe & Sons, Solicitors to the Company, Rofe Chambers, O'Connell Street, Sydney.

A clause in the former agreement meaning thereby the underwriting agreement provides that the underwriters shall have the right to make firm application for and be allotted 60,000 of the shares now offered for subscription.

> BROKERAGE
>
> The underwriters will pay a brokerage of 6d. per share on allotments in respect of applications identified as coming through members of any recognised Stock Exchange. The directors reserve the right to reject any application without giving reasons therefor.

On June 11, 1929, by an agreement in writing between the appellants, Keith Williams and the respondents, the agreement contained in the two letters of April 15, 1929, was duly adopted by the respondents and made binding on the appellants and respondents, and Keith Williams was discharged from liability thereunder.

On June 30, 1930, the appellants set up that the underwriting agreement was, *ultra vires*, the respondents and unenforceable.

On October 9, 1930 the respondents, in pursuance of the underwriting agreement, allotted to the appellants 16,308 shares of £1 each in the capital of the respondents.

On October 29, 1930 the appellants filed the statement of claim in the suit out of which this appeal arises, alleging that the taking up of any of the shares pursuant to the underwriting agreement involved payment by the respondents out of their share capital of commission in respect of such shares, and claiming to have the share register rectified by the deletion therefrom of the name of the appellants as the holders of any of the 16,308 shares.

The respondents demurred *ore tenus* on April 9, 1931. Mr. Justice Long Innes, in a valuable judgment in which the authorities are carefully reviewed, and which has been of much assistance to their Lordships, reached the conclusion that the demurrer should be allowed. At the same time, the learned Judge gave the appellants liberty to amend the statement of claim within 21 days, and ordered that in default of amendment within that time the suit should be dismissed.

Leave to appeal to His Majesty in Council was subsequently obtained from the Supreme Court of New South Wales.

The decision of the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper*[1] made it plain that a company limited by shares could not issue its shares as fully paid up for a money consideration less than their nominal value.

In his speech in that case Lord Watson at p. 136 after referring to the relevant sections of the Companies Act 1862 said:—

> In my opinion these enactments read together indicate the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value.

and later on he said:

> Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of this statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance when duly called for. A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once

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[1] [1892] A. C. 125

> return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the Company has agreed to accept as representing in money's worth the nominal value of the shares.

The difference between subscribing for shares and placing shares had been previously well explained by Lord Justice Mellish in *Gorrissen's* case[2] where he said:

> It appears to me that an agreement to place shares, even although the person making it binds himself within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares then by agreeing to take shares he does at that moment become a shareholder and the company are entitled and are indeed bound at that moment to put him on the register. But if he agrees to place shares he does not agree to become a shareholder nor are the company entitled to put him on the register as a shareholder but he simply agrees that he will procure other persons to take the shares.

The principles indicated in the foregoing quotations are in no respect impinged upon by the decision that payment by a company of brokerage to brokers for placing its shares with other persons is legitimate (see *Metropolitan Coal Consumers Association* v. *Scrimgeour*[3].

The point as to the validity of commission paid by a company to a person for subscribing for or underwriting its share capital was however never clearly decided in England before the passing of the Companies Act 1900 unless as has been urged before their Lordships such a decision is to be found in the case of *Licensed Victuallers' Mutual Trading Association ex. p. Audain*[4], which will be examined presently.

Upon this point of commission Lord Lindley in the Sixth Edition of his work on Companies published in 1902 at p. 43 expressed himself as follows:

> After some doubt it was decided before the Companies Act 1900 was passed that a limited company might pay a reasonable sum to brokers by way of brokerage for placing its shares but the better opinion seems to have been that such a company could not make any payment out of capital to a person for subscribing for or underwriting its shares.

When the matter was before the judge below the parties agreed that for the purpose of construing the letters of April 15, 1929 the word "underwrite" should be taken to mean "to agree to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public." This is a definition which seems to express accurately the meaning of the word underwrite in the sense in which it is commonly used.

Now it is not disputed that an agreement by a company to pay a commission to a person in consideration of his subscribing *in præsenti* for a definite number of shares in the company's capital would be *ultra vires* the company. It would in effect be an arrangement whereby he was allowed a rebate or discount on the amount payable by him for the shares for which he agreed to subscribe.

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[2] 8 Ch. 507 at 515

[3] [1895] 2 Q. B. 604

[4] 42 Ch. D. 1

But it is said that the position is different where as in an underwriting agreement, on the one hand, the obligation of the subscriber is to subscribe only for such number of shares, if any, as the public may not take up, so that in the result he may not be under liability to subscribe for any share at all, while, on the other hand, the consideration for the obligation to subscribe, namely the commission, is payable in any event and is not in amount related to the number of shares, if any, which ultimately have to be taken up under the agreement.

For the purpose of determining whether such an underwriting agreement is within the powers of the company their Lordships are content to apply the test suggested by Lord Watson in the passages already quoted from his speech in *Ooregum Gold Mining Co. of India* v. *Roper ubi supra.* What are the services rendered by the underwriter in return for the commission over and beyond his agreement to subscribe for shares? In their Lordships' opinion the answer must be that there are none.

In the case of an agreement to subscribe for a definite number of shares *in præsenti* it could not be suggested that there was any consideration for the commission beyond the agreement to take shares. What further obligation is imposed on the underwriter or what further service does he undertake to render because the number of shares (if any) which he becomes bound to take up depends upon a contingency, namely, the course the public will take in regard to the issue?

The learned judge below has said:

> In substance an underwriting agreement is a contract of guarantee or indemnity whereby the underwriter in effect guarantees that the whole of the shares in question will be subscribed by undertaking that to the extent to which they are not otherwise subscribed he will apply for them himself. It is in effect equivalent to a contract of insurance and might be expressed as such.

With all respect to the learned judge their Lordships are of opinion that the ambit of the obligation of the underwriter cannot be altered or enlarged by changing the language by which the contract is described. The obligation in fact is and remains nothing more or less than an obligation to subscribe for shares in the company. It is true that it is an obligation to subscribe for shares only on the happening of a contingent event the number if any of the shares to be taken up depending upon the magnitude of the event, but this is an obligation of the same nature as an obligation to subscribe for a definite number of shares *in præsenti* though of more uncertain burden until it is crystallised by the happening of the contingency.

In both cases the commission is agreed to be paid to induce the same thing namely the undertaking of the obligation to subscribe. No other service than undertaking this obligation is in either case rendered by the receiver of the commission. In both cases he in effect receives from the company a discount or rebate upon the amount payable upon the shares which he has to take up. It cannot make any difference that under the underwriting agreement he may not in the event have to take up any share and may yet get his commission all the same.

It is true that the benefit to the company of an underwriting agreement may be great but to resolve the question now under consideration the benefit to the company in not a relevant matter. The solution must be found in the obligation undertaken by the underwriter.

It has however been contended before their Lordships that this view of the matter is inconsistent with the decision of the English Court of Appeal to which Lord Lindley (then Lord Justice Lindley) was a party in *Re Licensed Victuallers Mutual Trading Union ex. p. Audain*[5]. Two points only were decided in that case. *First* after hearing expert evidence the Court determined the meaning of the term "underwriting" and *secondly* the Court held that the phrase in the underwriting agreement "at 15 per cent discount" did not mean discount but commission. The question whether an agreement to underwrite shares for a commission was *intra vires* or *ultra vires* the company does not appear to have been argued by counsel or considered by the Court. Their Lordships are therefore unable to obtain any assistance from this decision.

The reference in the prospectus in the present case to payment of brokerage by the underwriters (a matter not mentioned in the underwriting agreement) does not in their Lordships' opinion affect the matter. Applying the considerations which have been already indicated their Lordships reach the conclusion that the learned judge below was in error in allowing the demurrer and that the appeal must succeed. The order of Mr. Justice Long Innes should be discharged and in lieu thereof the demurrer of the respondents should be dismissed and their Lordships will humbly advise His Majesty accordingly.

The costs here and below will be borne by the respondents.

Appeal allowed

K. C. Ashurst, Morris, Crist and Co.—Solicitors for the appellants.
Gwyn, Davis and Co.—Solicitors for the respondents.

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[5] 42 Ch. D. 1

TSANG CHUEN (*Defendant*)
versus
LI PO KWAI *alias* LI KAN (*Plaintiff*)*

Civil

1932

July 19

Lord Blanesburgh
Lord Tomlin
Sir Lancelot Sanderson

Estoppel—Assignment—Assignor acknowledging receipt of consideration—Deed registered—Assignor estopped from setting up fictitious nature of transaction—Evidence Act, Sec. 115.

If a grantor conveys in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but that the grantees take on a secret trust not disclosed in the conveyance. *Re King's Settlement*, [1931] 2 Ch. 294 *approved.*

If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of encumbrance or adverse equity, and he cannot be heard to say that he has not received such purchase money. *Rimmer* v. *Webster*, [1902] 2 Ch. 163 *approved.*

Where words of any written instrument are free from ambiguity and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible.

Where a father executed an assignment in the shape of a sale-deed in favour of himself (in an assumed name) and his son jointly for a stated consideration and the deed recited that the consideration had been received and the document was registered under the law of Registration, *held*, that the son was competent to convey a good title to his mortgagee and the father was estopped from setting up the fictitious nature of the transaction.

Appeal from a decision of the Supreme Court of Hong Kong.

Gover, K.C., Wilfred Hunt and *C. Shaweross* for the appellant.

Spers, K.C. and *D. Adrews Uthwartt* for the respondent.

The following judgment was delivered by

Lord Blanesbugh

Lord Blanesburgh—The question at issue on this appeal is whether the respondent has shown a title in himself to the entirety of certain leasehold properties in Hong Kong, freed and discharged from a legal mortgage upon an undivided moiety thereof held by the appellant from Li Nga Ching, the second son of the respondent. In the Courts of Hong Kong, the respondent has established his claim. The appellant's title as mortgagee has, following deliverances of great elaboration, been set aside, and he has been ordered to reassign to the respondent freed from his mortgage the undivided moiety in question. The order to that effect made on April 8, 1930, by the Supreme Court of Hong Kong in its original jurisdiction was, on appeal, affirmed in the Full Court by its judgment of August 28, 1930. This is the mortgagee's appeal therefrom.

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*P. C. A. No. 93 of 1931

The respondent is a Chinaman of position resident in Hong Kong. His dispute with the appellant concerns an undivided moiety of one of three separate parcels of leasehold properties, held under Crown leases for long terms of which in 1912 the respondent became possessed, on the division of his deceased father's estate.

The particular leaseholds the undivided moiety of which is now in question are described in terms both elaborate and identical in a deed of assignment of them of March 9, 1917, and in a memorial of that deed duly registered under the Land Registration Ordinance of 1844. For present purposes it will suffice compendiously to describe the properties as Nos. 18 and 20 Wing Kut Street, Victoria, Hong Kong, and it will be convenient hereafter to refer to them as the properties in question.

By the deed of March 9, 1917, these properties were assigned by the respondent to one Li Kan and to Li Nga Ching already mentioned as joint tenants for the residues of the terms granted by the Crown leases under which they are held at the appointed rents adjusted with the Crown. The deed upon the terms of which much in this case will be found to depend is one of purchase and sale. The respondent party to it of the one part, and, as such, described throughout as "the vendor," is named as "Li Hung Cheung *alias* Li Po Kwai of Victoria in the Colony of Hong Kong, gentleman." The parties to it of the other part and as such described throughout as "the purchasers" are named and described as "Li Kan and Li Nga Ching, both of Victoria aforesaid, gentlemen." The deed contains a recital that "the vendor" has agreed with "the purchaser" for the sale to them of the properties in question at the price of $16,000. The assignment is expressed to be made in pursuance of that agreement and in consideration of $16,000 to the vendor then paid by the purchasers. The receipt of the $16,000 is acknowledged by the respondent as vendor in the body of the deed. It is made also the subject of a separate endorsement signed by the respondent in his vendor name and witnessed by his solicitor. The assignment of the properties in terms extends to all the estate right title interest property claim and demand whatsoever of the vendor in or to the same and the deed contains the usual full covenants for title given on a sale by a vendor to purchasers as also a covenant by the purchasers with the vendor to pay the apportioned rents and perform the covenants in the leases under which the properties in question are held so far as relating to these properties, with a further covenant by them to indemnify the vendor against such rents and covenants.

The respondent in executing the deed signs his vendor name in Chinese characters: the execution signature of "Li Kan" is in English characters. The attesting witness to both executions is the respondent's solicitor.

Li Nga Ching was, as has already been stated, a son of the respondent, but there is nothing either in the deed or anywhere else to suggest the existence of that or of any other relationship between them: nor is there any hint of the fact, for the first time set up in this litigation, that Li Kan, the other "purchaser" is the same person as the vendor. On the contrary the deed is so framed as to represent that the vendor is a separate person from either of the purchasers: that the transaction is an out and out sale and that the vendor, as a result of it has parted with all estate and interest of every kind in the properties assigned. In entire accordance with its expressed effect the deed was stamped $80 the *ad valorem* stamp on the stated purchase price.

On October 11, 1927, a lease of 20 Wing Kut Street, parcel of the properties in question was granted by "the purchasers" to a tenant for a term of five Chinese years from September 26, 1927, subject to the rent therein mentioned. The lease is expressed to be executed by Li Kan in Chinese characters and by Li Nga Ching in English characters. The deed of assignment had not been executed by Li Nga Ching. The execution by him of this sub-lease of October 11, 1927, to anyone perusing the two deeds, manifests his acceptance, if any such manifestation were necessary, of the deed of assignment from which was derived his only sub-lessor's interest in the properties in question. The respondent now states, it will be seen, that it was he who executed the lease in Li Nga Ching's name on his behalf.

As already indicated there has been in force in Hong Kong since 1844, a system of registration of deeds under the Land Registration Ordinance, 1844, and memorials, both of the deed of assignment and of the lease just referred to, were duly registered by the respondent in the register at the Land Office. It will be convenient before considering in detail the terms of these memorials—and more particularly those of the memorial of the assignment—to refer to some of the immediately relevant provisions of the ordinance under which both were registered.

First of all its preamble, in striking contrast with that of the Yorkshire Registry Act of 6 Anne c. 20, from which many of the procedure and other clauses of it have clearly been taken, is in its concluding terms very significant:—

> Whereas it is expedient to prevent secret and fraudulent conveyances and to provide means whereby the title to real and immovable property may be easily traced and ascertained.

Section 2 declares that the Land Office shall be a public office for the registration of deeds, conveyances and other instruments in writing, and wills and judgments, and provides for the entry and registration in that office of any of these documents by which any parcels of ground tenements or premises in the colony may be affected. Section (3) (2) provides that any such instruments which are not registered shall (as against any subsequent *bona fide* purchaser or mortgagee for valuable consideration of the same premises), with a proviso not presently material, be null and void to all intents and purposes.

Section 4 has no counterpart in the Yorkshire Act of Anne, and is very material:—

> No notice whatever, either actual or constructive, of any prior unregistered deed, conveyance or other instrument in writing or will or judgment shall affect the priority of any such instrument as aforesaid as is duly registered.

The particulars required to be stated in every memorial are set forth in the 1st schedule to the ordinance, and in striking contrast to what

Lindley, M.R., in *Kettlewell* v. *Watson*[1] described as the "very little information given" by the memorials required by the Yorkshire Act, are so complete as to be really exhaustive.

They are in these terms:—

1. Date of instrument or will.
2. Nature and object thereof.
3. Names and additions of the parties or of the devisors or divisees.
4. Names and additions of the witnesses thereto.
5. Description of the land or premises conveyed in or affected by the instrument or will.
6. Name and description of the place where situate.
7. Consideration and to whom and how paid.
8. Any other particulars which the case may require.

Section 7 requires that every memorial shall be verified by the oath of some competent person that the same contains a just and true account of the several particulars therein set forth, which oath shall be taken before a Justice of the Peace.

The memorial of the deed of assignment was registered by the respondent on March 14, 1917. As required by the ordinance, the memorial is in effect a complete statement of the deed of assignment. That deed is therein described as being one made between "Li Hung Cheung *alias* Li Po Kwai (who and whose executors and administrators were thereinafter called the vendor of the one part) and Li Kan and Li Nga Chin (who and the survivor of them and the executors and administrators of such survivor their or his assigns were therein called the purchasers) of the other part." The assignment is stated to have been made in consideration of $16,000 "to the vendor then paid by the purchasers." The premises in question described in the identical terms of the assignment with "all the estate right title interest property claim and demand whatsoever of the vendor therein or thereto," are expressed to have been assigned by the vendor to the purchasers as joint tenants for the residue of the terms of years stated in detail and subject to the apportioned rents specified and to the covenants in the Crown leases affecting the properties in question. It may be said as definitely of the memorial as it has already been said of the deed itself, that there is nothing in its terms to suggest even remotely the existence of any relationship between the respondent and Li Nga Ching, nor is there any hint that the respondent, the "vendor" is the same person as Li Kan, the other of "the purchasers."

Two further facts of real significance in relation to the memorial, and very relevant in the present dispute, are that its correctness is verified by the oath of the clerk to the respondent's solicitors and that it is actually signed by the respondent himself in his "vendor" name.

The memorial of the lease of October 11, 1927, also registered at the Land Office, took the form of a full copy of the original. It was registered on October 16, 1927, and was like the other memorial verified by the oath of the clerk of the respondent's solicitors.

Some facts relating to the dealings by the respondent with the two or other long leaseholds to which he became entitled in the division of his father's estate may, at this point, be collected. The respondent has four sons. In 1917 his three younger sons, the first of whom was Li Nga Ching, were aged, respectively, 21, 19, and 14 (Chinese reckoning). Evidence was given to show that on the same March 9, 1917, on which the respondent executed the assignment already stated he executed another relating to the second of the leasehold properties to the same "Li Kan" and his third son as joint tenants, and an assignment of the third leasehold property to "Li Kan" and his fourth son as joint tenants. The form of each of these assignments was the same as that of the assignment of the properties in question, but with different sums expressed as the purchase consideration.

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[1] 26 Ch. Div. 501

These two assignments are relied upon by the respondent as confirmatory of the case he makes with reference to the deed now in question. But it is not suggested that the existence of these deeds or of either of them was known to the appellant or his solicitors prior to the institution of these proceedings. It would appear, indeed, that had these deeds been known to the appellant before he took his mortgage, he would have tended to confirm rather than otherwise the complete regularity of the assignment now in question. For it was stated on behalf of the respondent in the Trial Court as a reason for the non-production of the first of the two deeds that the properties comprised therein had since been sold, presumably under the title thereby conferred.

The association of the appellant with the properties in question came about in the following way. He is a banker, a partner in, and in the transaction of mortgage now to be stated, the nominee of the Han Chuen Bank of Victoria, Hong Kong. In March, 1929, he was approached in the ordinary course of business by a mortgage broker with a proposal that he should lend $25,000 for six months to Li Nga Ching on the security of his half-interest in the properties in question. Li Nga Ching may now be conveniently referred to as the mortgagor. The appellant did not know him, nor had he previously heard of the respondent. He himself inspected the properties, was satisfied with the sufficiency of the security offered; was prepared favourably to consider the loan proposal, and he instructed his solicitor to proceed leaving it to him to make all enquiries.

It is matter of admission that, prior to the mortgage which followed, the appellant's solicitor searched the register at the Land Office in reference to the properties in question and that he inspected the registered memorial of the assignment and that he proceeded with the preparation of the mortgage deed and the completion of the transaction of loan as a result of that inspection. He did not see the assignment itself. That he asked for it and was informed that it was in the possession of Li Kan joint tenant with the mortgagor is not improbable in view of his letter later to be mentioned asking Li Kan for a loan of the deeds in order to make copies of them to keep with the mortgage deed. But it is not proved that any such inquiry was made. The solicitor did not give evidence. The fact that he did not do so was a source of real embarrassment to the learned counsel for the appellant in their argument before the Board. In the view which their Lordships take of the case his non-appearance as a witness is less serious than it might well have been, and it may have seemed to him that his activities being to a large extent matters of admission the desirability of a full account from him of what he did was unimportant. It is right to add that no suggestion is made that either the appellant or he had actual notice or any suspicion, when the mortgage was accepted and the advance made, of any defect in the mortgagor's title to an undivided moiety of the properties in question.

The advance of $25,000 was made by the appellant to the mortgagor on March 7, 1929. By the mortgage deed of that date, after a recital that the properties in question were vested in Li Kan and the mortgagor for the residues of the terms of years under the said Crown leases, the mortgagor in consideration of the loan assigned the undivided moiety of the property in question to the appellant for the unexpired residues of the terms of years subject to the usual proviso for redemption. A memorial of the mortgage deed was, on its execution, duly registered pursuant to the ordinance.

At the date of its registration there was no entry in the register of any estate or interest in the properties in quesion being possessed or retained by the respondent; no memorial, indeed of any subsisting interest therein other than that of "the purchasers" under the deed of assignment and of their tenant under the registered lease.

It appears, however, that shortly before this date information had reached the respondent that his sons, or one of them, were attempting to deal with properties standing in their names. The respondent's reaction was to insert in a newspaper what one of the learned Judges describes as a perfectly futile advertisement: he made no warning entry on the register.

On March 11, 1929, four days after the advance was made the appellant's solicitors in a letter addressed to "Mr. Li Kan" at the address of the respondent gave him notice of the mortgage by the mortgagor. The letter proceeded:

> As our client is informed the title deeds are in your possession we are instructed to request you to lend us the title deeds to enable us to make attested copies thereof to accompany the mortgage to our client.
>
> We shall be glad if you will lend us the title deeds upon the usual understanding.

The reply of the respondent's solicitor of March 14 is, it must be agreed, a somewhat inapt description of his case as finally made in Court.

> We are instructed by our client, Mr. Li Po Kwai, who in the names of Li Kan and Pi Lo respectively is the co-owner of the above properties to reply to your letter of the 11th inst. Mr. Li Nga Ching, the mortgagor, had no beneficial interest in any of these properties the funds for which were provided by our client and he had no right to mortgage them.

Fourteen days later, on March 28, 1929, the respondent commenced the action out of which this appeal emerges. The defendants were the appellant and the mortgagor. The mortgagor did not appear: indeed he was never served with the writ. His whereabouts were said to be unknown to the respondent.

The respondent gave evidence at the trial. He gave the account already set forth of his connection with the properties in question and with his other inherited leasehold properties. He proceeded to say that "Li Kan," the joint purchaser, was himself. The name was his milk name

—a name given to him when a baby by his mother. Other persons knew it. "Li Po Kwai" was an alias and he was mostly known to the public by it. He admitted that except in the three assignments to which reference has been made he had never taken any transfer of property in the name of "Li Kan." His only object in putting the leasehold properties into the joint names of himself and his three younger sons respectively was, he asserted, to mark them out so that in case of his death the properties might be handed to his sons later on. In cross-examination he said, with reference to the properties in question:

> The sum of $16,000 was mentioned as the purchase price. I gave instructions that the sum should appear as purchase price. When making deed I knew I would have to pay solicitors' costs and stamp duty. I intended to mark out the property so that it might go to my son at my death if he behaved properly. But not automatically. If he did not behave properly I thought I had a right to cancel the assignment. If he behaved properly I would not have allowed the assignment to operate. I would have left my property by will.

The respondent went on to say that it was a Chinese custom to mark out property in this way: that in fact no money had passed and that he retained the assignments and earlier deeds in his possession and collected the rents and paid the outgoings. The mortgagor's signature to the lease of October 11, 1927, was attached by himself, he said. He had authority so to sign as the mortgagor was his son. He denied that the assginments were executed to escape or save death duty. None of his sons knew of them at the time they were made. The respondent did not explain how or when the mortgagor heard of the assignment in his favour, nor did he suggest that he had ever told the mortgagor that the assignment was not intended to confer any beneficial interest on him or that he was to hold any estate of his thereunder in trust for himself. Indeed, no evidence of any kind was adduced by the respondent to show that the mortgagor was ever aware that any trust was intended by himself, much less that one had ever been assumed by the mortgagor. Nor was any explanation offered why, if the assignment in question was to have no other function than that averred by the respondent it was appropriate that it should have been registered at all, to say nothing of the circumstance with which registration was in fact made.

Chief Justice Kemp observes in his judgment on appeal:—

> When Li Nga Ching discovered the fact of the assignment he may have believed that his father had intended to transfer a beneficial interest to him, as he may well, and not unreasonably, have thought that his father's object as suggested on behalf of the [Appellant] was either to avoid the payment of estate duty or to obviate the necessity of legal representation.

Their Lordships agree. But, as will be seen later, they do not so readily accept the learned Chief Justice's observation which immediately follows:—

> This point, however, appears to be irrelevant for the purposes of this judgment.

The evidence of the respondent to the effect just stated was given subject to objection taken to its admissibility. It was also contended on the appellant's behalf that it was in essentials entirely unreliable. In this regard, the evidence was, in that result, although with some hesitation,

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believed by the learned Trial Judge. He accepted, but not without some reserve, the rspondent's assertion that the transaction had not been put through by him to escape death duty or for some other ulterior purpose. The complete futility of registration, from the respondent's alleged point of view, does not seem to have struck the learned Judge. Upon the point of its admissibility he held the evidence to be receivable in order to rebut the presumption of advancement and to show that there was a resulting trust of the properties in question in favour of the respondent. There was in his view no estoppel, while the omission of the appellant to demand production of the deed of assignment from the mortgagor before making the advance to him constituted such gross negligence on his part as to deprive him as against the respondent of the protection of his legal estate. Accordingly, to adopt the language of another jurisdiction, he decreed the respondent's suit.

On appeal by the appellant to the Full Court the trial judgment was affirmed. The learned Judges there, as the learned Trial Judge had done, accepted the respondent's evidence as reliable, but, it would seem, mainly if not exclusively because of their reluctance to interfere, on a pure question of fact, with the finding of a Trial Judge who had seen and heard the witness concerned.

They agreed with the learned Trial Judge's view that the reception of the evidence was permissible to rebut the presumption of advancement while its effect was to disclose the existence of a resulting trust for the respondent. True it might be that neither the appellant nor his solicitor had either notice or suspicion of the existence of such a trust, but their ignorance was the result of gross negligence on the part of the solicitor in not insisting upon the production of the deed of assignment before any advance to the mortgagor was made. The fact that the respondent had always retained that deed in his possession entitled him, as they thought, notwithstanding his registration of the memorial, to assume that no dealings with any property comprised in it would take place without reference to himself. *Kettlewell* v. *Watson*[2], showed that even a system of registration did not dispense an intending purchaser or mortgagee from the duty of inquiring for or examining deeds, memorials of which were registered. Had the application of March 11, 1929, for inspection of the deed been addressed to the respondent when the loan was only in prospect and not after it had been made, the appellant would have ascertained that the mortgagor had no interest in the properties in question and was not in a position to offer any security whatever over them. *Oliver* v. *Hinton*[3] was the authority in point. The appellant had been guilty of negligence in the transaction so gross that it would be unjust to deprive the respondent's resulting trust of its priority over his subsequently registered mortgage.

The above is a compendious summary of the ruling considerations which led the learned Judges in the Courts below to their conclusions in favour of the respondent. Their Lordships must say at once that they are not prepared to accept the correctness of these conclusions nor the soundness of the elaborate reasoning on which they depend. If regard be had, as it must be, to the admitted or accepted facts of the case and to the well recognised principles of law and equity applicable thereto, the respondent's action must, their Lordships think, necessarily fail. It was because so much depended thereon that they have been at pains in the earlier part of this judgment to examine these facts in their appropriate setting. That examination has satisfied them that the conclusions of the learned Judges can only be reached by ignoring essential principle and by refusing to attribute their proper consequences to the conduct and actions of the respondent, even as avowed in his own evidence which, with a reluctance no less than that of any learned Judge below, their Lordships also accept at its face value.

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[2] 26 Ch. Div. 501, 508

[3] [1899] 2 Ch. 264

The outstanding fact disclosed by the examination is that the evidence of the respondent, admitted by both Courts, and essential to support the judgment in each, was evidence which directly contradicted the terms of his own deed. It ought not to have been received at all.

Chief Justice Tindal's statement of the law on this subject in *Shore* v. *Wilson*,[4] has never been departed from. It may be useful to recall his words:—

> "The general rule," he says, "I take to be, that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise no lawyer would be safe in advising upon the construction of a written instrument nor any party in taking under it for the ablest advice would be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself.

These observations apply with peculiar force here. Perhaps the evidence of the respondent tendered and accepted may euphemistically be termed evidence to rebut the presumption of advancement and incidentally establish a resulting trust, but it was in fact tendered to show that the deed of assignment, followed by its attested registration, was an elaborate make-believe with, so far as the operative provisions of the deed were concerned, no word of truth in it from beginning to end. There were no "purchasers"; there had been no sale to anyone; no purchase money had either been paid or received; it was a mere assignment by the respondent to himself. It is unnecessary, however, to dwell on more than one of these contradictions—that which sought to deny the payment and receipt of purchase price acknowledged in the deed by the respondent and attested by his solicitor.

As Sir George Farwell says in *Rimmer* v. *Webster*[5]:—

> If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property 'he voluntarily arms the purchaser with the means of dealing with the estate as the

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[4] 9 Cl. and Fin. 355, 565

[5] [1902] 2 Ch. 163, 173

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absolute legal and equitable owner free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not received such purchase money.

It is not, Sir George Farwell goes on to say, as if the purchase money had been paid out of money found by the vendor himself or by some third person, and that fact was being deposed to. The distinction between the two cases is obvious:—

> There is no contradiction of the deed in saying 'True the purchase money was paid by him but out of some third person's money.' There is a direct contradiction in saying that it was never paid at all.

Evidence to that effect was accordingly under Chief Justice Tindal's rule here inadmissible "to establish either a lien for unpaid purchase money or that there was a resulting trust for the vendor." Indeed it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact. Instances of each of these will be found in *Haigh* v. *Kaye*,[6] *re Duke of Marlborough*,[7] *Barton* v. *Bank of New South Wales*,[8] *Carritt* v. *Real and Personal Advance Company*[9]. But the present position is that correctly described by Farwell, J., in the recent case of *re King's Settlement*,[10] where he says:—

> If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but that the grantees take on a secret trust not disclosed in the conveyance.

And this statement brings into clear relief the respondent's position in these proceedings. If he fails to establish a resulting trust which requires no writing to support it, his claim must fail. He cannot set up an effective express trust against the appellant for at least four reasons. First, no agreement by the mortgagor to be a trustee for him has been established, and the respondent's own evidence negatives the possibility of the existence of such an agreement. Secondly, to be valid, that agreement must have been in writing. Thirdly, if it were in writing it would, even if known to the appellant, have been of no avail against his registered mortgage unless it had been first registered. (*See* Ordinance, Section 4.) Fourthly, such a trust has never been registered. The truth, indeed, is that after the execution of his deed of assignment, the respondent's claim had to be rested on an express declaration of trust by the mortgagor. But such a trust unregistered would have been useless to him as against the appellant. His essential task, accordingly, was to establish a resulting trust, which, in the circumstances, alone could help him. This he has sought to do by evidence inadmissible for its purpose. On this ground alone, therefore, as it seems to their Lordships, the respondent's case must fail. He proves no resulting trust whatever.

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[6] 7 Ch. 469

[7] [1894] 2 Ch. 133

[8] 15 App Cas. 379

[9] 42 Ch. D. 263

[10] [1931] 2 Ch. 294, 299

But not only on this ground does his case disappear. It fails also because of estoppel. To their Lordships it seems clear that by his registration of the memorial of his deed of assignment the respondent is estopped as against the appellant who took his registered mortgage in reliance on that memorial from denying its correctness in any essential particular. The memorial is a complete statement of the deed of assignment, including therein a statement as to receipt of the purchase price. Its correctness, as required by the ordinance, is duly attested. Its registration is, in terms of the ordinance, a means whereby the title to this immovable property may be easily traced and ascertained. The respondent has been acquitted of any fraudulent intent or ulterior purpose in registering it, but his avowed purpose in executing the deed would have been fully attained without any registration at all, and the respondent by the registration of the memorials both of the deed and the lease must be taken, in the absence of any other explanation, to have intended "to produce faith" by such registrations—to adopt a phrase of Fry L. J. in *Bickerton* v. *Walker*[11]. It is not to be disputed—*Rimmer* v. *Webster, ubi supra,* would be authority for the proposition if it were—that if the actual deed of assignment had been produced by the mortgagor to the appellant before he took his mortgage, the respondent would have been estopped from disputing its correctness and the appellant have been relieved of any imputation of negligence had he refrained from inquiry of the respondent as to any rights or claims of his. (See *Bickerton* v. *Walker, ubi supra,* p. 158.) Their Lordships can see no reason why the respondent should not have put the appellant in precisely the same position towards himself, so soon as it is proved or admitted that on the faith of the memorial the appellant advanced his money to the mortgagor. Their Lordships have some difficulty in appreciating the real relevance of the decision in *Kettlewel* v. *Watson,*[12] on this point. That was a Yorkshire Registry case, under the statute of Anne and before "the law on the subject of registration as regards land in Yorkshire was revolutionised by the Yorkshire Registries Acts, 1884, and 1885. (*See* Dart, Vendors and Purchasers, 7th ed., vol. 1, p. 607.) Lindley L.J. there said that the registered memorials under the earlier Act gave very little information. He added that the object of the statute of Anne seemed rather to be to let people know what they were to inquire about than to dispense with inquiry respecting deeds and documents, memorials of which are registered—a passage from his judgment already referred to. All of which is, of course, true with reference to that statute. But the statute contained no preamble corresponding to that in the Hong Kong ordinance; it required no memorial in any sense complete. There was, for instance, no obligation to disclose the purchase consideration, and in the memorial in question in *Kettlewell* v. *Watson* there was no such disclosure. (*See* 21, Ch. D. at p. 699) nor did the subsequent purchasers or mortgagees there ever inspect the register. The memorial accordingly in that case could have worked no estoppel. But Fry, J. in the course of his

[11] 31 Ch. Div. 151, 159

[12] 21 Ch. D. 685; 26 Ch. Div. 501

judgment (21 Ch. D., p. 703) indicates how much the facts of the present case would have influenced him:—

> The registration of the deed is not notice to all the world of the receipt of the purchase money, because the memorandum does not state the receipt for the purchase money and therefore it appears to me that it cannot interfere with the right of the vendors to the lien which was created by the mere fact of the non-payment of the money.

The learned Judge indicates in that passage not obscurely what his view would have been had he been dealing with a memorial like that in the present case and, in fact, relied upon by the subsequent mortgagee.

On this ground also, in their Lordships' judgment, the respondent's case fails.

But lastly it fails also on a comparison of the conduct of the respondent and the appellant in this matter, the ground selected by the Courts below for their decision in favour of the respondent. How first of all may the respondent's conduct in relation to the transaction be described? He placed upon the register an assignment which he now asserts was no assignment at all. He thereby made a representation which induced the appellant to advance money to his son; he misinformed as to his position all persons searching his title in a public record; and when he heard of attempts by his son to raise money he published a futile advertisement and entered no warning notice on the register. In the face of that catalogue their Lordships have difficulty in following Kemp, C. J. when in his judgment he says that of "the respondent it cannot be said that he did anything which he was under a duty not to do, or that he omitted anything which he was under any duty to do."

And where was the "gross negligence" of the appellant's solicitor? It consisted, so it is said, in not demanding from the mortgagor production of the deed of assignment, a deed quite naturally in the possession of his co-tenant. Now, that the solicitor by refraining from demanding production of the deed exposed his client the appellant to the grave risk of being postponed to some mortgage by deposit made by "the purchasers" after the date of the assignment to them is not after the decision in *Oliver* v. *Hinton ubi supra* to be gainsaid. But that is not the equity which is now being set up by the respondent against the appellant. That was an equity of which the custody of the deeds was a concomitant. The equity here sought to be set up by the respondent is one in no way dependant upon the whereabouts of the deeds: it is an equity upon the existence of which the production of the deed of assignment would cast no light at all. For the protection of the appellant against such a concealed equity as this production of the deed, when a memorial of it had been already considered, would have been of no assistance. The appropriate question for the appellant's solicitor to have asked would have been, not where is the deed of assignment, but whether the respondent had thereby reserved to himself any interest in the properties in question. And why should the solicitor have troubled himself to ask any such question when the possibility of the existence of any such interest was negatived by the terms of the registered memorial of the deed vouched by the respondent himself?

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The inquiry as it seems to their Lordships would have been impertinent, and the solicitor cannot be said to have been guilty of any negligence for not having made it. The respondent having put his hand to and registered his deed of assignment was not entitled to suppose that any inquiry with regard to that or any other reserved equity would ever be addressed to him. And the appellant with no notice of that equity has now had assigned to himself for value the legal estate. Between the respondent and the appellant in this matter, so far as the conduct of either is questionable, there is in their Lordships' judgment no room even for comparison.

The judgments in favour of the respondent on this point in the Courts below have been based on what their Lordships cannot help thinking is a misunderstanding of the decision of the Court of Appeal in *Oliver* v. *Hinton, ubi supra.* There the contest in a non register County was between a person in the position of the appellant and one, not in the position of the respondent, but of a mortgagee from him by deposit made subsequent to the date of his purchase deed. "The defendant has been cheated by Hill, but she has not been in any way cheated by the plaintiff," says Lindley L. J. In that passage Hill corresponds roughly to the respondent, and the plaintiff to his subsequent mortgagee by deposit. No production of the deeds was required by the purchasing defendant. The plaintiff was entirely blameless in the matter. On these facts the Court held that the defendant had been guilty of such gross negligence in not asking for the deeds as would render it unjust to deprive the plaintiff who held them of his priority. Their Lordships can see no analogy between that case properly understood and the present. It is not necessary to say that the respondent here was as bad as Hill was there. But it is through the respondent's representations that the appellant has been led to part with his money. That which then was gross negligence in relation to the possibility of a prior equitable charge, is not necessarily any negligence at all in relation to the possibility of a resulting trust. It is only of the latter negligence, if any there be, that the respondent can claim the benefit. There is nothing in Lord Lindley's judgment to indicate that the protection which he exended to the entirely blameless mortgagee by deposit he would have thought of extending to the respondent in the present case.

For all these reasons their Lordships are of opinion that this appeal should be allowed: that the judgment of the Full Court of the Supreme Court of Hong Kong of August 28, 1930, and the judgment of that Court in its original jurisdiction of April 8, 1930, should both be discharged: and that the respondent's action should be dismissed and with costs in both Courts.

And Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellant his costs of this appeal.

Appeal allowed

Gibson and Weldon—Solicitors for the appellant.

Sharpe, Pritchard and Co.—Solicitors for the respondents.

Civil

1932

June 16

Sulaiman, C. J.
Kendall, J.

HIGH COURT

KISHORI LAL
versus
BALKISHAN*

Civil Procedure Code (V of 1908), Sec. 24—High Court or District Judge—Whether empowered to transfer case to another court which has pecuniary but not territorial jurisdiction—'Competent'—Meaning of.

The High Court or the District Judge, acting under Section 24 C. P. C. has power to transfer a suit pending in one subordinate court to another subordinate court, which has pecuniary, but not territorial jurisdiction to try that suit.

The word "competent" as used in Section 24 C. P. C. must be taken to refer to pecuniary jurisdiction only.

Ram Das v. *Habib Ullah,* 1931 A. L. J. 1061 overruled. *Sheikh Jannat Husain* v. *Sheikh Ghulam Kutubuddin Ahmad,* 52 I. C. 522 *dissented from.*

Order on application of Seth Kishori Lal.

U. S. Bajpai and *S. B. L. Gour* for the applicant.

N. P. Asthana for the opposite party.

The following judgments were delivered:—

Sulaiman, C. J.

Sulaiman, C. J.—This is an application for the transfer of a suit pending in the court of the Munsif of Kasganj. A question arose whether the suit could be transferred to the court of another Munsif in the same district and my learned brother, entertaining a doubt as to the correctness of the ruling in *Ram Das* v. *Habib Ullah,*[1] has referred the point of law to a Division Bench.

The question for consideration is whether the High Court or the District Judge, acting under Section 24 C. P. C. has power to transfer a suit pending in one subordinate court to another subordinate court, which has pecuniary, but not territorial jurisdiction to try that suit.

In one sense it might be said that the present question did not strictly arise in the case mentioned above, because the Bench came to the conclusion that the order of the District Judge directing a transfer of the case when he did not proceed *suo motu,* but on an application made by a party, was illegal and irregular inasmuch as no notice had been issued to the defendant. The order could have been set aside on that ground alone. It however appears that the learned advocate for the applicant pressed the other question as well, presumably because he did not want that the case should be transferred to the particular Munsif to whose court it had been transferred. Bajpai, J., in whose judgment I concurred, accordingly expressed that view following a Patna case, namely, *Sheikh Jannat Hussain* v. *Sheikh Ghulam Kutubuddin Ahmad*[2] and gave directions to the District Judge to bear that view in mind. It is therefore not possible to say that the last observation was altogether an *obiter dictum.*

Under Section 25 of Act XIV of 1882, the High Court and the District Court were given power to transfer a suit pending in a subordinate

*Mis. Case 166 of 1932

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[1] 1931 A. L. J. 1061

[2] 52 I. C. 522

court to any other subordinate court "competent to try the same in respect of its nature and the amount or value of its subject-matter". These words have been slightly altered, and in their place we now have in Section 24 the words "competent to try or dispose of the same". Under the old section there could be no doubt that all that was required of the subordinate court to which the case was to be transferred was that it should have pecuniary jurisdiction to try the suit. The deletion of those words from the new section may *prima facie* suggest that the competence of the court now required may be either pecuniary or territorial. If the words were to be taken literally, it might be open to argument that the word "competency" includes both pecuniary and territorial jurisdiction. Although the change in the words in the section was not emphasised, this view was certainly expressed by the learned Chief Justice of the Patna High Court in the case of *Sheikh Jannat Husain* v. *Sheikh Ghulam Kutubuddin Ahmad.* He was of opinion that the word "competent" was very wide and included both kinds of jurisdiction. The headnote of the case did not show that the other learned judge had expressed some doubt as regards this view and had reserved his opinion. The unfortunate omission of the words which appeared in the old section have made the new section somewhat ambiguous, but on reconsideration I am satisfied that the words have been deleted because they were considered redundant or unnecessary by the legislature. To hold that it is necessary that the court to which the case is transferred must have territorial jurisdiction would make it impossible for a High Court to transfer a case pending in the court of a District Judge to that of the District Judge of another district, for these District Judges would not have concurrent territorial jurisdiction. The section would, therefore, be nullified if the interpretation put upon it in the case of *Ram Das* v. *Habib Ullah* were to be accepted. In order not to render the section useless, I am constrained to hold that the word "competent" must be taken to refer to pecuniary jurisdiction only.

Cases of concurrent jurisdiction where two courts have both pecuniary and territorial jurisdiction to try a suit are dealt with in Section 22. The same words "competent to try the suit" occur in Section 11 C. P. C. as also in Section 15. It is quite clear that for purposes of *res judicata* it is not necessary that the two courts must have concurrent territorial jurisdiction, which depends entirely on the subject-matter in dispute. The provision in Section 15 would point to the same conclusion. It may also be pointed out that a distinction has been drawn in the Code as regards territorial jurisdiction, and Section 21 provides that no objection as to the place of suing shall be allowed, unless such objection was taken in the court of first instance at the earliest possible opportunity, and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

On a reconsideration I am, therefore, of opinion that the observation made in the last portion of the judgment in *Ram Das's* case, in which I concurred, did not lay down the correct law.

KENDALL, J.—I concur.

BY THE COURT—In our opinion it is open to the High Court or a

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District Judge to transfer a case pending in a subordinate court to another court which has pecuniary jurisdiction to try the suit although it may not at the moment possess territorial jurisdiction to try it. We accordingly direct that this case be laid before the learned judge who has referred it to this Bench, for disposal on the merits.

Reference answered

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April 27
SULAIMAN, C. J.
MUKERJI, J.

JAUHARI AND ANOTHER (*Defendants*)
versus
TUNDAY (*Plaintiff*)*

Mortgage—Several mortgagors—A co-mortgagor redeems property from the mortgagee—Another co-mortgagor redeems property from the co-mortgagor who has already redeemed it—Whether right of subrogation arises—Transfer of Property Act, Section 92 (as amended in 1929).

One of several co-mortgagors having redeemed the mortgaged property, the appellants, who had purchased the share of one of the co-mortgagors, redeemed the property from the co-mortgagor who had already redeemed it on payment of the mortgage money. The plaintiffs, who were the other co-mortgagors, then brought a suit to recover possession of their shares without paying their proportionate shares of the mortgage debt. *Held*:

Per SULAIMAN, C. J.—That although the appellants had no right to redeem more than their own shares against the will of the mortgagee, nevertheless they were entitled to redeem the whole property *with the mortgagee's consent*. Having redeemed the whole property with the mortgagee's consent they cannot be dispossessed unless the plaintiffs pay their proportionate shares of the mortgage debt. As defendants in possession they can set up their payment as a shield. At the very least they are licensees of the mortgagee and not mere trespassers.

Per MUKERJI, J.—That the appellants were only entitled to redeem their own shares and had no right to redeem the shares of the plaintiffs also. When they paid the mortgage debt due upon the plaintiffs' shares they did so as volunteers, and have no right to retain the property or to be reimbursed. For these reasons the appellants are nothing but trespassers and are bound to hand over the property to the plaintiffs without receiving any payment.

Per KING, J. (on reference)—That the principle of Section 95 Transfer of Property Act (IV of 1882) was applicable to cases where a co-mortgagor redeems the whole property, with the mortgagee's consent, although he might have compelled the mortgagee to permit redemption of his own share only, and the appellants are therefore in possession of the plaintiffs' shares as mortgagees and not as trespassers, and the plaintiffs cannot recover possession without paying their proportionate shares of the mortgage debt.

LETTERS PATENT APPEAL from the judgment of the HON'BLE MR. JUSTICE BAJPAI.

N. P. Asthana and S. S. *Sastry* for the appellants.

Baleshwari Prasad for the respondent.

The following judgments were delivered:—

Mukerji, J.

MUKERJI, J.—The facts of the case are given in the judgment of the learned single Judge against whose judgment this Letters Patent appeal

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*L. P. A. 52 of 1931

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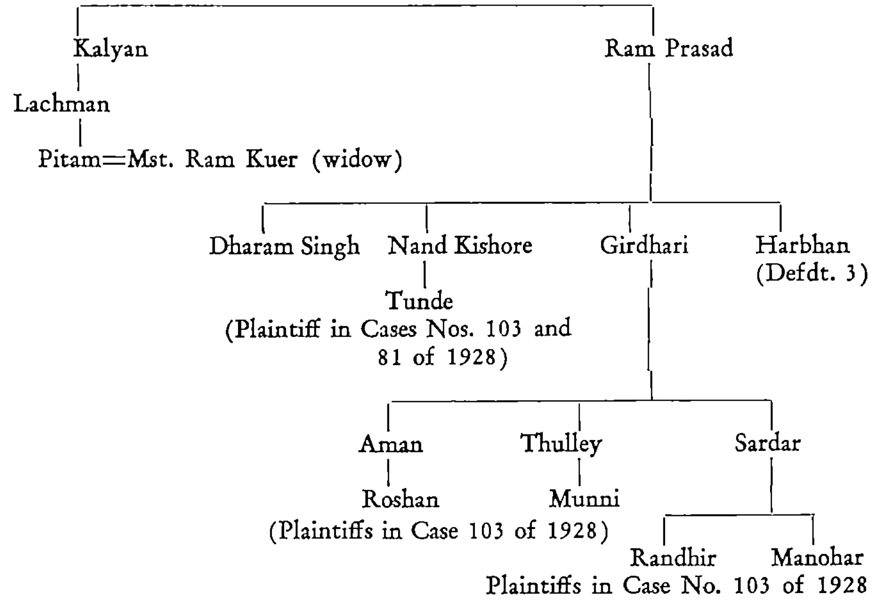
has been filed. I will state the facts only briefly so that the discussion involved in this judgment may be properly understood. The following pedigree will be useful:—


Kalyan
Ram Prasad
Lachman
Pitam=Mst. Ram Kuer (widow)
Dharam Singh
Nand Kishore
Girdhari
Harbhan
(Defdt. 3)
Tunde
(Plaintiff in Cases Nos. 103 and 81 of 1928)
Aman
Thulley
Sardar
Roshan
Munni
(Plaintiffs in Case 103 of 1928)
Randhir
Manohar
Plaintiffs in Case No. 103 of 1928

The two original owners Kalyan and Ram Prasad owned a 2 biswa share in a certain village and they mortgaged the same to one Lakshmi Chand on a date which has not been disclosed. All that we are told is that the mortgage is an ancient one. In course of time the 2 biswa share was split up into three complete Mahals. One Mahal consisting of 1 biswa was named after Pitam, the son of Lachman. Another Mahal was known after Girdhari, one of the four sons of Ram Prasad. This Mahal consisted of a half biswa of the original Mahal and was owned by Dharam Singh and Girdhari, two of the four brothers. The third Mahal was named after Harbhan and consisted of a half biswa original share and was given to Harbhan and Nand Kishore, the two remaining of the four brothers being sons of Ram Prasad.

Girdhari's half share in Mahal Girdhari was sold at an auction sale and was purchased by one Khem Singh. It has been found by the learned single Judge of this Court that Dharam Singh had died after the auction sale, therefore, so much of the share of Dharam Singh as was inherited by Girdhari was not sold by the auction sale. The correctness of this finding was impeached by the learned counsel for the appellants, but I am satisfied that this finding is correct and the finding of the lower appellate court on this point was vitiated by the fact that the lower appellate court thought that there was no evidence as to the date of Dharam Singh's death. Girdhari's one-quarter biswa in the original Mahal which is equivalent to one-half of Girdhari's Mahal passed by the auction sale to Khem Singh on December 1, 1890. Khem Singh redeemed the mortgage in favour of Lakshmi Chand on June 26, 1898 and thus became the owner of Girdhari's original share and became entitled to hold possession over the other shares till the co-owners redeemed the original mortgage in his hands.

Pitam's widow Ram Kuer sold the entire Mahal Pitam to the appellants for a sum of Rs.600 and directed that out of this sum of Rs.600, Rs.210 should be paid by the purchasers in satisfaction of the mortgage.

The appellants paid the sum of Rs.210 to Khem Singh and we are told that Khem Singh handed over to the appellants not only the Mahal Pitam to which alone the appellants were entitled but also all other properties mortgaged including the property purchased by Khem Singh himself. This redemption was by private treaty and took place on March 26, 1920.

The appellants, it seems, purchased the whole of Mahal Harbhan. Two suits were instituted in respect of property against the appellants. One was by Tunde, son of Nand Kishore, in the right of his own father's original share in Mahal Harbhan. He claims one-half of Mahal Harbhan without offering to pay anything to the defendants on the allegation that the property belonged to him in his own right and Harbhan had no right to sell it, on July 19, 1920. This was suit No. 81 of 1928. The second suit was instituted by the four grandsons of Girdhari and Nand Kishore's son Tunde for recovery of the share of Dharam Singh inherited by them. They claimed twelve shares out of 27 shares in Mahal Girdhari, but they have obtained a decree for nine shares out of 27 shares or one-third. Their case was as follows:—On the death of Dharam Singh his half share in Mahal Girdhari was inherited in three equal shares by Nand Kishore, Girdhari and Harbhan. Nand Kishore thus got one-sixth in the Mahal and Girdhari got one-sixth share in the Mahal and Harbhan got one-sixth. Harbhan sold his share and therefore two one-sixths remained with Nand Kishore and Girdhari which the plaintiffs in Suit No. 103 of 1928 claimed. They did not offer to redeem the mortgage.

Both the suits succeeded in the lower appellate court but in Suit No. 103 the plaintiffs got a decree on condition of payment of a sum of Rs.70-2-4. Tunde in Suit No. 81 got a decree for possession of the share claimed without any condition of payment.

The learned single Judge of this Court held that the mortgage of Lakshmi Chand was paid with the money left by Pitam's widow out of the sale proceeds with the appellants. The appellants paid off the mortgage with the money of Pitam's widow and therefore were not entitled to be repaid in giving up the property claimed by the plaintiffs. In other words, the appellants did not hold, according to the opinion of the learned single Judge, as mortgagees.

The defendants have appealed. The plaintiffs are not only satisfied with the decree of this Court made by the single Judge, but they have also not appeared in the Letters Patent appeals.

The points that have been urged before us are:—(1) The appellants have paid off Khem Singh and having been put in possession of the plaintiffs' shares in the two suits are in the position of a mortgagee and therefore the plaintiffs cannot get possession without payment of a proportionate share of the mortgage money. (2) As the date of the mortgage is not established and as it cannot be said that the claim is within time, the suit must be dismissed. I have already disposed of the third point raised, namely, the share of the plaintiffs in Suit No. 103 of 1928 which was filed by Tunde and the four grandsons of Girdhari was less than 9|27 or 1|3 as Dharam Singh died before Girdhari's share was sold.

It is clear that if my answer on the point No. 1 be that the appellants do not hold as mortgagees, the second question raised by them does not arise.

It is settled law that when one of several co-mortgagors redeems, he holds his own share free from mortgage and he holds the remaining shares with the same rights as the mortgagee had. This position of the redeeming co-mortgagor is due to the fact that the co-mortgagors are in the eye of law not only principal debtors but also are sureties for one another for the payment of the mortgage money. When a surety satisfies a principal debt, he is entitled to hold the securities held by the creditor, in order to realise the sums which the co-mortgagors or co-debtors are liable to contribute towards the satisfaction of the principal debt. This is the principle of contribution as enacted in Section 82 of the Transfer of Property Act and this is the principle of subrogation as enacted in Section 92 of the Transfer of Property Act, as amended in 1929.

The question then is: when a co-mortgagor has redeemed the mortgaged property and when one of the co-mortgagors seeks to recover his property from the co-mortgagor who has redeemed, is the co-mortgagor entitled to recover not only his own share but the shares of other co-mortgagors who have not yet contributed towards the payment of the mortgage debt? It was conceded by the learned counsel for the appellants before us that the co-mortgagor seeking redemption from his co-mortgagor is entitled only to take possession of his own share and not the shares of the other co-mortgagors. There is a conflict of opinion on this point among the various High Courts. But so far as this Court is concerned, the decisions except one are all one way and lay down that the co-mortgagor is entitled to his own share alone. This was held in *Kallan Khan* v. *Mardan Khan*[1], *Zebun-nissa* v. *Parbhu Narain*[2] and *Kuray Mal* v. *Puran Mal*[3]. A contrary view was taken in the case of *Shiam Saran* v. *Banarsi Das*[4]. But a Bench of this Court in *Ahmad Husain* v. *Qasim*[5] preferred to follow the three earlier cases to the case of *Shiam Saran* v. *Banarsi Das*. The principle on which these cases are decided is that the integrity of the mortgage has been broken. The only object of one of the mortgagors being compelled to redeem the whole mortgage (being for the benefit of the mortgagee) no longer subsists. A co-sharer as such is not entitled to possession over the share of other co-sharers. The co-sharer who has redeemed the mortgage initially, holds shares other than his own simply for the sake of being able to enforce payment to himself. That object does not exist in the case of the other co-sharers. These pay their proportionate share in the mortgage money and take their own property from the redeeming co-mortgagor. This principle has been applied to cases where out of the usufruct of the mortgaged property entire mortgage money is paid off. In such a case, it has been held that one of the co-mortgagors is entitled to recover possession of his own share alone and it has been further held that if one of the co-mortgagors takes possession of more than his legitimate share, he holds adversely to the owner of the excess share (see *Fakir Baksh* v. *Sadat Ali*[6] and *Gobardhan* v. *Sujan*[7]. It is in the last-mentioned case that the possession of the co-mortgagor who had obtained more than his share of the property was held to be adverse to the owner of the excess share. This must be so as there is no fiduciary relationship among the co-sharers as such.

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[1] I. L. R. 28 All. 155

[2] I. L. R. 2 All. 565

[3] I. L. R. 39 All. 618

[4] 20 A. L. J. 258

[5] I. L. R. 48 All. 171

In this view of the law, the appellants on payment to Khem Singh had no right to take possession of the property belonging to the plaintiffs in the two suits and held by Khem Singh as security for a proportionate share of the mortgage money paid by him to the heirs of Lakshmi Chand. I may remark here that I am unable to agree with the learned single Judge of this Court that the mere fact that the mortgage money was paid out of the sale proceeds of the share sold by Mustt. Ram Kuer will deprive the appellants of their right to hold the redeemed property as mortgagees in order to secure payment of proportionate mortgage money to themselves. That is to say, if the appellants had paid off Lakshmi Chand's heirs, that is to say, to the mortgagees themselves and not Khem Singh, a co-mortgagor, who had redeemed in the first instance, in my opinion, the appellants would have been entitled to hold the shares other than their own till the owners of those shares redeemed them. The money has actually been paid by the transferee and it is immaterial whether it was described as part of the purchase price. The purchase price was Rs.600 and out of this sum Rs.210 were left to pay Lakshmi Chand's heirs. The same transaction may very well have been described as a sale of property subject to mortgage for a sum of Rs.600 minus Rs.210 or for Rs.390.

The argument on behalf of the appellants, however, is that although it may be correct in law that the appellants were not entitled to recover from Khem Singh any property other than the Mahal Pitam Singh, the property sold to the appellants, yet they having paid more than their legitimate share to Khem Singh and having recovered other shares from Khem Singh, they are in the same position as Khem Singh. I am unable to accept this position in law. If the appellants have no right to recover anything beyond their own share and if they recovered anything more they are pure trespassers with respect to the extra share recovered by them. If they paid a little money due by others, they paid as mere volunteers. No body asked the appellants to pay and they cannot recover. I need hardly repeat that Khem Singh's rights arose on the principle of subrogation which is expressly granted to a co-mortgagor redeeming property. On the other hand I find no warrant in Section 92 of the Transfer of Property Act as amended in 1929 or in decided cases any warrant for the proposition that a right of subrogation can arise on redeeming property from a co-mortgagor who has already redeemed it.

For the reasons given above, in my opinion, the appellants are nothing but trespassers and are bound to hand over the property to the plaintiffs in the two suits and they asked for the same.

Now remains to notice one more argument of the learned counsel for the appellants. It is this. Assuming that the appellants have no title to the property and they are not to be reimbursed for what they have paid, the plaintiffs have no right to recover the property as they have not paid off the mortgage. The answer to this argument is in my opinion simple. The "owner" of the property is the morgtagor at all times although the same property may have been mortgaged more than once. This question was discussed at length in the case of *Sohan Lal* v. *Mohan Lal*[8] and the view taken by the majority of the Judges in that case (*see* especially pages 991 and 992 and 999 to 1001) is in accordance with general principles. In view of that case the plaintiffs are the owners of the property and they are entitled to recover the same from any person who has got possession of the same for less than twelve years. In the case of *Amir Hasan* v. *Nazir Hasan*[9] the widow of a deceased Muhammedan was in possession in lieu of dower. She sold her right to dower to a legal practitioner who was debarred from purchasing an actionable claim, and put him in possession. It was held that an heir of the deceased could recover the property from the transferee without paying the dower. This was because the plaintiff had a title and the defendant had none. The suit is based on title and to such a suit Article 144 of Schedule I of the Limitation Act applies, as held by their Lordships of the Privy Council (see the case of *Rani Chattar Debi* v. *Mohan Vikram Shah*[10]. This view had already been taken by two learned Judges of this Court in the case of *Kanhaiya Lal* v. *Girwar*[11]. This last-mentioned case has been followed by me and Bennet, J. in other cases.

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[6] I. L. R. 7 All. 376

[7] I. L. R. 16 All 254

The title being thus with the plaintiffs the only person who could resist their claim for possession was either Lakshmi Chand and his successor-in-title or Khem Singh who redeemed the mortgage from them. The appellants' position being that of a trespasser pure and simple, they are bound to hand over the property to the plaintiffs, if they failed to establish (as they cannot establish in this case) that they have held the property adversely to the plaintiffs for more than twelve years.

In my view the plaintiffs are entitled to a decree for unconditional possession in each case.

The result is that I would dismiss both the appeals but without costs as the respondents are not represented before us.

Sulaiman, C. J.

SULAIMAN, C. J.—The facts are fully stated in the judgment of my learned brother.

So far as the question whether after the integrity of the mortgage has been broken a co-mortgagor can, as of right claim redemption of his share only, is concerned, I have no doubt that he cannot claim more. He is not entitled to take possession of the share of the other co-mortgagors against the will of the mortgagee. When the mortgagee has acquired a part of the mortgaged property, he is on the same footing as the other co-mortgagors. He cannot be compelled to hand over possession of shares which do not belong to the plaintiffs. I do not think that any of the cases referred to by my learned brother is an authority for the proposition that if the mortgagee submits to the redemption of the whole property on payment of the whole amount due, the taking over possession of the other co-mortgagors' shares is unlawful and the redeeming co-mortgagor enters into adverse possession of those shares immediately.

[8] I. L. R. 50 All. 986

[9] 1932 A. L. J. 275

[10] 58 I. A. 279=I. L. R. 10 Pat. 851

[11] 1929 A. L. J. 1106

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In *Kuray Mal* v. *Puran Mal*[12] Spankie, J. merely held that the representative of a mortgagor of a particular share, is *entitled* to redeem his own particular share in the joint mortgage of which the joint character has been broken up, but he cannot redeem, *against the will of the mortgagee,* the share of another share-holder. Oldfield, J. also emphasised that when the joint character of the mortgage has been broken the right to redeem the whole mortgage resting on the joint character of the mortgage ceases, and he cannot redeem more than his share *against the will of the mortgagee.* In the case of *Fakir Baksh* v. *Sadat Ali*[13] the mortgage debt had been satisfied from the usufruct and therefore the mortgage no longer existed.

Gobardhan v. *Sujan*[14] was also a case where the amount of the mortgage had been satisfied out of the usufruct, and as the learned Judges put it, the mortgage had become extinct and the parties were relegated to the position in which they were before the mortgage. They accordingly held that one of the mortgagors could only claim from the mortgagee his own individual share, as he had no right to take possession of the share of the others. But the learned Judges also observed that there can be no doubt that when one of several mortgagors redeems the mortgage by payment of the mortgage money and takes possession of the mortgaged property, he steps into the shoes of the mortgagee as regards the share of his co-mortgagors, and his possession over those shares can only be regarded as the possession of a mortgagee. In *Kallan Khan* v. *Mardan Khan*[15] Banerji, J. relied on *Kuray Mal's* case, and quoted the observation that the person interested in a part of the mortgaged property after the joint character had been broken up, was not entitled to redeem anything beyond his own share *against the will of the mortgagee.* He laid down the principle that such a mortgagor "may" redeem his own share only on payment of a proportionate part of the mortgage money, but he "cannot compel" the mortgagee to allow him to redeem the shares of the other persons in which he is not interested.

The case of *Ahmad Husain* v. *Muhammad Qasim Khan*[16] is an authority only for the proposition that one mortgagor after the integrity of the mortgage has been destroyed, cannot as of right claim redemption of more than his own share when the mortgagee objects to it. In that case the mortgagee was resisting the claim and was objecting to any greater share being allowed to be redeemed. The same remarks apply to *Zaib-un-nissa Bibi* v. *Maharaja Parbhu Narain*[17].

On the other hand a Bench of this Court in *Shiam Saran* v. *Banarsi Das*[18] allowed a part owner of the mortgaged property to redeem just as much of it as did not belong to the mortgagees themselves, on payment of a proportionate share of the mortgage debt. Possibly, the learned Judges were influenced by the circumstance that the majority of the *pro forma* defendants had supported the plaintiff's claim and had asked that his suit might be decreed as brought.

I am not prepared to go to the length to which the Bench in *Shiam Saran's* case did, but I would certainly say that none of the cases referred to above is any authority for the proposition that when the mortgagee himself does not object and submits to redemption of the share of all the

[12] I. L. R. 2 All. 565

[13] I. L. R. 7 All. 376

[14] I. L. R. 16 All. 254

[15] I. L. R. 28 All. 155

[16] I. L. R. 48 All. 171

[17] I. L. R. 39 All. 618

[18] 20 A. L. J. 258

co-mortgagors other than that which he himself has acquired, on receipt of the proportionate amount of the mortgage money, the possession of the redeeming co-mortgagor at once becomes adverse as against the other co-mortgagors.

It seems to me that when the delivery of possession is made by the mortgagee to the plaintiff co-mortgagor the property is delivered to the latter on behalf of all the persons interested, and the initial possession taken by them is in a representative capacity and therefore not at all adverse. The character of such representative possession would not change unless subsequently there is an assertion of adverse title to the knowledge of the other co-mortgagor. In the case where the redeeming co-mortgagor is a co-sharer with the other co-mortgagors, his possession in the eye of the law is on behalf of all the co-sharers and without an express denial of their title and their ouster to their knowledge, his adverse possession cannot commence. If the possession of one co-mortgagor redeeming the whole property were to become adverse automatically from the very commencement, the mortgagors would find their period of redemption suddenly cut down to 12 years some times without their knowledge.

Article 144 of the Limitation Act will apply where there has been no dispossession, and the defendant must prove his adverse possession for over 12 years. Article 142 applies only, when the plaintiff having been previously in possession has been dispossessed, in which case he must sue within 12 years of his dispossession. I do not imagine that the learned Judges in *Kanhaiya Lal* v. *Girwar*[10] meant to lay down anything different.

There is no doubt that Khem Singh, by virtue of his auction purchase in 1892 of the interest of Girdhari, became a co-mortgagor. When in 1898 he redeemed the entire mortgage on payment of the entire mortgage money and obtained possession of all the three mahals his position was that of a full proprietor *qua* Girdhari's interest purchased by him and that of a charge holder *qua* the interest of the other co-mortgagors.

When Johri and Mangli, who subsequently purchased mahal Pitam, wanted to redeem the mortgage, the could not have insisted on Khem Singh submitting to a redemption of the entire property. If Khem Singh had insisted upon his rights, he would have compelled Johri and Mangli to redeem only their share on payment of the proportionate amount. But as the redemption took place out of court under a mutual agreement, Khem Singh did not object and handed over possession of the entire mortgaged property to Johri and Mangli on the receipt of the entire mortgage money. Subsequently Johri and Mangli purchased the whole of mahal Harbhan also.

It seems to me that the position of Johri and Mangli, as regards the share of the plaintiffs, must be one of a person who has paid off their share of the mortgage money on their behalf and taken possession from the mortgagee and has not yet been paid off by the plaintiffs. The plaintiffs own the equity of redemption, but so long as they do not pay the mortgage money they are not entitled to obtain possession. The right to possession was with Khem Singh so long as he was not paid. He has passed on his possession to Johri and Mangli on taking the plaintiffs' share of the mortgage money from Johri and Mangli. The latter therefore cannot be treated

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[10] 1929 A. L. J. 1106

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as rank trespassers, but as persons who have been put in possession by the lawful mortgagee, Khem Singh, and who have paid off the share of the mortgage money, due from the plaintiffs. The defendants are, to say the least, the licencees of the mortgagees, and if 12 years were to expire, they would certainly acquire adverse possession as mortgagees against the other mortgagors. But before such adverse possession has matured they would not be entitled to enforce their rights as plaintiffs, but as the defendants they are in equity entitled to protection.

The position of the defendants therefore is not that of trespassers, pure and simple, but of persons who are in possession of the mortgaged property, having paid off a part of the mortgage money, and are entitled to use that payment as a shield so long as they themselves are not redeemed. Legally the mortgagee rights have not been assigned to them to that they cannot, as plaintiffs, enforce any rights of subrogation in a court of law. But as defendants in possession they can set up their payment as a shield. For authority I may refer to the observations made at page 281 and page 285 in *Mannu Mal* v. *Ram Chander*[20]. *See* also *Nasiruddin* v. *Ahmed Husain*[21]. In the Full Bench case of *Ram Sanehi Lal* v. *Janki Prasad*[22], three out of the remaining four learned Judges agreed with my judgment in which on pages 744 to 745 I referred to previous cases laying down the rule of equity in favour of a defendant in possession, to claim the amount paid by him in discharge of a previous mortgage. The position of a person paying off a simple mortgage (otherwise than by purchasing the property in execution of a decree on a prior mortgage) stands on a different footing because the mortgagee has no right to take possession. But a person paying off a possessory mortgagee in his capacity of a mortgagor or subsequent mortgagee does not obtain possession as a trespasser and cannot be turned out so long as the amount due is not repaid.

It seems to me that the plaintiffs who have neither redeemed their mortgage, nor paid the mortgage money, cannot recover possession against the defendants who have taken possession from the usufructuary mortgagees on payment of the mortgage debt. The case of a Mahommedan widow in possession of her husband's property in lieu of her dower debt over which she has a lien is different. The lien is always extinguished when possession is lost. If she transfers the property without tranferring the lien itself, the transferee obviously cannot claim payment of the dower debt as against her heirs. But it has always been held that her right to recover the debt and her lien are both heritable and transferable. If she were to transfer the lien itself, there can be no doubt that the transferee would be able to resist a claim for possession brought by the heirs. But where she has not transferred the lien at all, a transferee of the property only cannot claim the lien.

I do not think that any of the points which arise in this case at all arose in the Full Bench case of *Sohan Lal* v. *Mohan Lal*[23].

But it seems to me that the defendants can also call upon the plaintiffs to prove their title. The mere fact that at one time the mortgage existed, is not sufficient for a claim for redemption to succeed. The plaintiffs must further establish that the mortgage was made within sixty years or that

[20] 1931 A. L. J. 273

[21] 1926 A. I. R. (P.C.) 109

[22] 1931 A. L. J. 729

[23] I. L. R. 50 All. 986

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their right of redemption has been kept alive by any subsequent acknowledgment. The burden is on them to show that they have a subsisting right of redemption. See *Anup Singh* v. *Fateh Chand*[24]. The view of the majority of the Full Bench is binding upon me.

Where a suit relates to possession of immovable property and limitation has expired, it is not only that the remedy is barred, but the right also is extinguished under Section 28 of the Limitation Act. If therefore 60 years have expired the plaintiffs' rights have been extinguished.

The defendants who are holding possession with the consent of the mortgagee, Khem Singh, are entitled to plead that they are not rank trespassers, and can legitimately urge that the plaintiffs should have brought their suit for redemption against the mortgagee, Khem Singh, impleading the present defendants as the persons who have been put in possession by the mortgagee. The plaintiffs cannot, over the head of the mortgagee Khem Singh, sue to dispossess the defendants who are in possession with their consent.

It also seems to me that the defendants are at any rate entitled to put the plaintiffs to proof of the fact that their right of redemption was subsisting till 1920 when the mortgagee Khem Singh put the defendants in possession. If the plaintiffs' right of redemption owing to lapse of time had become extinguished by March 26, 1920, then they cannot get a fresh start as against the present defendants merely on the ground that the latter are mere volunteers, even if they were so, who have paid off the mortgage money and taken possession of the mortgaged property without any formal deed of assignment. If the right of redemption had been extinguished by 1920, the only person to whom the defendants are responsible is Khem Singh from whom they have taken over possession for consideration. They cannot be compelled to hand over possession to the plaintiffs without receipt of their money.

In the absence of proof of the exact date of the mortgage the plaintiffs' claim should be dismissed, as laid down by the Full Bench in *Anup Singh's* case. I would accordingly allow the appeal and dismiss the suit.

By the Court—As we differ on the questions of law arising in this case we direct that this case be laid before the Chief Justice for being sent to one or more of the other Judges.

[The appeal was accordingly heard by King, J., who delivered the following judgment on June 7, 1932.]

King, J.

King, J.—This was an appeal under Sec. 10 of the Letters Patent against the decree of a learned single Judge of this court dismissing a second appeal arising out of a suit for possession of zamindari property. As the two learned Judges who heard the appeal have differed in opinion on a point of law, the case has been referred to me for opinion on that point.

The point of law on which my opinion is required has not been formulated, but both sides have been represented before me by learned counsel who agree that the question is:—"Are the appellants Jauhari and Mangali in possession of the plaintiff's share in the capacity of mortgagees, or trespassers, or in any other capacity?"

The position in 1898 was that there were 3 mahals jointly subject to an old usufructuary mortgage. The mahals were called Mahal Pitam, Mahal Girdhari and Mahal Harbhan. One Khem Singh owned a share in Mahal Girdhari. Khem Singh, as one of the co-mortgagors, redeemed the whole mortgaged property by paying the mortgage money, Rs.210-8 to the mortgagee Jwala Prasad and got possession of the whole property.

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[24] 1920 A. L. J. 789

After redemption the position was that Khem Singh held his share in mahal Girdhari free from the encumbrance. In respect of the rest of the mortgaged property Khem Singh was subrogated to the rights of the original possessory mortgagee. In the absence of authority the language of Section 95, Transfer of Property Act might have led one to hold that Khem Singh merely held a charge over the remaining property for the proportionate mortgage debt, but it is well established by judicial authority that in respect of the property of his co-mortgagors he must be treated as the assignee of the mortgage security. This proposition has received statutory recognition in Section 92 of the Transfer of Property Act as amended in 1929. So far there is no difficulty.

In 1919 the appellants bought mahal Pitam, and on March 26, 1920 they redeemed, not only mahal Pitam, but the whole of the mortgaged property, on payment of the mortgage debt of Rs.210-8 to Khem Singh. The latter delivered possession to them of the whole mortgaged property including even his own proprietary share in mahal Girdhari. It is not clear why Khem Singh delivered possession of his own share, which was free from the encumbrance, but it seems that he did so. Subsequently the appellants purchased from Harbhan certain shares in mahal Harbhan and Mahal Girdhari but these transactions have no material bearing on the point at issue.

Tunday (the plaintiff in suit No. 18 of 1928) owns a half share in mahal Harbhan. Tunday and the grandsons of Girdhari (plaintiffs in suit No. 103 of 1928) between them own a share in mahal Girdhari. They claim possession of their shares from the appellants, without paying the proportionate share of the mortgage debt, alleging that the latter are in possession without title. The appellants claim that as they had discharged the mortgage debt upon the plaintiff's share they cannot be dispossessed without being paid the proportionate share of the mortgage debt.

Mukerji, J. takes the view that the appellants were only entitled to redeem their own share and had no right to redeem the share of the plaintiff also. When they paid the mortgage debt due upon the plaintiff's shares they did so as volunteers, and have no right to retain the property or to be reimbursed. For these reasons the appellants are nothing but trespassers and are bound to hand over the property to the plaintiff without receiving any payment.

Sulaiman, C. J. is of opinion that although the appellants had no right to redeem more than their own shares against the will of the mortgagee, nevertheless they were entitled to redeem the whole property *with the mortgagee's consent.* Having redeemed the whole property with the mortgagee's consent they cannot be dispossessed unless the plaintiff pays his proportionate share of the mortgage debt. As defendants in possession they can set up their payment as a shield. At the very least they are licensees of the mortgagee and not mere trespassers.

I find it very difficult to hold that the appellants who were co-mortgagors, and who obtained possession from the mortgagee, after paying up the entire mortgage debt, are mere trespassers.

It is conceded that, when the integrity of a mortgage has been broken a co-mortgagor is entitled to redeem his own share and cannot compel the mortgagee to permit redemption of more than his share. The mortgagee also cannot compel a co-mortgagor to redeem more than his share. But I cannot find any authority for the view that a co-mortgagor cannot redeem the whole mortgaged property *with the mortgagee's consent*. Such a transaction does not contravene or evade the provisions of any law nor does it injure anyone. The plaintiff as a co-mortgagor was not entitled to recover possession of his share without paying off the proportionate mortgage debt due upon his share. It is immaterial to him whether he pays the money to Khem Singh or to the appellants, so he has not been prejudiced in any way.

In my opinion Section 95 of the Transfer of Property Act applies not only to the redemption by Khem Singh from the mortgagee, but also to the redemption by the appellants from Khem Singh. When Khem Singh redeemed the whole property from the mortgagee he was undoubtedly subrogated to the rights of the mortgagee. He occupied the position of an assignee of the original security. So when the appellants redeemed the whole property from Khem Singh, on payment of the whole mortgage debt, I think the appellants stepped into the shoes of Khem Singh as assignee of the original security. It is true that the appellants were not (like Khem Singh) *bound* to redeem more than their own share, as the integrity of the mortgage had been broken. But there is nothing in Section 95 to indicate that its application is restricted to cases where the co-mortgagor cannot redeem his own share only and is compelled to redeem the whole property. I think that the same principle will apply where a co-mortgagor redeems the whole property, with the mortgagee's consent, although he might have compelled the mortgagee to permit redemption of his own share only. If the principle of Section 95 is applicable, as I think it is, then the appellants are clearly in possession of the plaintiff's share in the capacity of mortgagees.

No judicial authority which is directly in point has been cited before me. The case of *Gobardhan* v. *Sujan*[25] has been cited by the respondent to support the contention that the appellants are in adverse possession of the plaintiff's shares, as trespassers and not as mortgagees but that case is clearly distinguishable on the facts. In that case a usufructuary mortgage had been satisfied out of the usufruct. One co-mortgagor recovered possession of the whole property. It was held that he was not entitled to take possession of more than his own share, and that he did not occupy the position of a mortgagee to his co-mortgagors but his possession was adverse to them. The reason for the decision was that as the mortgage had been satisfied out of the usufruct the mortgage became extinct and the parties were relegated to the position in which they were before the mortgage. In the present case the mortgage had not be-

[25] I. L. R. 16 All. 254

come extinct and the appellants took possession of the property from the mortgagee Khem Singh on payment of the whole mortgage debt. I think this ruling is no authority for holding that, on the facts of this case, the appellants are in possession of the plaintiff's share not as mortgagees but as trespassers.

There is one aspect of this case which has not been touched upon, either in the foregoing judgments or in arguments before me. The language of Section 70 of the Contract Act seems wide enough to be applicable to the facts of this case. The appellants lawfully discharged the mortgage debt on the plaintiff's share. They clearly did not intend to do so gratuitously and the plaintiff enjoys the benefit of such discharge. The plaintiff claims possession of his share without payment on the ground that the appellants have discharged the plaintiff's debts officiously and voluntarily. But Section 70 is not restricted to cases where a service is rendered to another person under compulsion or in circumstances of pressing necessity. It is not the appellant who are seeking as plaintiffs to recover money from the persons benefited. It is the persons benefited who are seeking to recover possession of the property, and under the provisions of Section 70 there is some force in the defence that the plaintiff should not be permitted to recover the property without repaying the sums paid by the defendants on behalf of the plaintiff. If it is held that Section 95 does not apply, and if there is nothing in the law of mortgage that expressly governs the question, then we are entitled to seek guidance from the general principles of equity. On the equitable principle laid down in Section 70 I think the plaintiff is not entitled to enjoy the benefit of the payment made by the appellants without making compensation.

The lower appellate court has decreed the claim in suit No. 103 on payment of Rs.70-2-4 and it is significant that the respondent has not even troubled to file a cross-objection. This shows that the plaintiff does not regard it as unjust that he should pay the proportionate mortgage debt as a condition of obtaining possession, and he will have to do so even if the appeal is dismissed. Whether the view that I take on the point of law is right or wrong, I feel that it is at least in accordance with justice and equity.

In my opinion the appellants are in possession of the plaintiff's share as mortgagees and not as trespassers, and the plaintiff cannot recover possession without paying his proportionate share of the mortgage debt.

JAI DAYAL MADAN GOPAL OF BENARES—IN THE MATTER OF*

Civil

1932

April 22

SULAIMAN, C. J.
MUKERJI, J.

Contract Act, Sec. 239—Firm—Whether can be partner in another firm—Income-Tax—Firm owned by two partners—Partners interested in other firms also—Income from other firms credited into the books of Benares firm—Whether partners individually or firm liable to tax.

Under Sec. 239 of the Contract Act a firm cannot be a partner in another firm. *Basanti Bibi* v. *Babu Lal Poddar,* 1930 A. L. J. 1617 and *Sheodayal Khemka* v. *Joharmull Mannmull,* I. L. R. 50 Cal. 549 *followed.*

Where two partners with equal shares, besides owning a registered firm in Benares, were interested in several other unregistered firms bearing the same name, and it was found that although the Benares firm had made no profits in the year of assessment, the other firms had made considerable profits, and the income received from these firms was credited into the books of the Benares firm, *held,* that subject to the limitation that it does not necessarily follow that the income received by the Benares firm is no part of its own income, the Benares firm cannot legally be a partner in the other firms.

Per SULAIMAN, C. J.—If money had been taken by the partners out of the Benares firm and reinvested by them in other firms, then it is their money and the profits earned on it belonged to them in their individual capacities. If on the other hand, the money belonged to the Benares firm and was invested by the Benares firm as such and profits on the amount had been received back by the Benares firm, the capital continues to belong to the Benares firm and the income earned thereon is the property of the Benares firm, although the Benares firm cannot in the eye of the law have the status of a partner in the other firms.

REFERENCE under Sec. 66, Sub-sec. 2 of the Income Tax Act by the Commissioner of Income-tax, U. P.

K. N. Katju and *Harnandan Prasad* for the assessee.

U. S. Bajpai (Government Advocate) for the Crown.

The following judgments were delivered:—

Sulaiman, C. J.

SULAIMAN, C. J.—The question referred to the High Court by the Commissioner is in the following words:—

> Whether having regard to the deed of partnership, dated April 16, 1928, and to other relevant evidence on the record, the finding that the registered firm Jai Dayal Madan Gopal of Benares is in its corporate capacity a partner in nine other firms bearing the same name was a legal and proper finding?

It is obvious that the Commissioner has assumed that a registered firm can under the law be a partner in another firm in its corporate capacity and he has asked us to answer the question whether having regard to the deed of the partnership and to other relevant evidence on the record, the firm Jai Dayal Madan Gopal of Benares is a partner in the other firms.

Strictly speaking the question of law that one firm cannot legally be a partner in another firm in its corporate capacity has not been referred to us. This would be clear if we see the grounds in the petition of the assessee for reference to the High Court. The first three grounds did not refer to this question at all. The fourth ground was confined to the proper construction of the instrument of partnership, and the fifth ground was

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*Mis. Case 653 of 1931

> Whether the income from various partnership concerns mentioned in the assessment order referred to in the appellate order is the exclusive income of the applicant firm or the individual income of the partners of the applicant firm under the instrument of partnership read with the proviso to Section 55 of the Act.

The question of the impossibility of one firm being a partner in another firm was not asked to be referred to.

It is, however, clear from the way in which the question has been put by the Commissioner, challenging, as it does, the legality and propriety of the finding of the Income Tax Officer, it may well be said to include the question of law as stated above. We have power to reframe the question so as to answer it correctly. But when reframing it we must take care that we do not answer the new question in a way which would lead the income tax department to imply an answer to another question not directly included. The real matter with which the department is concerned is whether the income received by the Benares firm from the various partnership concerns in other places is a part of the taxable income of the Benares firm or not. It is in a proceeding relating to the assessment of tax on the income of the Benares firm that the question whether the Benares firm can legally be a partner in the other firms arises.

The instrument of the partnership begins as follows:—

> Whereas a partnership firm in the name of the head of our family Seth Jai Dayal Madan Gopal is carried on at Kashi (Benares) and other places, in which we are shareholders of half and half, etc.

If the question had turned entirely on an interpretation of the instrument of the partnership, I would have said that it means that there is one partnership firm in the name of Seth Jai Dayal Madan Gopal carrying on business at Kashi (Benares) and other places in which the two persons are partners to the extent of a half share each. If an answer were sought as to whether the Benares firm is a partner in the other firms on the basis of the deed of the partnership and other relevant evidence on the record, I would decline to answer the question because that is not a question of law at all but one of fact. Where the evidence is both oral and documentary in addition to the deed of partnership, I would not say that the matter is merely one of a legal inference from found facts, but I would say that it is a question of fact itself.

But if a question were asked whether one firm can legally be a partner in another firm, then I would unhesitatingly proceed to answer it.

There is authority for the view that one firm cannot legally be a partner in another firm. Section 239 of the Contract Act defines a partnership as the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. The view has been expressed that the word 'person' in this Section does not include a firm. I may refer to the case of *Sheodayal Khemka* v. *Joharmull Manmull*[1] where Page, J. remarked that a firm is not a person, it is not an entity but is merely a collective name for the individuals who are members of the partnership. This case was

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[1] 50 Cal. 549 at 558

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followed by a Division Bench of the Calcutta High Court in *Brojo Lal Saha Banikya* v. *Budh Nath Pyari Lal and Co.*,[2] where it was held that a partnership entered into by two or more persons is not a legal person and that a firm is not a person within the meaning of Section 239 of the Contract Act. A Bench of our own High Court in *Basanti Bibi* v. *Babu Lal Poddar*[3], expressed a similar view that the owning of a five annas share in the factory could not be regarded as forming a separate partnership, but that there was only one partnership owning the whole factory. The facts of the last mentioned case were however peculiar.

But it may be pointed out that the definition of the word 'person' as given in the General Clauses Act of 1868 which was in force when the Contract Act was passed, and which definition has been reproduced in the Act of 1897, was not expressly considered in the above cases. According to that definition a person includes any company or association or body of individuals, whether incorporated or not (II (3) of 1868 and Section 3(39) of 1897).

In *Kader Bux Omer Hyat* v. *Bukt Behari*[4] another learned Judge of the Calcutta High Court when considering the argument that a partnership which purports to exist between a firm and an individual is unlawful according to Indian Law, pointed out the fallacy that "conceding that a firm is not a legal person, a person within the meaning of Section 239 may yet be a combination of persons", but pointed out that "person" is not defined in the Contract Act, and the definition of person in the General Clauses Act permits of this being the case; the terms of the section do not render unlawful or impossible a partnership between an association of persons, although unregistered, and an individual". But the learned Judge went on to say

> that a firm is nothing but an association of individuals, and that when such an association under a firm name enters into a partnership with another individual or another association of individuals, it is not the aggregate that combines with the individual but the individuals composing that aggregate.

If the definition of 'person' as given in the General Clauses Act were to be applied to the word 'person' in Section 239, there would be absolutely no reason to exclude a firm from the scope of the word. No doubt the definitions in the General Clauses Act apply only when there is nothing repugnant in the subject or text. But it would be difficult to say that there is something repugnant in Section 239 itself to the applicability of that definition of person. No doubt there are other sections in Chapter XI of the Contract Act dealing particularly with the death or disability of partners which would not be applicable to a firm.

There is nothing absolutely incongruous in holding that a firm is a legal person. Indeed such a conception exists in some systems of law. The English Partnership Act of 1890 (53 and 54 Vict. Ch. 39), Section 4, Sub-section (2) lays down that in Scotland a firm is a legal person distinct from the partners of whom it is composed.

The question is not free from difficulty but having regard to the previous authorities, particularly of this Court, I am not prepared to dissent

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[2] 55 Cal. 551

[3] 1930 A. L. J. 1517 (1519)

[4] 36 Cal. W. N. 489 (490)

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from the view that the word 'person' in Section 239 of the Contract Act should not be interpreted so as to include a firm. Such an interpretation avoids complications in dissolution of partnerships and may well be accepted.

But the question whether a firm cannot be legally a partner in another firm so as to be able to enforce all the rights of a partner and be burdened with all the liabilities of a partner, is entirely different from the question whether the income received by a firm which was wrongly admitted as a partner and paid over to that firm is not legally money belonging to that firm.

The question before us arises under the Indian Income Tax Act. The firm Jai Dayal Madan Gopal of Benares is the assessee in this case. According to Section 2(2) of that Act an assessee means a person by whom income-tax is payable. The present reference under Section 66 arises in the course of an assessment and has been made at the request of the assessee. We must for the purposes of the Income Tax Act regard the assessee, namely, the Benares firm, as a "person", otherwise the department cannot tax the assessee at all. Under Section 239 of the Indian Contract Act the firm of Benares is a partnership firm. It can own property and have its own income. It can have a manager authorized to act on its behalf and to dispose of its funds. The Income-tax Act recognizes a firm which has got itself registered under Section 26A of the Income Tax Act. It, therefore, seems to me that the firm of Benares is a distinct legal entity recognized by law, separate from the two individuals who are its partners or proprietors. If the Benares firm had some funds of its own, and a part of its funds was invested in some other firm under a mistaken view of the law that the firm can be a partner in the other firm and some profit was earned on that income and has been paid over to the Benares firm and received by it as its own income, the money belongs to the Benares firm and it is income received by that firm for purposes of the income-tax. It is immaterial whether in the eye of the law the status of the Benares firm was that of a partner in the other firm or not, and quite immaterial whether the Benares firm could have in a court of law enforced its rights as a partner in the other firm or that other firm could have enforced the liability of the Benares firm as a partner. Money that has already been paid over to the Benares firm without protest as profits on that firm's own funds has become a part of the income of the Benares firm. If once it is conceded that the Benares firm exists as an entity, separate from the two individuals who own it, it cannot be said that a part of its funds ceases to be the property of the firm as soon as it is invested in another firm. Surely, even if the relationship of a partner does not legally come into existence, the money so invested continues to be the property of the Benares firm, and its return can be claimed. If profit earned on it has been paid to the Benares firm the profit must be the property of that firm. In my opinion the question whether such income belongs to the firm or to the partners in their individual capacities is entirely one of fact. If money had been taken by the partners out of the Benares firm and reinvested by them in the other firms, then it is their money and the profits earned on it belonged to them in their individual capacities. If, on the other hand, the money belonged to the Benares firm and was invested by the Benares firm as such and profits on the amount had been received back by the Benares firm, the capital continues to belong to the Benares firm and the income earned thereon is the property of the Benares firm, although the Benares firm cannot in the eye of the law have the status of a partner in the other firms.

Sulaiman, C. J.

Subject to the limitation that it does not necessarily follow that the income received by the Benares firm is no part of its own income, I would answer the question referred by saying that even though the finding may be justified on the evidence, the Benares firm cannot legally be a partner in the nine other firms.

Mukerji, J.

MUKERJI, J.—This is a reference under Section 66, Sub-section (2) of the Income Tax Act by the Commissioner of Income Tax, United Provinces.

There is a firm in Benares known as Jai Dayal Madan Gopal. It consists of two partners with equal shares one being Lala Jai Dayal and the other Rai Sahib Ram Ratan Das. There seems to be a slight clerical mistake in the name of the second partner in paragraph 1 of the statement of the case.

The firm has an expensive business. Besides owning this firm the two partners have an interest in numerous firms bearing the same name and carrying on business at different parts of the country. In the year of which the income for the purpose of assessment was under investigation, it was found that the firm made no profits. It was, however, calculated that the other firms in which the two partners at Benares were interested made considerable profits which after a slight correction was declared to be Rs.1,81,338. On this amount the tax and super-tax leviable has already been realised in the hands of the different firms. It appears that under the proviso to Section 55 of the Income Tax Act, where profits of an unregistered firm have been assessed to super-tax, no further super-tax can be levied on that sum in the hands of an individual partner of the firm. If the two gentlemen, Mr. Jai Dayal and Rai Sahib Ram Ratan Das be treated as partners of the numerous firms which have yielded the income described above, they would not be any longer liable to pay super-tax, on their individual share in the profits. The firm Jai Dayal Madan Gopal has been registered within the meaning of Section 2, Clause (14) of the Income Tax Act. The view taken by the Income tax department is that the registered firm Jai Dayal Madan Gopal is a corporate body and as a corporate body is a partner in the nine unregistered firms the profits of which have come to Rs.1,81,338. If this view be correct, the exemption from super-tax contained in the proviso to Section 55 of the Income tax Act will no longer be applicable to the shares of the two individuals, Lala Jai Dayal and Rai Sahib Ram Ratan Das. The contention of these gentlemen is that, as a matter of law, the firm Jai Dayal Madan Gopal is not a corporate body and could not be, having regard to the provisions of Section 239 of the Indian Contract Act, a partner of any other firm. They further contend that as a matter of law they, namely, Lala Jai Dayal and Rai Sahib Ram Ratan Das are partners, in the nine firms mentioned, in their individual capacity and are, therefore, not liable to be taxed with super-tax on one-half of the amount of Rs.1,81,338.

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Mukerji, J.

A preliminary objection was taken by the learned Government Advocate that the reference itself was incompetent because the controversy arises not because any tax is sought to be levied on the firm Jai Dayal Madan Gopal but because of a controversy that arises out of assessment on the individuals Lala Jai Dayal and Rai Sahib Ram Ratan Das.

This contention, however, is not sound because the question has arisen "in the course of the assessment" on the firm Jai Dayal Madan Gopal. The reference is correct and competent.

The question that has been referred to us by the learned Commissioner of Income tax runs as follows:—

> Whether having regard to the deed of partnership, dated April 16, 1928, and other relevant evidence on the record, the finding that the registered firm Jai Dayal Madan Gopal of Benares is in its corporate capacity a partner in nine other firms bearing the same name was a legal and proper finding?

In framing this question for determination by the High Court the learned Commissioner has taken it for granted that the firm Jai Dayal Madan Gopal is a corporate body and it was possible under the law as contained in the Indian Contract Act, for a firm like this to be a partner of another firm. The assessee firm has always contended that the income of Rs.1,81,338 and odd is their individual income and not the income of the firm Jai Dayal Madan Gopal. The question was very prominently and very clearly put before the Commissioner of Income tax in paragraphs (4) and (5) at page 25 of the printed reference. The same questions were raised before the Assistant Commissioner of Income tax in their appeal by the assessee firm in paragraph 7 at page 20 which runs as follows:—

> Because the findings of the learned Income tax Officer as treating the registered firm Jai Dayal Madan Gopal partners in other partnerships is illegal and is self-contradictory by treating the registered firm as capitalist partners.

It has been held in this Court that when a Commissioner of Income-tax states a case, it is open to this Court to find out for itself what are the question or questions of law that do arise between the parties, namely, the assessee and the Income-tax department for determination by the High Court and to decide those questions. *Sheo Prasad* v. *Commissioner of Income-tax*[5] and *in re Kajori Mal Kalyan Mal*[6]. This view has been followed in Bombay in the case of *Income Tax Commissioner, Bombay Presidency* v. *National Mutual Life Association Limited*[7].

In this view of the law this Court has to determine first what was the real point of controversy between the parties and then to pronounce an opinion on it.

The real controversy between the parties is whether the partners of the nine unregistered firms which yielded profits are Lala Jai Dayal and Rai Sahib Lala Ram Ratan Das individually or whether it is the firm Jai Dayal Madan Gopal that is the partner. This is also clear from Para 3 of the statement of the case.

There can be no doubt that under Section 239 of the Indian Contract Act a firm cannot be a partner in another firm. According to the Income Tax Act, the words "firm", "partner" and "partnership" have the same meaning respectively as in the Indian Contract Act 1872 (*Vide* Section 2, Sub-section (6) (*a*)). A partnership as defined in Section 239 of the Indian Contract Act is the relation which subsists between persons who are agreed to combine their property, labour or skill in some business and to share the profits thereof between them.

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[5] 1929 A. I. R. All. 819

[6] 1930 A. L. J. 78

[7] I. L. R. 55 Bom. 647

Persons who have entered into a partnership with one another are called collectively a firm.

It is true that under the definition of the word 'person' contained in the General Clauses Act of 1868 a person includes a number of individuals associated for a purpose, although they may not be a corporate body. But this definition would apply only if any other meaning is not indicated by the context of the law to be interpreted. Now by the Second Paragraph of the definition of "partnership" persons who have entered into a partnership with one another are called collectively a firm. Then if a firm can be a partner, we have this position that in defining a "partnership" the law uses the word "firm" which is hardly to be expected. For the definition of "partnership" would then run something like this. Partnership is the relation which subsists between individual persons or a firm and another firm or a firm and individual persons who have agreed, etc. This way of defining a term of law is hardly satisfactory. Then if we look to the other sections of the Act, we shall find that Chapter XI of the Indian Contract Act never contemplated that an incorporate body like a firm could be a partner. Take for example Section 254 which runs as follows:—

> At the suit of a partner the court may dissolve the partnership in the following cases:—
>
> (1) When a partner becomes of unsound mind.

Now can a firm become of unsound mind? Then again let us consider Section 253. Almost each of the rules regulating the relations of partners *inter se* presupposes that the partners are individuals and not an incorporate body like a firm. My own opinion, therefore, is that a firm cannot be a partner in another firm. This opinion of mine was expressed by my brother Bennet, J. (sitting with me) in *Basanti Bibi* v. *Babu Lal Poddar*[8]. This view has also been taken in Calcutta—see *Sheodayal Khemka* v. *Joharmull Manmull*[9] which was approved in *Brojo Lal Saha Banikya* v. *Budh Nath Pyari Lal and Co.*[10]. The latest Calcutta case, *Kader Bux Omer Hyat* v. *Bukt Behari*[11] does not take a contrary view as was urged by the learned Government Advocate.

It being then the settled law that a firm cannot be a partner in another firm, the Income-tax Officer was undoubtedly in the wrong when he held that the firm Jai Dayal Madan Gopal was a partner in the nine firms carrying on business at different places under the style Jai Dayal Madan Gopal.

The question of law that does arise in this case is: whether as a matter of law the firm Jai Dayal Madan Gopal of Benares could be a partner of the nine unregistered firms of the same name carrying on business at different places and, whether or not, it follows also as a matter of law, that the participation in the nine firms by Lala Jai Dayal and Lala Rai Sahib Ram Ratan Das was in their individual capacity.

[8] 1930 A. L. J. 1617

[9] I. L. R. 50 Cal. 549

[10] I. L. R. 55 Cal. 551

[11] 36 Cal. W. N. 480

From what I have already stated it seems to me clear that there could be only one answer to this question and that is

> that the two gentlemen Lala Jai Dayal and Lala Rai Sahib Ram Ratan Das are partners in their individual capacity in the nine unregistered firms styled Jai Dayal Madan Gopal.

It was argued on behalf of the Income-tax department that the income received from the unregistered firms was credited into the books of the Benares firm, namely, Jai Dayal Madan Gopal (registered) and, therefore, the income should not be treated as the income of two individual partners.

In my opinion this argument has no force. It may be that the two partners who constituted the registered Benares firm Jai Dayal Madan Gopal were not aware of the law and for this reason or for some reason of convenience the money was deposited in the firm account of Jai Dayal Madan Gopal (registered). But this fact and this fact standing by itself could not make the income, the *source of which is known,* the property of the firm and not the property of the two partners considered individually. In the registered Benares firm the two partners had equal shares, and, therefore, it was immaterial to themselves whether the amount was recorded as belonging jointly to them or whether one-half of the sum received was credited to each of them separately. It is only because of the law of income-tax that the question has now arisen.. But an individual, however clever, cannot be expected to take precaution against the language employed by the Income-tax enactment, the provisions of which are so often obscure and exercise the minds of counsel and Judges so much. In any case the Income-tax Act being a fiscal enactment must be liberally construed and administered with leaning always in favour of the subject, where that may be possible.

In the result I would frame the question of law as stated above and would answer it also as stated above.

In my opinion the assessee has succeeded in this reference and, therefore, the Crown must pay his costs including the sum of Rs.100 that was deposited by the assessee for the reference. I would assess the fee of the learned Government Advocate at Rs.250 as considerable time was occupied in court in hearing this reference.

BY THE COURT—Subject to the limitation that it does not necessarily follow that the income received by the Benares firm is no part of its own income, we answer the question referred to us by saying that even though the finding may be justified on the evidence, the Benares firm cannot legally be a partner in the nine other firms.

The Crown must pay the costs of the assessee including the sum of Rs.100 that was deposited by the assessee for the reference. We assess the fee of the learned Government Advocate at Rs.250. We assess the costs of the assessee in this Court at the amount certified by his counsel up to Rs. 250.

Reference answered

Civil

1932

May 27

King, J.
Thom, J.

SAHU DEPUTY SHANKAR (MINOR) THROUGH BHAGWATI
(*Applicant*)

versus

MANGAL SEN AND ANOTHER (*Opposite parties*)*

Civil Procedure Code (V of 1908), Or. 21, R. 93—Property sold under mortgage decree—Subsequently third party declared true owner of property—Auction purchaser loses property—Whether suit to recover money maintainable.

The doctrine of *caveat emptor* applies to court-sales. The right given to the auction purchaser being a creation of the statute, the remedy to enforce that right must be confined to that prescribed by the statute. The remedy is to apply under Or. 21, R. 91 to set aside the sale, and if the sale is set aside, to apply for a return of the purchase money under Or. 21, R. 93.

Where a person purchases immovable property at an auction sale in execution of a mortgage decree and subsequently loses the same under a decree passed in a suit brought by a third party against the mortgagor and the mortgagee in which the third party was declared the true owner and entitled to possession, such a purchaser is not entitled to bring a suit for recovery of his purchase money as against the mortgagee decree-holder. *Mannu Lal* v. *Bhagwan Das*, I. L. R. 39 All. 114 *relied on. Bindeshri Prashad* v. *Badal Singh*, I. L. R. 45 All. 369 *distinguished.*

EXECUTION SECOND APPEAL from a decree of D. C. HUNTER ESQ., District Judge of Moradabad, confirming a decree of BABU MAKHAN LAL, Subordinate Judge.

N. P. Asthana and *Shabd Saran* for the applicant.

S. K. Dar and *K. N. Malaviya* for the opposite parties.

The judgment of the Court was delivered by

King, J.

KING, J.—This defendant's appeal arises out of an application for the refund of purchase-money by Mangal Sen and Ram Prasad, the purchasers of immovable property sold in execution of a mortgage decree. Briefly the relevant facts are as follows: One Mathura Pershad on April 7, 1919 mortgaged a shop at Chandausi, the mortgagee being Babu Gokul Chand, the father of Deputy Shankar, minor, opposite party No. 1 in the application. Gokul Chand, who is now deceased, in respect of the mortgage obtained a final decree for sale on March 5, 1924. The property was put up for sale under the decree and was sold to Mangal Sen and Ram Prasad, the applicants, on September 4, 1924. The proceeds of the sale were distributed eventually amongst opposite party No. 1, (the son of the mortgagee), opposite party No. 2 the mortgagor Mathura Pershad, and opposite party No. 3 Pandit Bohj Raj, a creditor of No. 2, by virtue of attachment in execution of a decree against him. Between the date of the final decree and the sale one Digambar Singh filed suit No. 6 of 1924 in the court of the third Subordinate Judge of Moradabad against the mortgagor and the mortgagee for a declaration that he was the true owner of the property in question and for recovery of possession. After being successful in the first court, his suit being decreed on December 23, 1924

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*E. S. A. 25 of 1931

—unsuccessful on appeal—his suit was decreed on 'second appeal' by the High Court on December 21, 1927. He obtained possession of the property on September 19, 1928. In the present application therefore the original purchasers Mangal Sen and Ram Prasad seek the return of the purchase money which they paid from those amongst whom it was distributed. In this appeal we are concerned only with their claim for recovery so far as directed against opposite party No. 1—the son of Gokul Chand, the mortgagee and decree-holder. As against him the applicants have been successful in both the courts below.

The trial court took the view that the final decree for sale was reversed or nullified as a result of the decree adjudging Digambar Singh the true owner of the property in question. The lower appellate court took the view that the applicants must have a remedy, as considerations of equity make it right and just that they should have the purchase-money refunded to them. In our opinion the applicants are not entitled to succeed upon either of these grounds.

It is argued for the appellant that under the present Code of Civil Procedure (Act V of 1908) an auction-purchaser has been given a statutory right, under Order 21, R. 93, to recover his purchase-money when the sale has been set aside on the ground that the judgment-debtor had no saleable interest in the property sold (in accordance with the provisions of Order 21, Rr. 91 and 92) and that he has no right to obtain a refund upon any other ground. In other words, the auction-purchaser has no right to recover his purchase money unless the sale has been set aside under Order 21, R. 92. We have come to the conclusion that this contention is correct.

Under S. 315 of the Code of 1882 the auction-purchaser was given a right to receive back his purchase money not only when the sale was set aside, but also when it is found that the judgment-debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it. Under the Code of 1882 therefore the auction-purchaser would in the present case have been entitled to a refund. But in the Code of 1908 the law was substantially altered. In Order 21, R. 93 the clause quoted has been deliberately omitted, and the auction-purchaser is only entitled to a refund when the sale has been set aside under Rule 92. The deliberate omission of the clause quoted certainly suggests that the legislature did not intend that the auction-purchaser could claim a refund on the ground stated therein but could only claim a refund when the sale is set aside under R. 92. This interpretation of the existing law has been adopted by most of the High Courts in India. In *Mannu Lal* v. *Bhagwan Das*[1] the effect of the statutory amendment was fully discussed and it was held that under the present Code of Civil Procedure, an auction-purchaser who has been deprived, by means of a suit against the judgment-debtor, of the property purchased by him cannot obtain refund of the purchase-money without getting the auction sale set aside. That ruling was followed by another Bench of this Court in *Ram Sarup* v. *Dalpat Rai*[2]. It was also followed by the Bombay High Court in *Balwant Raghunath* v. *Bala*[3] and it may be noted that the property in that case had been sold in execution of a mortgage decree, as in the present case. The Allahabad rulings cited above were also followed by the Lahore High Court in *Habib-ud-din* v. *Hatim Mirza*[4]. The Madras High Court took the same view in *Parvathi Ammal* v. *Govinda Sami Pillai*[5]. Their Lordships remarked:

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[1] I. L. R. 39 All. 114

[2] I. L. R. 43 All. 60

[3] I. L. R. 46 Bom. 833

> The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through court, the purchaser has no right of action.

The Calcutta High Court has also held in *Rishikesh* v. *Manik Molla*[6] that the auction-purchaser cannot obtain a refund of purchase money, when the sale has not been set aside under R. 92, unless he can bring himself within the equitable principles which justify a suit for money had and received to his use, e.g., by establishing fraud or breach of duty on the part of the decree-holder, or collusion between the decree-holder and judgment-debtor. In the present case, no such fraud, collusion or breach of duty are suggested.

As against all these authorities, the respondent relies upon a Full Bench decision of the Chief Court of Oudh in *Bahadur Singh* v. *Ramphal*[7]. Here it was held by a majority of two learned Judges (Srivastava, J. dissenting) that when a person purchases immovable property at an auction sale in execution of a decree of court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such a purchaser is entitled to bring a suit for recovery of his purchase money as against the decree-holder. Stuart, Chief Judge, held that as the statute law was silent on the subject, an auction-purchaser who loses the property under a decree passed in favour of a third party, has a right to a refund of the purchase money under the general principles of equity. This decision is based upon the view that there is a warranty by the decree-holder that the property belongs to the judgment-debtor. We think it unnecessary to discuss this proposition, as this Court at least (not to mention other High Courts) has clearly taken the view that "as regards sales under a decree of a court there is no warranty of title either by the decree-holder or by the court". See *Shanto Chandar Mukherji* v. *Nain Sukh*[8] and the two Allahabad rulings already cited.

The trial court relied upon the Full Bench ruling in *Bindeshri Prasad* v. *Badal Singh*[9] but that ruling is clearly distinguishable. In that case, the decree under which the property had been sold was set aside. The auction-purchaser is entitled to assume that the decree is a valid decree. He is not entitled to assume that the property sold under the decree really belongs to the judgment-debtor. The principle "caveat emptor" is applicable to auction sales. In the present case the decree under which the property had been sold was never set aside, so the ruling is not applicable.

It may seem hard that the auction-purchaser should have no remedy when he has been deprived of property for which he paid cash. Before the confirmation of sale he did not know that the judgment-debtor's title would prove defective although he knew that the title had been impeached.

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[4] I. L. R. 6 Lah. 283
[5] I. L. R. 39 Mad. 803
[6] I. L. R. 53 Cal. 758
[7] I. L. R. 5 Luck. 552
[8] I. L. R. 23 All. 355
[9] I. L. R. 45 All. 369

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MANGAL SEN

King, J.

It would also be hard on the decree-holder to be deprived of his share of the sale proceeds when he believed in good faith that the property belonged to his judgment-debtor and he had advanced a loan to the judgment-debtor on the strength of his belief. However much we may sympathise with the auction-purchaser, the law seems to be clear that he has no remedy. It is unnecessary to consider the subsidiary question of procedure whether he should have proceeded by a regular suit or by an application under S. 47.

In our opinion the appellant's contention is clearly supported by the Allahabad rulings on which he relies. They do not appear to have been doubted or dissented from by any Bench of this Court. They are also supported by the authority of other High Courts and we have no hesitation in following them.

We therefore allow the appeal, set aside the decree of the court below and dismiss the application with costs throughout.

Appeal allowed

MOHAMMAD RAFI AND ANOTHER (*Plaintiffs*)
versus
KRIPA RAMJI AND ANOTHER (*Defendants*)*

CIVIL

1932

June 10

SULAIMAN, C. J.
MUKERJI, J.

Limitation Act (IX of 1908), Sec. 19—Mortgage—Acknowledgment of—Contained in a dakhalnama *filed in an execution proceeding—When valid.*

In a suit for redemption of a mortgage which was *prima facie* time-barred, the plaintiffs relied on an acknowledgment contained in a *dakhalnama,* which was filed in court in an execution proceeding—after describing what property the auction-purchasers had purchased, they expressly stated that that property did not include an 8 bigha area which was in their possession as mortgagees and which belonged to the mortgagor's representatives, *held,* that the necessary implication was that the mortgage was subsisting and that they were in possession as mortgagees, and there was therefore a valid acknowledgment within the meaning of Section 19 of the Limitation Act.

LETTERS PATENT APPEAL against the judgment of the HON'BLE MR. JUSTICE SEN.

S. *Majid Ali* for the appellants.

S. N. *Verma* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage, dated July 12, 1840. The plaintiffs are the representatives of the original mortgagors and the defendants are the representatives of the original mortgagees. The existence of the mortgage is not now in dispute, but the main plea for consideration is whether the claim is barred by time. Obviously the suit was brought more than sixty years after the date of the mortgage and was *prima facie* barred by time. In the plaint the plaintiffs, however, relied on two acknowledgments, one contained in a *dakhalnama,* dated November 21, 1887 and the other contained in a scheme for partition, dated June 27, 1888.

The court of first instance held that there was no valid acknowledgment under either of these two documents and accordingly dismissed the suit on the ground of limitation. The lower appellate court came to the conclusion that there was a valid acknowledgment under the *dakhalnama* of 1887 which extended the period of limitation and it accordingly decreed the claim. On appeal a learned Judge of this Court came to the conclusion that the *dakhalnama* was not a valid acknowledgment, because it was not an acknowledgment of a liability but was contained in a mere description of a certain property and he held that it was not established that the person who had signed the *dakhalnama* had authority to acknowledge the liability on behalf of the mortgagees.

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*L. P. A. 57 of 1931

The question of the authority, in our opinion, does not arise, because the *dakhalnama* purports to have been executed by the mortgagees themselves, namely, Sadhu Ram and Jai Ram, who are described therein as the executants and whose names appear under the heading "Signed". But it does appear that the document was executed on their behalf by Ghiau, who alleged himself to be the mukhtar-am of the purchasers.

The *dakhalnama* being more than thirty years old, there is a presumption that it was a genuine document and had been executed by the persons who appeared on the face of it to have executed it—see *Haji Sheikh Sheikh Bodha* v. *Sukhram Singh*[1].

It must, therefore, be presumed that the document was validly executed by Sadho Ram and Jai Ram which necessarily implies that the persons, who put down their signatures on their behalf, had authority to do so.

The next question is whether there was a valid acknowledgment within the meaning of Section 19. No doubt this acknowledgment was not addressed to the mortgagors directly, but it was contained in a *dakhalnama* which was filed in court in an execution proceeding against them. After describing what property the auction-purchasers had purchased, they expressly stated that that property did not include an 8 bighas and odd area which was in their possession as mortgagees and which belonged to the mortgagors' representatives. The exact date of the mortgage was mentioned in the order for attachment and the proclamation of sale and the identity of the mortgage to which there was reference is not in dispute.

It is contended on behalf of the defendants that an acknowledgment must be made as such and must in express language contain an admission of an existing liability of the mortgage and that such an inference cannot be drawn when it is contained in a description of some other property given in the deed. We are not able to accept this contention. So long as there is a clear indication of an intention to admit the existence of the mortgage, it amounts to a valid acknowledgment. In the present case the mortgagees clearly admitted that they were in possession of the area belonging to specific persons as mortgagees, and there is, therefore, the necessary implication that the mortgage was subsisting and that they were in possession as mortgagees. In our opinion this was a valid acknowledgment within the meaning of Section 19 of the Limitation Act. We do not think that the case of *Khiali Ram* v. *Taik Ram*[2] or the Bombay case on which it is based has any direct application to the present case.

The appeal is accordingly allowed, the decree of this Court is set aside and the decree of the lower appellate court is restored with costs.

Appeal allowed

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[1] 22 A. L. J. 857

[2] 14 A. L. J. 834

CIVIL

1932

June 15

PULLAN, J.
NIAMAT-ULLAH, J.

CHANDRABHAN (*Defendant*)
versus
RAJ KUMAR (*Plaintiff*) AND SRI PARASNATHJI AND OTHERS (*Defendants*)*

Limitation Act, Secs. 6, 9 and 19—Suit on mortgage by mortgagee's son after attaining majority—Prima facie *time-barred—Acknowledgment—Made when plaintiff a minor—Whether a new period runs from date of acknowledgment—Whether plaintiff entitled to benefit of Sec. 6.*

The plaintiff sued within three years of his attaining majority on a mortgage executed in favour of his late father. In order to bring his suit within limitation he relied on an acknowledgment of liability made by the mortgagor in a second mortgage which was executed at a time when the plaintiff's father was dead and he himself was a minor, and the plaintiff claimed the benefit of Sec. 6 Limitation Act. *Held*, that first period ceased to run entirely and a new period came into existence from the date of the acknowledgment, and the plaintiff was therefore a minor 'at the time from which the period of limitation is to be reckoned' and was entitled to institute the suit within the period of three years after his disability ceased; and Sec. 9 was no bar to the plaintiff's suit. *Venkataramayyar* v. *Kothandaramayyar*, I. L. R. 13 Mad. 135 *followed.*

FIRST APPEAL from a decree of J. N. MUSHRAN ESQ., Subordinate Judge of Etah.

K. Verma for the appellant.

K. N. Katju, Bhagwati Shankar, N. P. Singh and *H. C. Mukerji* for the respondents.

The judgment of the Court was delivered by

Niamat-ullah, J.

NIAMATULLAH, J.—This appeal arises from a suit brought on the basis of a mortgage, and the only question for determination is whether or not the suit is barred by limitation. A mortgage was executed on April 14, 1910, by two persons Dwarka Das and Jamna Das in favour of Sekhar Chand, father of the plaintiff. The plaintiff was at that time a minor, living jointly with his father. Sekharchand died in 1912, and on February 15, 1913, Dwarka Das and Jamna Das executed a second mortgage in favour of Sonpal, father of the defendant, including in that mortgage a sum of Rs.1,511, being the whole amount due as the principal and interest on the mortgage of April 14, 1910. Sonpal deposited the sum due on the mortgage of 1910, but for certain reasons, which need not be specified, subsequently withdrew the deposit, and his application was automatically struck off on April 10, 1915. On August 26, 1919, defendant No. 1, the son of Sonpal, purchased the mortgagor's rights from Dwarka Das, and in the sale-deed credit was allowed for the amount due under the mortgage of February 15, 1913. The suit was brought on March 14, 1928, the plaintiff claiming that he was entitled to sue within three years of attaining his majority. The defence is two-fold. In the first place it is argued that the plaintiff attained his majority more than three years before filing the suit, and secondly that as time had begun to run against

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*F. A. 316 of 1928

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v.
RAJ KUMAR

Niamat-ullah, J.

the plaintiff from the date of the mortgage, no subsequent disability could stop it as laid down by S. 9 of the Limitation Act, and consequently the plaintiff cannot claim the period of three years from the date of attaining majority under S. 6 of the Limitation Act.

Both parties have given evidence as to the plaintiff's age. He himself stated in accordance with the age in his certificate of guardianship that he became a major on November 14, 1925. He also filed an extract from a register of births showing that he was born in the month of June, 1905, in which case he would not attain majority till June, 1926. The discrepancy between the two dates is relied upon by the defence as casting doubt on the plaintiff's evidence. We do not, however, consider that the discrepancy is material. The plaintiff undoubtedly felt himself bound to uphold the date given in the guardianship certificate but such a certificate is not accepted by this court as evidence of age, and in our opinion the age of the plaintiff should be determined by reference to the register of births and the oral evidence. The register shows that a son was born to Sakri Bania Saraogi, resident of Ganesh Katra mohalla, in the town of Etah. It is now suggested that Sakri and Sekharchand are not the same, but there is nothing in the evidence to indicate that this point was raised in the lower court. We have no doubt that Sakri represents the more formal name of Sekharchand, and the caste and the mohalla correspond to those of the plaintiff's father. The defence witness Gulzarilal, who knew the plaintiff's father and is a member of the same community but wished to make out that the plaintiff was more than 25 years of age at the time of the suit, admitted that the plaintiff and his father lived in mohalla Katra, and that there was no other Sekharchand in the mohalla, and in cross-examination he stated that the plaintiff's father died in the hot weather of the Sambat year of 1970 or 1971 when the plaintiff was a boy of 8 or 9 years. Sambat 1970-1971 corresponds to 1913 A.D., and puts the plaintiff's birth in or about the year 1905, which is the year given in the birth register. We consider that the plaintiff is entitled to rely upon the facts elicited from this witness in cross-examination, and we accept the finding of the lower court that the plaintiff filed the suit within three years of his attaining majority.

As the plaintiff, although a minor, was a member of a joint family with his father when the mortgage deed of 1910 was executed, time began to run against him and against his father from the date of the execution of the mortgage, and the learned counsel for the appellant argues that the minority of the plaintiff became a disability only after his father's death, and was therefore a subsequent disability arising after time had begun to run, and on a proper interpretation of Section 9 of the Indian Limitation Act the time must be held now to have run out and the suit to be barred by limitation. Section 6 of the Indian Limitation Act uses the words "at the time from which the period of limitation is to be reckoned." It does not use the words, "the time from which limitation began to run." The point which we have to determine is whether limitation in this case ran continuously from the date of the execution of the mortgage in 1910 and merely received a new life from the date of the second mortgage of 1913, or whether the first period ceased to run entirely and a new period came into existence from the date of the second mortgage. In our opinion the mortgage of 1913 was a clear acknowledgment of liability, and a further acknowledgment was made in 1914 after the mortgage money was deposited for payment. Under Section 19 of the Indian Limitation Act a fresh period of limitation is to be computed from the time of such an acknowledgment. When this acknowledgment was made the plaintiff's father was dead, and he himself being a minor was under a disability within the meaning of Section 6 of the Limitation Act. In our opinion the plaintiff was therefore a minor "at the time from which the period of limitation is to be reckoned" and he might therefore institute the suit within the period of three years after his disability ceased. This is the view taken by the Judges of the Madras High Court in the case of *Venkataramayyar* v. *Kothandaramayyar*[1], a case almost exactly parallel to the one before us. The case for the other side had been stated by a single judge of the Bench of the Madras High Court in a judgment which is reported together with that of the Bench. He took the view that time was already running against the plaintiff before the acknowledgments were made, and Section 9 of the Limitation Act was a bar to the plaintiff's plea that time ceased to run when the acknowledgment was made. The view taken by the Bench was "that the former period, already running, was not extended, but terminated, and that an entirely new period runs from the date of acknowledgment". The view of these learned judges was followed by a Bench of the Calcutta High Court in the case of *Sarat Chandra Singh* v. *Sudhan Hari Mukerjea*[2]. There is no reported case of the Allahabad High Court which is directly in point, but a similar view was taken in the case of *Zamir Hasan* v. *Sundar*[3] in a case of execution of a decree. In that case a decree had been passed in 1881 in favour of two decree-holders. Subsequently one of them died, and the widow and the minor children became his representatives. In 1888 the widow made an application for execution on behalf of the minor sons, which was dismissed. In February, 1894, the sons being still minors made another application, and this application was held to be in time within the terms of Section 7 of the Indian Limitation Act. The important point about this decision is that it expressly followed the decision of the Calcutta High Court in *Lolit Mohan* v. *Janoki Nath Roy*[4] which laid down that if a person entitled to exception "is under a disability at the time when any one of such periods commences (that is to say, the period from which limitation begins to run) the operation of the Act is suspended during the continuance of the disability by the operation of Section 7."

We have no doubt therefore that the view taken by the lower Court in this case was correct, and that the suit was within time. We accordingly dismiss the appeal with costs.

Appeal dismissed

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[1] I. L. R. 13 Mad. 135

[2] 14 I. C. 694

[3] I. L. R. 22 All. 199 (F.B.)

[4] I. L. R. 20 Cal. 714

Civil

1932

June 16

Mukerji, J

Bennet, J.

THE GRESHAM LIFE INSURANCE SOCIETY, LIMITED (THROUGH THEIR CHIEF AGENTS FOR INDIA, GRESHAM BUILDINGS, BOMBAY (*Defendant*)

versus

THE COLLECTOR OF ETAWAH (AS MANAGER, COURT OF WARDS, PARTABNER ESTATE (*Plaintiff*)*

Succession Act (XXXIX of 1925), Sec. 214—Policy holder executed a will in favour of adopted son before his death—Insurance Co. refused payment without production of probate or letters of administration—Whether company acted within its rights.

A Hindu took out an Insurance Policy payable on his death. Before he died he adopted a minor and also executed a will in his favour. The Insurance Company having refused to pay to the court of wards, who had taken over management of the minor's estate, without production of either a probate or letters of administration, the court of wards brought the present suit to recover the sum payable on the policy. *Held,* that Sec. 214, Succession Act, applied and the company acted within its rights and no decree could be made against the company without production of a probate or letters of administration or a succession certificate.

There is nothing in law to prevent a company from entering into a contract with a proposer for life assurance that the company would pay the money only to him or his assign or to his executor or administrator and such a contract must bind not only the assured but also anybody claiming title under him.

First Appeal from a decree of Maulvi Tufail Ahmad, Subordinate Judge of Etawah.

B. E. O'Conor and *Ram Nama Prasad* for the appellant.

U. S. Bajpai (Government Advocate) and *G. S. Pathak* for the respondent.

The judgment of the Court was delivered by

Mukerji, J.

Mukerji, J.—This appeal raises a question which is of great importance to companies doing life insurance business.

It appears that a gentleman named Raja Hukum Pratap Singh took out a Policy of insurance on August 15, 1917, which was payable either when the Raja attained the age of 40 or on his death. The Raja died on May 17, 1925. One day previous to his death he adopted a minor, who subsequently became Raja Maha Bindeshwari Pratap Singh, and he also executed a will in favour of the adopted son. The proprietor of the estate being a minor the Court of Wards took over superintendence and management of the estate. The Policy having become payable on the death of the assured, the Court of Wards called upon the appellant to pay the sum of Rs.15,000 to the Court of Wards as represented by the Collector of Etawah. The company asked for proof of title and stated that they were ready to pay the money as soon as they were satisfied as to the title of the claimant. Their letter will be found printed on page 51 of the record. It stated:

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*F. A. 26 of 1929

> Kindly now submit us the probate of the will of the deceased as mentioned in the Court's decree, when we shall be pleased to give instruction for the final discharge.

The Court of Wards was advised by the Government Pleader of Etawah that there was no necessity for taking out a probate of the will, as it would be a costly affair and without any legal necessity. The company having refused to pay without what they called proof of title, the suit, out of which this appeal has arisen, was instituted. The suit was decreed by the court below with costs and future interest. The decree however grants interest during the pendency of the suit.

In appeal it has been contended by the learned counsel that under the terms of the Policy granted to the late Raja, the Company were entitled to insist on the production of either a probate or Letters of Administration. It was also contended that under the law for the time being in force the appellant was entitled to insist on the production of either a probate or Letters of Administration or at least a succession certificate, and therefore no decree should have been made against the company without production of any one of these documents.

It appears that after the decree was made by the court below, the company paid the decretal amount in court under protest and filed this appeal. Two questions arise for determination in this case: (1) whether the contract of policy by which the assured agreed that the money would be paid to himself or to his assign or to his executor or administrator is a binding contract and (2) whether, if it is not, the defendant can insist on the production of either a probate or Letters of Administration or a succession certificate?

We shall take the second point first. As the suit is based on the ground that the young Raja Maha Bindeshwari Pratap Singh succeeded to the property of his adoptive father by virtue of the adoption and also by virtue of the will, this is, therefore, a case where there is no allegation that the family was a joint one. It may be mentioned casually that if the family be a joint one, the will would be invalid in law and the right to obtain the property would be by survivorship and not under the will.

The claim being therefore by one who claims to be the heir of a deceased creditor, we have to see what rule of law applies. Section 214 of the Indian Succession Act (1925) lays down that no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased except on the production by the person so claiming of (*i*) a probate or Letters of Administration, or (*ii*) (*iii*) a succession certificate granted under part X and having the debt specified therein, etc. . . " This is a case in which the plaintiff claims by right of succession the effects of a deceased person and wants that the debt due to the deceased should be paid to the plaintiff. In the circumstances there is no escape from the provision of Section 214 of the Succession Act, and the plaintiff must supply either a Probate or Letters of Administration or a Succession Certificate.

In the case of a will executed by a person who is neither a Mohammedan nor a Hindu nor a Budhist nor a Sikh nor a Jaina mentioned in Section 57 of the Act, it cannot be insisted that a probate shall be taken out (Sec. 213). But there is no prohibition against Letters of Administration being taken out in the case of the estate of a deceased Mohammedan, Budhist, Sikh or Jaina, *vide* Sec. 218. Where the testator has not appointed an executor, as in this case (the will is printed on page 31), Section 233 of the Indian Succession Act permits Letters of Administration being granted to the plaintiff who claims as the sole legatee.

In any case there is no bar whatsoever to the grant of a Succession Certificate under Section 370 of the Succession Act. A succession certificate is permissible to be issued in the case of even a particular debt. It is thus a comparatively less costly matter than taking out Letters of Administration to the entire estate.

On a consideration of the law on the subject we are, therefore, of opinion that the appellant can insist on the production by the claimant of either a probate or Letters of Administration or a Succession Certificate in order to be satisfied that the person to whom it would pay the money was really the person entitled to it.

It was argued by the learned Government Advocate that the production of any of these documents has become unnecessary by the fact that the plaintiff has established his title by the suit and the company must pay to him. This argument however is not sound. A decree between the parties does not bind people who are no parties to it, and therefore if there be any claim for the money by any other person, the decree would be no answer for the defendant to such a claim. It is only a probate or Letters of Administration or a succession certificate which grants a complete immunity to the debtor who pays off his debt to the holder of any one of these documents. These are called judgments *in rem* and have force as against all possible claims. We hold therefore that the defendants were entitled to succeed.

On the first point we are of opinion that the defence is equally strong. There is nothing in law to prevent a company from entering into a contract with a proposer for life assurance that the company would pay the money only to him or his assign or to his executor or administrator. The law of succession varies in different parts of the country, and it cannot be expected of a company doing life insurance business to know the law obtaining in different parts of the country, nor can it be expected that it would undertake an investigation into the title of a claimant or of claimants in general and to decide for itself who is the person best entitled to the money. In the circumstances an agreement that the money under the policy would be paid only to the assured or to his assign or to his executor or administrator is a good contract which must bind not only assured but also anybody claiming title under him. In this view also the defendant was entitled to insist on the production of any of the three documents mentioned above. It may be pointed that even a successor to a property by right of survivorship may take out a succession certificate. See *Banwari Lal* v. *Maksudan Lal*[1].

In the result, the appeal must succeed. The law does not contemplate the dismissal of a suit where a suit has already been instituted. All that

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[1] [1930] A. L. J. 280

Civil — 1932 — The Gresham Life Insurance Society, Limited *v.* The Collector of Etawah — *Mukerji, J.*

it provides against is the passing of a decree without the production of any of the title deeds. In the circumstances, it would not be desirable to dismiss the suit altogether. We should grant the plaintiff-respondent some time in order to enable him to produce either a probate or Letters of Administration or a succession certificate in which last case the debt in question may be specifically mentioned.

As regards interest and costs, we are of opinion that this litigation was entirely brought about without justification. The company was throughout within its right and therefore when a succession certificate or any of the other two kinds of documents is produced, the decree will be in favour of the respondent without any costs or interest and the respondent must pay the costs of the appellant in both the courts.

We grant three months' time to the respondent to produce either a probate or Letters of Administration or a Succession Certificate.

Appeal allowed

Civil — 1932 — *June 16* — King, J. Thom, J.

PIYARE LAL (*Plaintiff*)
versus
CHUNNI LAL AND OTHERS (*Defendants*)*

Hindu Law—Partition—Joint family—Separation of one member—No presumption of jointness or separation of other members—Question to be proved as one of fact.

When one co-parcener separates, then there is no presumption that the remaining co-parceners remain joint and there is also no presumption that the remaining co-parceners have separated. The question whether the remaining co-parceners remained joint or whether they separated has to be proved as a question of fact in each case.

Balabux v. *Rukhma Bai,* I. L. R. 30 Cal. 725, *Bal Krishna* v. *Ram Krishna,* 1931 A. L. J. 499, *Palani Ammal* v. *Muthuven Katacharla,* 52 I. A. 83 and *Mt. Jatti* v. *Banwari Lal,* 21 A. L. J. 582 *referred to.*

SECOND APPEAL from a decree of MUHAMMAD ZIAUL HASAN ESQ., Additional District Judge of Gorakhpur, confirming a decree of ALI MUHAMMAD ESQ., Additional Subordinate Judge.

K. N. Katju and *Banke Behari* for the appellant.

M. Waliullah and *Sankar Saran* for the respondents.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff is in possession of a one anna four pies share in a certain village as proprietor, and that defendant No. 1 Ghurai Ram has no concern with that share.

It is unnecessary to recite the history of the property which has been fully set forth in the judgment of the courts below. The whole decision turned upon the question whether Jamna Prasad remained joint with his father Suraj Nath and his brother Suraj Prasad in the year 1908. Suraj Nath is the father of the plaintiff Piyare Lal and of Suraj Prasad and Jamna Prasad. The family remained joint until 1907 in which year the plaintiff sued his father and brothers for partition of his share. Jamna Prasad was

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*S. A. 1707 of 1930

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"The pronote and receipt were sent to Mr. F. BREWESTER of Calcutta and to Mr. Charles E. Hardless of Allahabad. I agree with Mr. Hardless as his reasoning is very sound and unassailable."—*Janga Khan* versus *Abdul Sattar Khan, Munsif of Utraula at* GONDA.

"The reasons given by Mr. Charles E. Hardless do appear to be more convincing than the reasons given by Mr. STOTT the Government Expert."—*K. E. vs. Pritchard, The Sessions Judge,* LAHORE.

"Mr. Charles E. Hardless has thus disposed of all the reasons given by Mr. BENNETT and he seems to have greater experience as an expert than Mr. BENNETT."—*Sobha Ram vs. Puran Chand Baqur, Subjudge,* AMRITSAR.

"In the opinion of Mr. Charles E. Hardless the receipt is a forgery and does not bear the signature of the plaintiff, while according to Mr. STOTT and his assistant Mr. HODGSON the receipt has been signed by the plaintiff himself and is a genuine document.

* * * * *

"I have considered the statement of all the witnesses and have also looked into the circumstances of the case and in my opinion the receipt does not seem to be genuine and I am not prepared to accept it as proved."—*Hazari Lal vs. Hukum Chand, The Munsif,* AGRA.

"The same documents were sent to another document expert by the opposite party in the suit. He gave exactly the same opinion as you gave. The case was compromised by the parties out of Court." *(Letter No. 319 dated 24th March 1930 in Suit Maung Po Su vs. U Nu, from the Subdivisional Judge of Bassein, Burma, to Expert Hardless of* ALLAHABAD.)

absent and exempted from the suit and in 1909 the partition was decreed on a compromise providing that the family property would remain in the possession of Suraj Nath as before and that on his death and on the death of his wife the plaintiff would be entitled to a certain share in the property.

In 1908 Suraj Nath and one of his sons Suraj Prasad borrowed money on a promissory note from the Kayastha Bank of Gorakhpur and renewed the promissory note in 1911. In 1914 the Bank instituted a suit on the basis of the promissory note and obtained a decree. Before the decree could be executed Jamna Prasad brought a suit for partition on August 19, 1915. This suit was decreed upon a compromise. In 1918 the whole of the family property consisting of 5 annas 4 pies was sold, in execution of the Bank's decree, to Ghurai Ram, defendant No. 1.

The plaintiff succeeded in establishing by a suit that his separate share was not affected by the sale. Jamna Prasad executed a deed of gift of a one anna four pies share on February 23, 1923 in favour of the plaintiff and it is this share which is in dispute in the present suit. The plaintiff's case is that this share was not affected by the auction sale in favour of Ghurai Ram.

The whole question is whether Jamna Prasad was joint with or separate from his father at the time when the debt was incurred in 1908.

It has been argued before us on behalf of the appellant that when Piyare Lal, the plaintiff, instituted his suit for partition in 1907, this had the effect of a disruption of the joint family so that each member of the family became separate. His contention is that the separation of one member of a joint family necessarily means the separation of every member of that family.

In support of his contention he has relied upon the decision of their Lordships of the Privy Council in *Balabux* v. *Rukhma Bai*[1]. In that case it was laid down that there is no presumption when one co-parcener separates from the others that the latter remain united. On the other hand, it is not laid down in this ruling that there is a presumption when one co-parcener separates from the others that the latter become separate. This ruling does not go the whole length of supporting the appellant's contention. There is no doubt one passage which might be interpreted as partially supporting him but the language is very guarded.

> In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to and, in this sense, the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact.

These words might be taken to mean that unless an agreement amongst the remaining members of the family to remain joint is proved, then it should be held that there has been a separation between them. The next case cited is *Bal Krishna* v. *Ram Krishna*[2]. This is also a decision of their Lordships of the Privy Council. In this case they cite with approval a judgment of the Board delivered by Sir John Edge in *Palani Ammal* v. *Muthuven Katacharla*[3]. In that judgment it was stated:

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[1] I. L. R. 30 Cal. 725

[2] 1931 A. L. J. 499

[3] 52 I. A. 83

> It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners *without any special agreement amongst themselves* may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property.

From this it is clear not only that the remaining co-parceners can remain joint amongst themselves but that they may do so without any special agreement amongst themselves. The question whether the remaining co-parceners do or do not continue to be co-parceners amongst themselves is a question of fact.

The case of *Mt. Jatti* v. *Banwari Lal*[4] has also been cited but this does not help the appellant any further. The position disclosed by these rulings seems to be that when one co-parcener separates, then there is no presumption that the remaining co-parceners remain joint and there is also no presumption that the remaining co-parceners have separated. The question whether the remaining co-parceners remained joint or whether they separated has to be proved as a question of fact in each case.

In the present case the courts below have concurrently held that after the plaintiff separated in 1907 the remaining co-parceners remained as members of a joint family amongst themselves up till 1915 when Jamna Prasad instituted his suit for partition. This finding is a finding of fact and is supported by admissible evidence. In our opinion the finding is binding upon us in second appeal.

On the finding that Jamna Prasad was a co-parcener with his father in 1908 when the debt was incurred and in 1911 when the promissory note was renewed, and even up to the time when the decree was obtained by the Bank in 1914, we think it is clear that the Bank as judgment creditor had a right to proceed against all the property that was the joint family property at the time when the debt was incurred. The fact that Jamna Prasad separated in 1915 is immaterial. His share cannot escape liability for the debt on the ground of the subsequent separation.

In our opinion the court below has decided the case perfectly correctly and we dismiss the appeal with costs.

Appeal dismissed

[4] 21 A. L. J. 582

CIVIL

1932

June 21

MUKERJI, J.
BENNET, J.

SABRATAN AND ANOTHER (*Defendants*)
versus
DHANPAT GADARIYA (*Plaintiff*) AND ANOTHER (*Defendants*)*

Mortgage—'Clog on equity of redemption'—What amounts to—Mortgagee given right to recover with interest at 2% p.m. money spent on rebuilding house—Whether stipulation enforceable.

A stipulation in the mortgage deed gave the mortgagee a right to build or rebuild the house mortgaged, and in case he did so, the mortgagor would on redemption pay the amount of the money spent over the building or rebuilding with interest at 2 per cent per mensem, *held* that the stipulation did not amount to a 'clog on the equity of redemption' under the Indian law and the contract was enforceable in a court of law.

SECOND APPEAL from a decree of BABU SARUP NARAIN, Second Additional Subordinate Judge of Gorakhpur, modifying a decree of MR. S. Z. RAHMAN, Munsif.

M. H. Faruqi for the appellants.

Haribans Sahai for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This appeal arises out of a suit for redemption instituted by the respondent, Dhanpat Gadariya. The mortgage was made by the respondent's father on October 30, 1905 for a term of sixty years in consideration of Rs.75.. The mortgagee was one Abdullah weaver, the predecessor-in-title of the defendants and the terms were as follows:—

The mortgagee was to be in possession of the premises. The rent of the premises was taken to be annas 8 per month. The interest carried by the mortgage money was 2 per cent per mensem. Thus, after deducting 8 annas per mensem as the rent of the house, the mortgagor had to pay Re.1 per mensem at the end of sixty years at the time of the redemption. It was further agreed that the mortgagee would be free to build or rebuild the house and in that case, in the case of redemption, the mortgagor would pay the amount of the money spent over the building or rebuilding with interest at 2 per cent per mensem.

The plaintiff alleged in the plaint that the mortgage had been made by his father without legal necessity, that the house was ancestral and that, therefore, he was entitled to redeem the property by removal of the onerous terms. The allegation that the house was ancestral was challenged in the written statement but no issue was framed by the courts below. The first court decreed the suit on condition of payment of Rs.2,300. The plaintiff appealed, but in his memorandum of appeal he did not ask the question of the character of the property to be tried. The lower appellate court came to the conclusion that the redemption should be allowed on payment of Rs.711 only. It held that the cost of the building was Rs.300 but, as the house was capable of fetching a rent of between Rs.5 and Rs.6 per month, the interest would be set off against the usufruct

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*S. A. 204 of 1931

CIVIL

1932

SABRATAN
v.
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GADARIYA

Mukerji, J.

and thus only the principal amount of Rs.300 was to be paid on this head.

The learned counsel for the appellants, that is to say, the mortgagees, has argued that the courts below were not entitled to interfere with the terms of the contract and we think he is right.

This case leads us to consider the law of mortgage with special reference to what is known as the clog on redemption.

In England the law of mortgage is essentially different from our law. Cases of mortgage used to come in England under the jurisdiction of the equity courts, and the rules of equity apply to cases of mortgage. Here in India we have got a codified law of mortgage and it would be improper for us in India to ignore the law obtaining in India and to look for the English cases as our guide. Where our statutory law will not help us, it may be open to us to look to the English cases, for rules of equity, justice and good conscience, as laid down by their Lordships of the Privy Council in the case of *Waghela Rajsanji* v. *Shekh Masludin*[1] and Privy Council Appeal No. 96 of 1927, *Mehrban Khan* v. *Makhana,* decided on February 13, 1930, and Privy Council Appeal No. 97 of 1930, decided on April 12, 1932, *Raza* v. *Abbas Bandi Bibi.* In the last mentioned case Section 10 of the Transfer of Property Act was applied as embodying a rule of justice and equity and good conscience.

It has been held by their Lordships of the Privy Council that the mere fact that the term of redemption is large is no ground for holding that the agreement is bad and should be relieved against; see *Bakhtawar Begum* v. *Husaini Khanum*[2]. The courts below, therefore, were wrong in holding that because the term of redemption was sixty years it was a bad stipulation and the plaintiff was entitled to redeem within the term. The defendants, however, did not appeal and a redemption having been decreed, we have only to see on what terms the redemption should be decreed.

The plaintiff stated in the plaint that the stipulations contained in the mortgage deed were unconscionable, and, therefore, not enforceable in a court of law. On this point the law is clearly defined in Section 14 and subsequent sections of the Indian Contract Act. Where a contract is not tainted by coercion, undue influence, fraud, misrepresentation or mistake, the contract has to be upheld in its entirety, unless there is any other law under which a relief can be granted to either party. For example, where the contract amounts to a penalty, Section 74 of the Contract Act provides for relief at the discretion of the court. Again, where the Usurious Loans Act applies, it is open to the court to modify the terms of the contract. But apart from special rules of law, there is nothing to authorise the courts to interfere with the sanctity of contracts. This has been laid down by their Lordships of the Privy Council in numerous cases.

The plaintiff did not allege that his father entered into the mortgage under any mistake of law or was influenced by fraud or there existed any other circumstance which would vitiate the contract. It was open to the plaintiff's father to sell the house outright. If he had sold the house outright for Rs.75, the plaintiff could never have asked for redemption. It is, therefore, wrong to say that the terms entered into by the father were onerous and unconscionable and the plaintiff should be relieved against them. If the plaintiff's father knew that he was entering into terms which would make it impossible for him to redeem the property later on or for his descendants to redeem the property at the end of sixty years, it was certainly open to him not to enter into the contract and go to a creditor who could have given him better terms. Thus, under the law of the land, a contract has to be respected and cannot be interfered with except on well known lines. Mere vague grounds of equity will not justify a court in interfering with the terms of a contract. In certain cases, the courts in India have followed the English rule which sets aside what it calls 'clogs on equity of redemption.' Those rules have to be applied within well defined limits, and what contract may be set aside in England as a mere clog on redemption need not necessarily be set aside having regard to the conditions of the Indian law. Broadly speaking a stipulation, which gives the mortgagee an advantage which does not arise legitimately out of the mortgage contract, is treated as a stipulation to clog the redemption. Thus where the mortgagee and the mortgagor agree that after redemption the mortgagee would remain in possession of the lands mortgaged as a tenant of the mortgagor with occupancy rights, the stipulation would be set aside as a clog on redemption. The reason is clear. After the mortgage is redeemed, there remains no consideration for the subsidiary contract by which the mortgagee wants to remain in possession. The contract, therefore, fails. The contract is no part of the original contract of mortgage. Similar cases may be cited.

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[1] L. R. 14 I. A. 89 at 96

[2] I. L. R. 36 All. 195

In the case of *Sher Khan* v. *Swami Dayal*[3] the stipulation was that there would be a redemption at the end of five years but, if no redemption was asked for, then it could not be asked for another twelve years. Their Lordships of the Privy Council said that under Section 60 of the Transfer of Property Act a party had an absolute right of redemption after the mortgage money fell due and any stipulation that sought to interfere with that right of the mortgagor was bad in law. The case came under Section 23 of the Indian Contract Act and was, therefore, covered by Indian law.

Two cases have been cited before us as showing that rules of equity have been applied by this court and the stipulations between the parties have been interfered with. One case is that of *Rajai Singh* v. *Randhir Singh*[4]. This was a case of mortgage of occupancy holdings. The mortgage itself was bad and, according to the view held in this court, the redemption is allowed, because the mortgagor was entitled to get back his occupancy holding. But by rules of equity he must pay back what he has received from the mortgagee. Their Lordships who decided the case pointed out that there were two kinds of cases, one kept the parties strictly within the terms of the mortgage and the other applied the English rules of equity. Their Lordships say:

> That is evident from the way in which the matters of this kind are treated in England as exemplified in the case of *Morgan* v. *Jaffers,* [1910] 1 Ch. 620.

[3] I. L. R. 44 All. 185

[4] 87 I. C. 30

The other case, that has been cited before us and was also cited before their Lordships, was the case in *Sarbdawah Singh* v. *Babunandan*[5]. Their Lordships pointed out that it bore the influence of English authorities. These two cases may be distinguished, the first on the ground that it was a case of occupancy tenancy and the second on the ground that it was covered by the ruling of their Lordships of the Privy Council in the subsequent case of *Sher Khan* v. *Swami Dayal*[6]. The case in I. L. R. 36 Allahabad need not have been decided on the grounds of equity. It could have been decided on the terms of Section 60 of the Transfer of Property Act on which the Privy Council relied.

There being, therefore, no abstract rules of equity applicable to the present case, the present case being governed by established rules of law made by the Legislature, we have to see whether we can cut down the interest or whether we can direct that the usufruct of the house would be set off against the interest payable under the terms of the mortgage.

In our view neither the court of first instance was right in reducing the interest, nor was the lower appellate court right in setting off the usufruct against the interest, there being no stipulation to that effect. The stipulation was that the mortgagee would be entitled to interest on the money laid out by him in building or rebuilding the house.

The lower appellate court has held that Rs.300 were spent in building the house. The appellants, therefore, are entitled to interest on this sum at 2 per cent per mensem from 1908 when the building was erected to the date of the decree which we take to be the present date. The interest will be calculated in complete years, as the exact dates are not forthcoming, i.e., for 24 years. The interest will be simple. A decree under Order XXXIV, Rule 7 of the Transfer of Property Act will be framed. We allow six months to pay. The decree will stand in other respects. The appellants as mortgagees will have their costs of the litigation throughout.

The cross-objections fail and they are dismissed with costs.

CIVIL
1932
July 19
PULLAN, J.
NIAMAT-ULLAH, J.

BEHARI AND ANOTHER (*Plaintiffs*)
versus
MUTHRA AND OTHERS (*Defendants*)*

Tenancy Act (III of 1926), Sec. 37—Co-tenants—Holding divided—Effect of—New tenancy not created nor mode of succession given in Secs. 24 and 25 changed.

On the death of an occupancy tenant, with whom plaintiff shared in cultivation, his widow, who had a life-interest in the tenancy under Sec. 24 of the Tenancy Act, sued for partition with the result that the holding was divided. The widow subsequently associated with herself in cultivation, defendants 2 to 4 with the consent of the landlord. In a suit by plaintiff for a declaration that on the widow's death defendants would have no rights in the tenancy as against themselves; *held*, that plaintiff's suit should be decreed. The partition merely changed the mode of enjoyment by the widow but did not confer on her greater rights than what she

*S. A. 1584 of 1929

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[5] I. L. R. 36 All. 551

[6] I. L. R. 44 All. 185

had before partition; nor did it change the mode of succession given in Secs. 24 and 25 of the Tenancy Act.

CIVIL

1932

BEHARI v. MUTHRA

SECOND APPEAL from a decree of MUHAMMAD ALI AUSAT ESQ., Additional District Judge of Aligarh, reversing a decree of BABU HARI SHANKER, Munsif of Etah.

Panna Lal for the appellants.

N. C. Vaish for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—The plaintiffs shared in the cultivation of the occupancy tenancy of one Gulzari during his lifetime. On the death of Gulzari his widow had a life-interest in the tenancy under the terms of Section 24 of the Agra Tenancy Act. She brought a suit for partition of the holding impleading the plaintiffs, and as a result of that suit the holding was divided, and a portion remained in the cultivation of the widow, who subsequently associated with herself in cultivation other persons, who are defendants 2 to 4 in this suit. The landlord agreed to this arrangement. The plaintiffs have now brought a suit for a declaration that on the widow's death defendants 2 to 4 will have no rights in the tenancy as against themselves, the plaintiffs, who shared in the cultivation of the last male-holder. The suit was decreed by the Munsif, but his decision has been reversed in appeal by the District Judge. The District Judge was of the opinion that the division of the holding created a new tenancy, and the plaintiffs' rights not having been maintained at the time of the partition, have now been lost to them. In argument in defence of this judgment we have been referred to Section 121 of the Agra Tenancy Act; but in our opinion that section has no connection with the present suit, as it is not a suit brought by a tenant against the landholder or any person claiming to hold through the land-holder for a declaration of his right as a tenant, and we cannot agree with the learned District Judge that this is a suit which could have been brought under the Agra Tenancy Act. The view taken by the learned Munsif on that as on other points is correct. On the question of partition the Munsif says:

> Partition would make no difference so far as the rights of the plaintiffs are concerned. Partition would merely change the mode of enjoyment by defendant No. 1 (the widow), but it would not confer on her greater rights than what she had before partition, nor would it change the mode of succession given in Sections 24 and 25 of the Tenancy Act.

In our opinion the judge was in error in allowing the appeal against the Munsif's decision which is a correct statement of the law. The plaintiffs were entitled to the decree awarded to them by the Court of first instance. We allow this appeal, set aside the decision of the lower appellate court and restore that of the court of first instance with costs throughout.

Appeal allowed

Civil

1932

July 21

King, J

Thom, J.

AMBA SAHAI AND ANOTHER (*Plaintiffs*)

versus

NATHU AND ANOTHER (*Defendants*)*

Tenancy Act, 1926, Sec. 197—Groveholder's right to maintain his grove by replacing fallen trees—Not taken away by new Act.

The right which a groveholder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

Replacing trees which have fallen down in a grove by planting new trees amounts only to "repairs" and should not be held to amount to an "improvement" within the meaning of Sec. 3 (11) of the Act.

Choke Lal v. *Behari Lal*, I. L. R. 42 All. 634 *referred to.*

SECOND APPEAL from a decree of MAULVI FARIDUDDIN AHMAD KHAN, Additional Subordinate Judge of Shahjahanpur, confirming a decree of BABU R. C. VERMA, Munsif of Tilhar.

Haribans Sahai for the appellants.

Hazari Lal Kapoor for the respondents.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a plaintiff's second appeal arising out of a suit for uprooting certain trees newly planted by a groveholder, and for a perpetual injunction restraining the groveholder from planting new trees in future without the permission of the zamindar.

The defendants pleaded *inter alia* that they had the right of planting new trees, in place of those which had been cut or had fallen down, without the zemindar's permission.

The trial court dismissed the suit and the lower appellate court took the same view and dismissed the appeal.

The facts proved are that the defendants are groveholders, and that the grove in question was planted more than 50 years before the institution of the suit. The area of the grove is 1·64 acres and 33 old trees are still standing on it. The courts therefore held that the land still retained its character of grove-land. It is further found that the defendant planted above 22 new trees in the month of July 1925.

As the new trees were planted before the commencement of the Agra Tenancy Act, 1926, the defendants had a right under the law then in force to plant new trees, in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land. For the law on this point we refer to the ruling in *Choke Lal* v. *Behari Lal*[1]. In that ruling the customary right of a groveholder to plant fresh trees was recognised, in the absence of a special custom or contract to the contrary.

In the present case the plaintiffs have relied upon the provisions of the *wajib-ul-arz* prepared at the previous settlement, between 1870 and 1873. In this *wajib-ul-arz* a list of groves is set forth, giving particulars of the Khasra-numbers, the names of the owners, the area, and the number of trees. After giving this list of groves we find the following entry:

*S. A. 1954 of 1929

[1] I. L. R. 42 All. 634

> As the Government has excluded from the *jama* the area of the groves and uncultivated area we, the persons in possession of the groves, declare of our own accord that we shall do our best in rearing and looking after the trees and that *we shall plant fresh trees in place of damaged trees with the permission of the zemindar.*

It appears therefore that the *wajib-ul-arz* does not even purport to record an existing custom in respect of groves but records a declaration or promise on the part of the groveholders to the effect that they will plant fresh trees, in place of damaged trees, with the permission of the zemindar. The plaintiffs have failed to establish that the grove now in suit is included among the groves mentioned in the *wajib-ul-arz*. In our opinion, therefore, the provisions in the *wajib-ul-arz* cannot be held to apply to the grove in suit since the *wajib-ul-arz,* at the most, only recorded a contract between the groveholders of certain groves and the zemindars of the village and those groves did not include the grove now in suit. We hold, therefore, that the courts below were perfectly right in dismissing the plaintiffs' claim for uprooting the new trees which the defendants had planted in July 1925, before the commencement of the present Tenancy Act.

It has been strongly urged on behalf of the appellants that even if they are not entitled to get the trees which were planted in July 1925 uprooted, they are entitled to a perpetual injunction restraining the groveholders from planting any fresh trees in future without their permission.

The appellants' argument is based on the provisions of the Agra Tenancy Act, 1926. It is argued, firstly, that the rights of groveholders have been defined in Section 197. This section mentions certain rights of groveholders, but is silent on the question whether a groveholder has a right to replant trees in place of trees which have fallen down or been cut down. It is argued therefore that by implication the legislature has denied the groveholder's right of planting new trees.

We are not prepared to accede to this contention. Section 197 does not purport to state the rights and liabilities of groveholders exhaustively. There is nothing to show that a groveholder has no right other than a right mentioned in that section. As we have already stated, the law which was in force before the commencement of the present Act recognised the groveholders' right of planting new trees, to replace fallen trees, so long as the land retained its character of grove-land, provided there was no village custom or contract to the contrary. This right of maintaining a grove was a very important incident of the right of a groveholder. It must be presumed that the legislature knew the existing law and in our opinion the legislature cannot be held to have intended to take away this important groveholder's right without express words to that effect. Merely because Section 197 is silent on the point whether a grove-holder has a right to maintain his grove-land as a grove, by replanting trees whenever required, we are not prepared to hold that the legislature has by implication taken away that right.

It is further argued that under Section 112 a non-occupancy tenant is prohibited from making any improvement except with the written consent of the landholder. Now, a groveholder is certainly a 'tenant'—

see Section 3(6). A groveholder is moreover presumed to be a "non-occupancy tenant'—see Section 197(*A*). Groveland is now included in the definition of 'land'—see Section 3(2). So it follows that groveland is a 'holding' or part of a 'holding'—see Section 3(8).

It is further pointed out that under Section 3(11) "the planting of trees" is expressly mentioned as an 'improvement' with reference to a tenant's holding—see Section 3(11). So the appellants' learned advocate claims to have proved (1) that a grove-holder is prohibited from making any improvement without the written consent of his land-holder, and (2) that the planting of trees in grove-land is an 'improvement' with reference to the grove-land. He contends therefore that a grove-holder is prohibited from planting trees in his grove-land without the written consent of his land-holder.

The first proposition must, we think, be conceded. The second proposition is however open to doubt. The question turns upon whether "the planting of trees" mentioned as an improvement in Section 3(11) (*c*) means only making a new plantation of trees or whether it includes the replacing of fallen or useless trees in a grove for the purpose of maintaining the grove.

We think there is a substantial distinction between making a new plantation of trees and maintaining an old plantation. For the purpose of maintaining an old grove it is necessary to plant new trees from time to time, to replace old trees which are dead or useless. But this sort of replanting, for the purpose of keeping a grove in good condition and of preventing further deterioration, would not ordinarily be held to amount to an improvement, and we do not think that it is an "improvement" within the meaning of the Act. All the works which are mentioned as improvements in Section 3(11) appear to be new works. "The planting of trees" is coupled with "the reclaiming, clearing, enclosing, levelling or terracing of land." The works of this latter nature are evidently intended to refer to new works. Moreover, it is expressly stated in Sub-clause (*e*) that "mere repairs" are not to be included among improvements. We think that replacing trees which have fallen down in a grove by planting new trees amounts only to "repairs" and should not be held to amount to an "improvement". Filling up gaps among trees of an old grove is analogous to filling up gaps in an old embankment. In each case the work is of the nature of repairs, for the purpose of maintaining the grove or embankment in its original state, and is not an "improvement."

Our conclusions on this point are fortified by the general principle that the legislature cannot be deemed to have intended to take away a very important right incidental to groveholding without enacting express provisions to this effect. In our opinion the right which a groveholder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

We hold therefore that the appellants' contention cannot be accepted and the courts below have come to a right decision.

We accordingly dismiss the appeal with costs. *Appeal dismissed*

Civil

1932

May 2

King, J.
Thom, J.

SHER PAL SINGH (*Defendant*)
versus
AIJAZ FATIMA AND OTHERS (*Plaintiffs*)*

Tenancy Act (III of 1926), Sec. 265—Lambardar—Agreement with certain co-sharers that they should collect rents of their shares separately—Whether binding on other co-sharers.

Where a lambardar, for the sake of good management, entered into an agreement with the purchasers that they should collect the rents of their shares separately, while he should collect the rents of the remaining share separately and the agreement was acted upon by the parties, *held*, that the agreement was perfectly valid and binding upon the other co-sharers.

Of the heirs of a deceased plaintiff one was brought on the record within time and the others filed an affidavit that they had relinquished their rights in favour of the heir whose name was on the record, *held*, that the affidavit could not be treated as a transfer of the rights of the remaining heirs in favour of the heir on the record and the suit abated as regards the heirs whose names were not brought upon the record.

SECOND APPEAL from a decree of ALI AUSAT ESQ., Additional District Judge of Aligarh, modifying a decree of RAFIULLAH KHAN ESQ., Assistant Collector, first class.

K. N. Katju and *S. B. L. Gaur* for the appellant.

Mushtaq Ahmad and *Jai Kishan Lal* for the respondents.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a defendant's appeal arising out of a suit for rent. The plaintiff originally was one Abdul Karim Khan and he claimed for himself and on behalf of 7 other persons the rent due from the defendants first set in respect of the 15 biswas share belonging to the plaintiff and the persons he represented. Defendant No. 4, Sheo Baran Singh, was joined as *pro forma* defendant upon the allegation that he was lambardar and entitled under the terms of an agreement between the parties to collect the rent of the remaining 5 biswas share. The suit was resisted on a great number of grounds which we need not set forth in detail for the purpose of this appeal. The trial court dismissed the suit but the lower appellate court has taken a different view and has decreed the major portion of the plaintiff's claim.

To understand the facts in dispute, it is necessary to give a brief history of the property in suit. In 1915 a 15 biswas share of the village was sold to Ghulam Mohiuddin Khan and Rashid Ahmad Khan. The plaintiff and 7 others whom he represented are the representatives of the purchasers. In 1916 Sheobaran Singh and Hardeo Singh, who were cosharers in the village, sued for pre-emption and the suit was decreed on September 26, 1916. Sheobaran Singh paid up the whole of the pre-emption money and thus obtained possession of the 15 biswas. On March 13, 1920 the High Court reversed the pre-emption decree, restoring the title of the original purchasers. The latter regained possession and Sheobaran Singh withdrew the pre-emption deposit. The case went up to their Lordships of the Privy

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*S. A. 418 of 1930

Council and on March 22, 1927 the Privy Council reversed the decree of the High Court, restoring the decree of the Court of first instance. On April 8, 1927 Sheobaran deposited the pre-emption money and regained possession.

This suit was instituted by Abdul Karim, on behalf of the representatives of the purchasers, for the rent of the years 1332 to 1334F.

One of the defences to the suit was that Abdul Karim Khan was not entitled to sue alone but was bound to join all the representatives of the original purchasers. This objection is based upon the provisions of Sec. 266 of the Agra Tenancy Act, but Sub-section (1) of that Section shows that the cosharers can appoint an agent to act on behalf of them all. Abdul Karim claimed to be acting as agent on behalf of them all and the objection is of no importance now, since Abdul Karim died during the pendency of the suit, and upon his death, the remaining representatives of the original purchasers were brought upon the record as plaintiffs. They expressly stated in their application, for being impleaded as plaintiffs, that Abdul Karim Khan was acting for them as the collector of rents. There is therefore no force in this objection.

Another point raised for the appellant is that Abdul Karim Khan and his cosharers had no authority to collect rent in respect of the 15 biswas share in the village. The plaintiff based his right upon an agreement arrived at between all the representatives of the purchasers on the one hand and Sheobaran Singh as lambardar on the other hand. It appears that after the decree of the High Court which resulted in the suit of Sheobaran Singh being dismissed, the purchasers applied to have Sheobaran Singh removed from the post of lambardar and one of themselves to be appointed. The parties came to a compromise in the lambardari case to the effect that Abdul Karim Khan and his vendee cosharers will realise the rent of the 15 biswas share and Sheobaran Singh will realise as lambardar the rent of the 5 biswas share. An arrangement was also made regarding the arrears of rent due from tenants.

It is argued that Sheobaran Singh had no authority to enter into this arrangement with the purchasers. We consider that there is no force in that contention. The powers of a lambardar in an undivided mahal are laid down in Section 265 which defines the powers which were previously exercisable by lambardars. This section expressly lays down that a lambardar is entitled to do all acts incidental to the proper management of the estate with a view to the common benefit. These words are very wide and we think that they cover a case such as the present, where the lambardar for the sake of good management came to an agreement with the purchasers of the 15 biswas share that they should collect the rents of their shares separately, while he should collect the rents of the remaining 5 biswas share separately. We think that this agreement was perfectly valid and binding upon the other cosharers. The court below has also found that the agreement was, as a matter of fact, acted upon by the parties.

Another point argued is that as the result of the Privy Council decree which restored the decree of the trial court, Sheobaran Singh was restored to the position of rightful owner with effect from the date when he deposited the pre-emption money in accordance with the decree of the trial court in the year 1916 and that the plaintiff and the other representatives of the purchasers must be held to have been in possession without title from the time of the High Court decree in 1920 up to the time of the Privy Council decree in 1927. We are not prepared to accede to this argument. After Abdul Karim Khan and the other representatives of the purchasers had been successful in the High Court and had recovered possession under the decree of the High Court we think it cannot be held that they were in possession without title. It must be remembered that Sheobaran Singh withdrew his pre-emption money and in our opinion Sheobaran Singh cannot be held to have regained his title until he deposited the pre-emption money a second time on April 8, 1927 after the Privy Council decree. Rulings have been cited before us on this point on behalf of both parties but we have not been shown any decision which is on all fours with the present case. It would certainly be very inequitable if Sheobaran Singh should be held entitled to the profits of the property from 1920 to 1927, although he had withdrawn his pre-emption money and had the use of it throughout that long period. From the other point of view, it seems inequitable that the purchasers who had paid their money for the property should not be entitled to the benefits of the property until they received the pre-emption money after the decree of the Privy Council. In our opinion, Sheobaran Singh is not entitled to the rents claimed from the defendants first party before April 8, 1927. We agree with the court below on this point.

Another point raised for the appellant is that the rent of the ex-proprietary holding of the defendants first party had not been properly fixed under Section 36 of the U. P. Land Revenue Act and therefore the suit was not maintainable. It appears that in the year 1923 Abdul Karim Khan applied to the Collector, as proprietor and collector of rent, for having the ex-proprietary rent fixed upon Sohan Pal, Sher Pal Singh and Ram Dei. Sher Pal is the appellant before us. Sohan Pal is his brother and Mst. Ram Dei his mother. The rent claimed was over Rs.926. On September 22, 1923, a compromise was filed by the parties agreeing that the rent should be fixed at Rs.570 per annum. The compromise was signed by Sohan Pal and by a barrister on behalf of the other two tenants. The revenue court fixed the rent according to the compromise. Sohan Pal also executed bonds on the same day as head of the family, for payment of arrears of rent in accordance with the compromise and for arrears of rent due in respect of an occupancy holding under a decree.

For the appellants it is contended that Sher Pal Singh the appellant was not properly represented in those proceedings and they are not binding upon him and the rent was not fixed in accordance with the provisions of Section 36. For the respondents it is argued that these proceedings are binding and operate as *res judicata*. We find that it is not necessary to go into the question how far these proceedings may be binding upon Sher Pal Singh and Mst. Ram Dei because it appears from the judgment of the trial court that the rates of rent claimed were not disputed by the defendants. There is therefore no force in the contention that the plaintiff is not entitled to the amount of rent claimed upon the ground that it was not properly fixed under Section 36.

Another important point which has been raised for the appellant is that the whole suit has abated. On June 7, 1928, Abdul Karim Khan who was then the sole plaintiff, died. On June 23 his daughter Aijaz Fatima applied for having her name substituted as heir and on July 11, 1928 the other representatives of the original purchasers applied to be impleaded as plaintiffs. It appears however that Abdul Karim Khan left as his heirs his daughter and two brothers and the brothers were never brought upon the record. It is argued that on account of the fact that the brothers were not brought upon the record the whole suit automatically abated three months after the date of Abdul Karim Khan's death.

The lower appellate court took into consideration an affidavit filed before that court to the effect that the other heirs of Abdul Karim Khan have relinquished their right in favour of his daughter. On that ground the court below thought it was not proper to dismiss the suit on the ground of abatement. In our opinion the court below was not right in treating the affidavit as a transfer of the right of the remaining heirs in favour of Kaniz Fatima. The other heirs might, if they pleased, relinquish their rights, but a mere relinquishment would not have the effect of transferring their rights to Kaniz Fatima. In our opinion, it must be held that the suit abated as regards the brothers of Abdul Karim who were not brought upon the record. They are only entitled to a half biswa share, so the suit must be held to have abated to the extent of a half biswa out of 15 biswas. It has been argued for the appellant that the suit does not abate merely to this extent, but the whole suit must be held to have abated. The ruling in *Haidar Husain* v. *Abdul Ahad*[1] was cited, but we think that the case was distinguishable upon the facts as the suit was for the demolition of a certain building. We think that the question of abatement must be considered with reference to the subject-matter of the suit. It was not possible to pass a decree for the demolition of a small portion of the building, but there is no difficulty in giving a decree for a definite fraction of a sum of money. No clear authority has been shown to us for holding that the suit must be held to have abated entirely, merely because all the heirs of one of the plaintiffs has not been brought upon the record. It has also been argued that a suit for the rent of a portion of a holding is not maintainable. In answer to this we need only say that this point was not taken in the grounds of appeal or argued before the lower appellate court and we cannot permit it to be raised for the first time in arguments.

We accordingly allow the appeal to this extent only that we vary the decree of the court below by deducting a 1|30th share of the sum decreed, namely, Rs.66-10-8. In other respects we maintain the decree of the court below. Parties will receive and pay costs in proportion to success and failure throughout.

Appeal allowed in part

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[1] I. L. R. 30 All. 117=5 A. L. J. 62

Civil

1931

April 2

Sen, J.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (THROUGH THE AGENT G. I. P. RAILWAY, AT BOMBAY) (*Defendant*)

versus

FAZAL UDDIN BADRUDDIN (THROUGH HYDER BAKSH) (*Plaintiff*)*

Civil Procedure Code (Act V of 1908), Sec. 80—Notice under Sec. 77, Railways Act does not dispense with the necessity of a notice under Sec. 80.

Sec. 80 of the Civil Procedure Code is imperative and therefore a notice under Sec. 77 of the Railways Act does not dispense with the necessity of a notice under Sec. 80 C. P. C. *Ali Asmat Shakur* v. *G. I. P. Ry.*, 1930 A. L. J. 1125 *followed.*

Where a postal receipt of acknowledgment is filed by the plaintiff which purports to be with reference to some document transmitted to a railway authority it cannot be predicated with certainty that the document in question was a notice which fulfilled the requirements of Sec. 77 of the Railways Act.

Civil Revision against the decree of the Additional District Judge of Agra.

Ladli Prasad Zutshi for the applicant.

S. C. Das for the opposite party.

The following judgment was delivered by

Sen, J.

Sen, J.—This is an application for revision by the Secretary of State for India in Council under Section 25 of the Provincial Small Cause Courts Act. On August 16, 1929 an oil tank was despatched by A. O. Oil Company Limited from Rawalpindi to Punjab Oil and Machinery Stores at Jhansi. Rawalpindi is on the North-Western Railway, while Jhansi is on the G. I. P. Railway. When the oil tank reached the Agra Cantonment Station, it was found to be leaking. Plaintiff who is the endorsee of the railway consignment receipt, applied to the railway authorities at Agra Cantonment Station for delivery of the oil tank to him, as the oil tank was leaking. On August 23, 1929, the oil tank was delivered to the plaintiff as requested. The present suit was instituted in the court of the Judge of Small Causes at Agra for recovery of Rs.216 together with interest being the difference of the freight between Rawalpindi and Jhansi, the place where the oil tank was stipulated to be delivered and Agra where it was actually delivered.

The suit was directed against the Secretary of State for India in Council upon the ground that he was the owner of the Great Indian Peninsula Railway Company. The North Western Railway was not impleaded in the action nor was any relief claimed against that Railway.

On July 16, 1930, the defendant applied that two preliminary issues be framed in the case and that the suit be decided on those two issues. It was contended that no notice of the projected suit had been served upon the Secretary of State for India in Council in the manner provided and prescribed by Section 80 of the Code of Civil Procedure. It was also contended that the non-joinder of the North Western Railway Company who were the contracting party was a defect which was fatal to the suit. Curiously enough, no order was passed on this application. The case was taken up in the ordinary course of hearing on November 4, 1930, and the plaintiff's claim was decreed.

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*Civ. Rev. 563 of 1930

The learned Judge of the court below has found that non-compliance of the provisions of Section 80 of the Civil Procedure Code does not defeat the suit inasmuch as notice under Section 77 of the Indian Railways Act (Act IX of 1890) had been served on the North Western Railway Company.

The court observes:

> it was contended that the notice should have been served on the District Officer of Agra, as both the Railways were State Railways. I do not think it was necessary to do so. For the purposes of the suit, the Agent or the Manager of the Railway Companies could be considered as representing the Secretary of State for India. I decide the issue in the negative.

Section 80 of the Code of Civil Procedure is mandatory and provides that

> No suit shall be instituted against the Secretary of State for India in Council until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district.

Ex hypothesi the notice of the contemplated suit had not been delivered to, or left at the office of a Secretary to the Local Government or the Collector of Agra.

The statutory rule of procedure quoted above is imperative. The court below is wrong in holding that the delivery or service of a notice under Section 77 of the Indian Railways Act obviates the necessity of the compliance of the rule contained in Section 80 C. P. C. The matter is covered by authority. It has been held by a Division Bench of this Court in *Ali Asmat Shakur* v. *G. I. P. Railway*[1] that a notice under Section 77 of the Railways Act would not dispense with the necessity of a notice under Section 80 C. P. C. The lower court was further not justified in arriving at the conclusion that notice in due compliance with Section 77 of the Railways Act had been served upon the railway authority concerned. No such notice either in the original or in the shape of an officially certified copy has been produced in the case. The finding of the court below rests upon very slender data. Because a certain postal receipt of acknowledgment has been filed by the plaintiff which purports to be with reference to some document transmitted to a railway authority, it cannot be predicated with certainty that the document in question was a notice which fulfilled the requirements of Section 77 of the Railways Act.

No notice under Section 80 C. P. C. having been tendered or delivered as required by Section 80 C. P. C. the suit against the Secretary of State for India in Council was bound to fail. I accordingly allow this application, set aside the order of the court below and dismiss the suit with costs.

Application allowed

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[1] [1930] A. L. J. 1125

Civil

1932

June 28

Sulaiman, C. J.

JAI KARAN (*Judgment-debtor*)
versus
PANCHAITI AKHARA CHOTA NAYA UDASI NANAK SHAHI
(*Decree-holder*)*

Limitation Act, Sec. 20, Proviso to (added by Act I of 1927)—Applicability of—Art 182—Step-in-aid of execution—Meaning of—Payment by judgment-debtor out of Court—Whether amounts to.

A money decree was passed on June 10, 1927. On December 9, 1929 Rs.85 were paid by the judgment-debtor out of Court to the decree-holder. The decree-holder applied to certify it on March 16, 1931. The application for execution was made on June 24, 1931. *Held,* that the proviso added to Sec. 20 Limitation Act by Act I of 1927, which came into force on January 1, 1928, applied and the payment of December 9, 1929 did not help to keep alive the decree; and the application certifying payment having been made more than three years after the decree cannot help the decree-holder.

A step-in-aid of execution is an act done by the decree-holder in Court and therefore a payment of money made by the judgment-debtor out of Court cannot be treated in any sense as a step-in-aid of execution.

Jatindra Kumar Das v. *Gangan Chandra Pal,* I. L. R. 46 Cal. 22 *referred to.*

Civil Revision from an order of Babu Brij Behari Lal, Judge, Small Cause Court of Allahabad.

Shankar Sahai Verma for the applicant.

Ambika Prasad for the opposite party.

The following judgment was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—This is an application in revision by the judgment-debtor from an order of the Court of Small Causes dismissing his objection to the execution of a money decree. The decree was passed on June 10, 1927. On December 9, 1929 Rs.85 are said to have been paid by the judgment-debtor out of court to the decree-holder. The decree-holder applied to certify it on March 16, 1931. The present application for execution was made on June 24, 1931. The court below has held that the certificate of payment was a step-in-aid of execution, and inasmuch as the payment was made within three years of the decree and the certificate was within three years of the payment, the court has held that there is no force in the objection that the application was barred by time.

Section 20 has been amended by Act I of 1927, which came into force on January 1, 1928. It is quite obvious that as the law of limitation is a law of procedure, the amended Act must govern all future payments and all future applications for execution, even though they may be in pursuance of a decree passed previously. Section 20, therefore, applies to the payment of Rs.85 made on December 9, 1929. The proviso added to the section makes it quite clear that a payment of interest as such does not now save limitation, unless there is an acknowledgment of the payment appearing in the handwriting of, or in a writing signed by, the person

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*Civ. Rev. 70 of 1932

CIVIL

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JAI KARAN
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AKHARA

Sulaiman,
C. J.

making the payment. This is not so in the present case. It follows that this payment did not help to keep alive the decree.

It seems to me that a payment of money made by the judgment-debtor out of court cannot be treated in any sense as a step-in-aid of execution. It is an act of the judgment-debtor out of court, whereas a step-in-aid of execution is supposed to be an act done by the decree-holder in court. It may be said that the payment of the amount by the judgment-debtor implies a receipt of the amount by the decree-holder, but that too takes place out of court, and cannot, in my opinion, be considered as a step-in-aid of execution, which obviously must be in court within the meaning of Article 182 of the Limitation Act. If the payment were to fulfil the requirements of Section 20, it would extend limitation. But that is quite a different matter from saying that it is a step-in-aid of execution.

The case of *Jatindra Kumar Das* v. *Gangan Chandra Pal*[1] was decided when the old law of limitation was in force, and I do not think that the learned Judges meant to lay down that the payment could itself be considered as a step-in-aid of execution. All that they decided was that the payment having been made within three years of the decree, it kept alive the decree, and its being certified within three years of the payment, saved limitation.

There has been some conflict of opinion on the question whether an application merely certifying payment is or is not a step-in-aid of execution. It may for the purposes of this revision be assumed without deciding that such a certificate is a step. But if the payment of December 9, 1929 cannot help to keep alive the decree and cannot itself be regarded as a step-in-aid of execution, the certificate which was made more than three years after the decree cannot help the decree-holder. I am, therefore, clearly of opinion that the application, in view of the new Limitation Act, was barred by time.

The court below has overlooked the new provision of the law, as was done at the first hearing of this case even in this Court. I think that this is a sufficient ground for interference in revision. I accordingly allow this revision, and setting aside the decree of the court below, dismiss the application for execution. As the point was raised at a late stage in the case, I direct that the parties should bear their own costs in both the courts.

Revision allowed

CIVIL

1932

June 17

SULAIMAN,
C. J.
MUKERJI, J.

SAID AHMED (*Objector*)
versus
RAZA HUSAIN AND OTHERS (*Decree-holders*)*

Civil Procedure Code, Or. 21, Rule 103 and Sec. 47—Order under Or. 21, Rule 98—Order came under Sec. 47 also—Whether appeal lay—Order exempting defendant from suit and allowing his name to remain in decree—Order tantamount to dismissal of suit as against him.

Order 21, Rule 103 merely lays down that where an order is passed against a person under rule 98, rule 99 or rule 101, the order is conclusive, subject to the result of the separate suit, it does not say that where the order falls under some other section as well (e.g., Section 47 C. P. C.), the order would still be conclusive and no appeal would lie therefrom.

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*L. P. A. 53 of 1931

[1] I. L. R. 46 Cal. 22

In a suit for partition, the appellant was exempted from the suit by the Court but his name appeared in the decree which was subsequently passed. In the execution department the plaintiff sought delivery of possession of the very house which the appellant had been claiming. The attempt was resisted by the appellant, who pleaded that he was the owner of the property. The execution court in a summary proceeding held that the appellant had failed to prove his title, and also went on to hold that he had been set up by the judgment-debtor. His objection was accordingly dismissed and possession was ordered to be delivered to the decree-holder. The appellant preferred an appeal to the District Judge, who dismissed the appeal on the ground that the proceedings were under Or. 21, Rules 97 and 98 and no appeal lay to him. *Held,* (1) that the order exempting the appellant and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him and in view of the explanation to Section 47 C. P. C. he must be deemed to be a party for all purposes under that section and was entitled to put forward his title to the property, (2) that even if it be conceded that the case in part fell under Or. 21, Rules 97 and 98, the main dispute between the parties really came within the scope of Section 47 C. P. C., and the order of the execution court being under Section 47 (read wtih Section 2) C. P. C., an appeal lay to the District Judge.

LETTERS PATENT APPEAL from the judgment of the HON'BLE MR. JUSTICE KING.

Vishwa Mitra for the appellant.

Baleshwari Prasad for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN C. J.—This is an appeal by defendant No. 4, arising out of an execution proceeding. A suit for partition was brought by the plaintiff against several defendants in respect of two houses originally. The appellant, Said Ahmad, was defendant No. 4. He pleaded that he was entitled to one house by virtue of his adverse possession. The plaintiff withdrew his claim as regards the other house, with liberty to bring a suit afresh. As regards the second house, it was claimed by Said Ahmad that the plaintiff instead of fighting the case against him, chose to exempt him from the suit. The court ordered that defendant No. 4 be exempted from the suit, and he be given his costs. There was, however, no order that his name should be struck off the array of parties and should no longer appear in the decree. His name continued to be on the record as one of the parties, and appeared in the decree which was subsequently passed, though it was noted that he had been exempted.

In the execution department the plaintiff sought delivery of possession of the very house which the defendant No. 4 had been claiming. The attempt was resisted by Said Ahmad, who pleaded that he was the owner of the property. The execution court in a summary proceeding held that Said Ahmad had failed to prove his title, and also went on to hold that he had been set up by the judgment-debtors. His objection was accordingly dismissed, and possession was ordered to be delivered to the decree-holder.

CIVIL

1932

SAID AHMAD
v.
RAZA HUSAIN

Sulaiman,
C. J.

Said Ahmad preferred an appeal to the District Judge, who dismissed the appeal on the ground that the proceedings were under O. 21, R. 97 and R. 98 and that no appeal lay to him. The order of the District Judge has been upheld by a learned Judge of this Court.

The learned Judge of this Court has held that the proceedings fell under Order 21, Rules 97 and 98 and also fell under Section 47 C. P. C. He has rightly pointed out that the defendant No. 4 was a party to the suit for the purposes of the execution proceedings, but he cannot be considered to be a judgment-debtor. He has, however, held that Section 47 contains a general provision of the law, whereas O. 21, R. 98 contains special provisions applicable to this particular case. In his opinion, the special provisions must prevail over the general provisions. He has accordingly upheld the order of the lower appellate court and dismissed the appeal.

It is true that a defendant who has been exempted from the suit and against whom no decree is passed or an order capable of execution made, is not a judgment-debtor as defined in Section 2(10) C. P. C. At the same time, it cannot be doubted that in view of the explanation added to Section 47, for the purposes of that section a defendant against whom a suit has been dismissed must be deemed to be a party to the suit. The order exempting him and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him. It follows that the defendant must be deemed to be a party for the purposes of the execution proceedings; he must therefore be deemed to be a party for all purposes under that section. Sections 2 and 47 have to be read together, and where there has been a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties in regard to any matter of controversy in the suit, the order amounts to a decree and all such orders which include the determination of any question under Section 47 are decrees. Section 47 is not necessarily confined to decree-holders, on the one side, and judgment-debtors, on the other and is wide enough to cover a dispute between co-defendants who may be parties in a partition suit. There is no doubt that the defendant was a party to the suit for the purposes of the execution department, and was entitled to put forward his title to the property which was sought to be seized by the decree-holder. Indeed, if he were not to do so, his remedy by a separate suit would be barred.

The learned advocate for the respondent has urged before us that inasmuch as the case fell under Order 21, Rules 97 and 98, the only remedy open to the defendant was one by way of separate suit under Rule 103, and the appeal was barred under that rule. Order 21, Rules 97 and 98 contemplate cases where the judgment-debtor or some one whom he has set up is resisting or causing obstruction to the delivery of possession to the decree-holder. The court has to see *prima facie* whether there is any just cause for such resistance and obstruction, and has not to investigate the question of title thoroughly. In the present case it was not merely a matter of resisting possession or obstructing delivery, but the setting up of a title as against the decree-holder. Even if, therefore, it be conceded that the case in part fell under Rules 97 and 98 and 103, the main dispute

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1932

Said Ahmad v. Raza Husain

Sulaiman, C. J.

between the parties really came within the scope of Section 47 C. P. C.

There is, in our opinion, no inconsistency between the provisions of the rules in Order 21 and the provisions of Section 47. But even if there were, it is obvious that Section 47 must override the provisions of the rules in the schedule, as is suggested by Section 128(1) C. P. C. Where a case falls both under Section 47 and under some rule in Order 21, there will be no prohibition against a second appeal, because the prohibition under Section 104(1) is confined to orders only and not decrees. If the order comes under Section 47 also, the order would be a decree and an appeal would lie under Section 96 C. P. C. and a second appeal under Section 100 to this Court.

Order 21, Rule 103 merely lays down that where an order is passed against a person under rule 98, rule 99 or rule 101, the order is conclusive, subject to the result of the separate suit, it does not say that where the order falls under some other section as well, the order would still be conclusive and no appeal would lie therefrom. The order being under Section 47, read with Section 2 C. P. C., an appeal lay to the District Judge, who has wrongly rejected the appeal. The appeal is accordingly allowed, the decree of this Court and of the lower appellate court set aside and the case is sent back to the lower appellate court with directions to readmit the appeal to its original number on the file and dispose of it according to law. Costs will abide the result.

Appeal allowed

Civil

1932

May 26

Pullan, J.
Niamat-ullah, J.

SHUKRULLAH AND OTHERS (*Defendants*)
versus
ZUHRA BIBI AND OTHERS (*Plaintiffs*)*

Mohammedan Law—Mohammedan joint family—Meaning of—Whether a legal entity—Rights of members and their heirs—How determined—Trusts Act (II of 1882), Sec. 88, Illustration (f) and Sec. 90—Mohammedan family—Joint business and joint purse—Partnership—Death of a member—Surviving members carry on business as before—Rights of heirs of deceased member—Limitation Act, Articles 144 and 106—Suit for joint possession by heirs of deceased member of Mohammedan joint family constituting a partnership—Whether maintainable—Limitation.

A so-called Mohammedan joint family implies nothing more than a group of individuals living and messing in commensality, owning property as tenants in common, carrying on business jointly and making fresh acquisitions. The law does not recognise a Mohammedan joint family as a legal unit having a corporate existence and as such owning property. In the generality of such cases their rights and those of their heirs can be determined with reference to express or implied agreement, relation of principal and agent, partnership, constructive trust or the like. In support of each claim it must be shown that it is justified by some known principle of law. Mere *a priori* conclusions based on the analogy derived from the law applicable to joint Hindu families, if they cannot be shown to be in conformity with a definite rule applicable to Mohammedans, cannot be accepted.

Where male members of a (Mohammedan) family carry on business jointly and have a joint purse and there is an understanding with regard to the sharing of the profits, they are members of a partnership as defined in Sec. 239 of the Contract Act. On the death of a member it is open to the surviving male members of the family to wind up the business and to pay off the heirs of the deceased member by valuing their interests. If the surviving male members prefer to carry on the business, retaining the entire assets, including the shares of the heirs of deceased member, with the result that the profits of their shares in the business and the property are made use of for improving the business and making acquisitions instead of being paid to them, Sec. 88, Illustration (*f*) and Sec. 90 of the Trusts Act (II of 1882) apply and the heirs of the deceased member are entitled to their shares (under the Mohammedan Law) not only in the property and the business as they were at the time of the death of the member but also in the subsequent improvements and acquisitions; and the heirs of the deceased member can maintain a suit for joint possession of the assets in the hands of the surviving members and Art. 144 of the Limitation Act applies to such a suit. It is not incumbent on them to institute a suit for an account and a share of the profits of a dissolved partnership to which Art. 106 of the Limitation Act applies.

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*F. A. 295 of 1927

It is open to the surviving members to charge for their personal services a reasonable remuneration, but if they do not do so, they cannot afterwards insist on account being taken of their personal services which it is impossible to assess in terms of money or a share in the improvements and acquisitions.

FIRST APPEAL from a decree of BABU HARIHAR PRASAD, Additional Subordinate Judge of Gorakhpur.

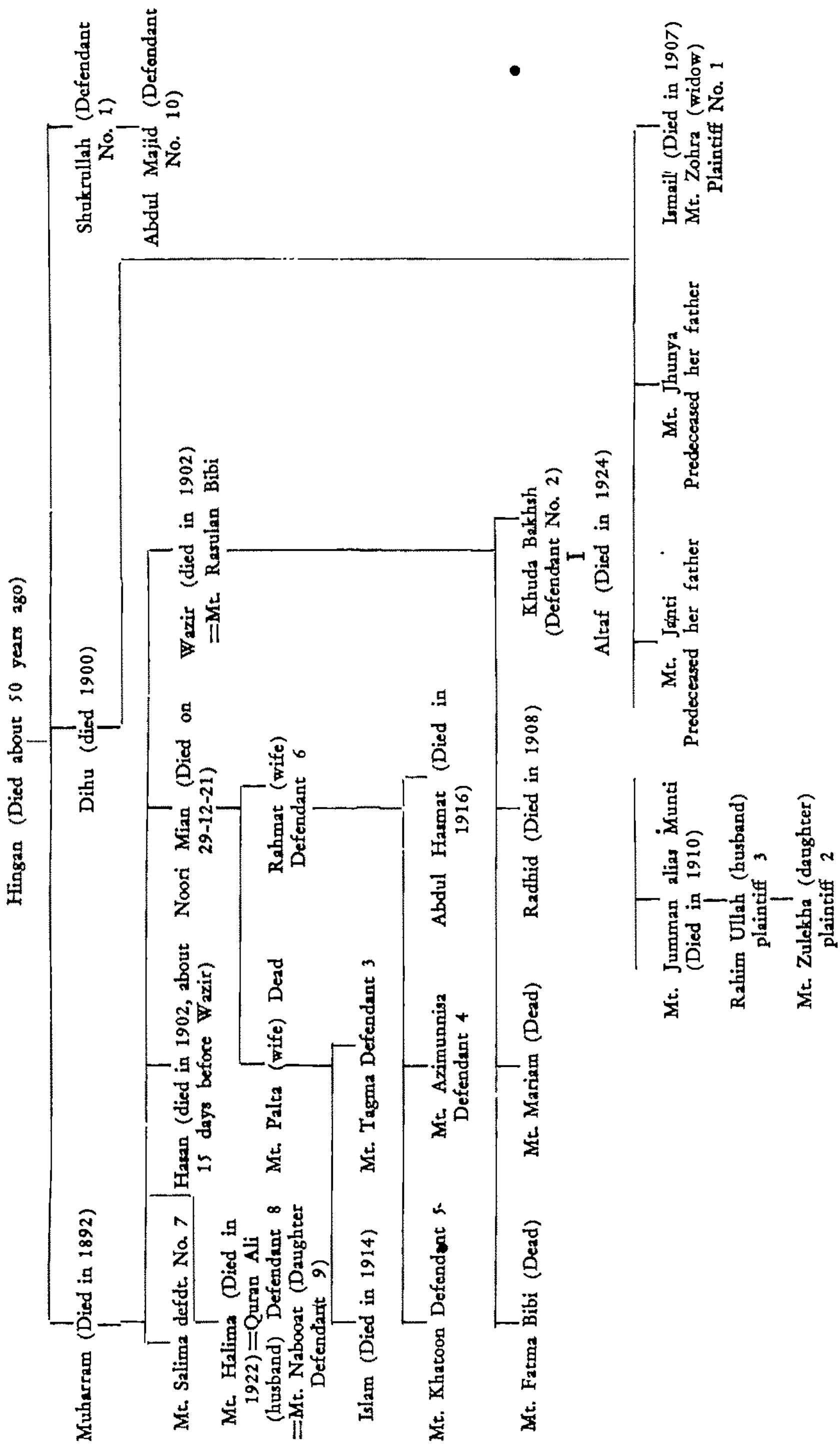
Sir Tej Bahadur Sapru and *Mushtaq Ahmad* for the appellants.

S. *M. Husain* (with him *A. M. Khawaja, Sankar Saran, Akhtar Husain Khan,* S. *Zamir Alam, Zahiruddin, A. Dharam Das* and *Jai Kishan Lal*) for the respondents.

The judgment of the Court was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This is an appeal by defendants Nos. 1 to 3 and 10 from the decree passed by the Additional Subordinate Judge of Gorakhpur in a suit for joint possession of a large number of immovable properties, including three mills, all detailed in schedule A annexed to the plaint, and for a declaration of their right of share in the sums due from third persons under a number of bonds, detailed in schedule C, together with mesne profits. The share of the plaintiffs in all the properties in dispute is alleged to be 16 out of 72 'sihams', that is, 2|9ths belonging to the first three plaintiffs, who have assigned half of their rights to the other three plaintiffs. The contesting respondents are five of the original plaintiffs and the legal representatives of the assignee plaintiff, Maqsud Ali, who died during the pendency of this appeal and is now represented by his heirs. Other defendants, who do not appeal, have been impleaded as *pro forma* respondents. The following pedigree will explain the position of the first three plaintiffs and the defendants, including the appellants, and will also elucidate the nature of the plaintiffs' claim:—


Hingan (Died about 50 years ago)
Muharram (Died in 1892)
Dihu (died 1900)
Shukrullah (Defendant No. 1)
Abdul Majid (Defendant No. 10)
Mt. Salima defdt. No. 7
Hasan (died in 1902, about 15 days before Wazir)
Noori Mian (Died on 29-12-21)
Wazir (died in 1902) =Mt. Rasulan Bibi
Mt. Halima (Died in 1922)=Quran Ali (husband) Defendant 8 =Mt. Naboot (Daughter Defendant 9)
Mt. Palta (wife) Dead
Rahmat (wife) Defendant 6
Islam (Died in 1914)
Mt. Tagma Defendant 3
Mt. Khatoon Defendant 5
Mt. Azimunnisa Defendant 4
Abdul Hasmat (Died in 1916)
Mt. Fatma Bibi (Dead)
Mt. Mariam (Dead)
Radhid (Died in 1908)
Khuda Bakhsh (Defendant No. 2)
Altaf (Died in 1924)
Mt. Jumman alias Munti (Died in 1910)
Rahim Ullah (husband) plaintiff 3
Mt. Zulekha (daughter) plaintiff 2
Mt. Janti Predeceased her father
Mt. Jhunya Predeceased her father
Ismail (Died in 1907)
Mt. Zohra (widow) Plaintiff No. 1

This pedigree is admitted, except in some particulars to be presently mentioned. Rahimullah, plaintiff No. 3, is a cousin of Khuda Bakhsh, defendant No. 2, being the son of the latter's maternal uncle. The defendants deny that Dihu had any daughter. In particular they deny that he left a daughter named, Jumman, *alias* Minti. On the contrary, they allege that Dihu had a son named Jumman, who predeceased him, and that Mst. Nakchhedi, an alleged daughter of Shukrullah, defendant No. 1, was also known as Minti. The second plaintiff Mst. Zulekha, though admittedly the daughter of Rahimullah, is not admitted to be the daughter of a daughter of Dihu, so that if the defendants' allegation on this part of the case is correct, plaintiffs Nos. 2 and 3 can have no interest in the property in dispute.

The plaintiffs' case, as stated in the plaint and supplemented by counsel's statements in the earlier stages of the suit, is that the three sons of Hingan had a joint business consisting of trade and banking on a small scale. They were joint in mess and residence. Their joint savings were invested in business and acquisition of properties. After the death of Muharram his sons remained joint with Dihu and Shukrullah, their uncles, and after Dihu's death his son Ismail was similarly joint with Shukrullah, defendant No. 1, and the sons of Muharram, and that all the properties acquired up to the year 1907 belonged jointly to Shukrullah, defendant No. 1, and the heirs of Muharram and Dihu, including Ismail. No male descendant of Dihu was left after the death of Ismail, and the latter's widow and sister, who were his heirs and who inherited a share in the property, remained joint with Shukrullah, defendant No. 1, and the descendants of Muharram. Mst. Zohra, plaintiff No. 1, was maintained by the defendants like other members of the family. Even since the death of her mother, which occurred in 1910, Mst. Zuleikha lived with and was brought up by Mst. Zohra, plaintiff No. 1, all her expenses being defrayed out of the property in which she had a share. According to the plaintiffs, no one was considered to own any definite share in the joint property which descended from the common ancestor or was subsequently acquired with joint funds; each person interested in it had his expenses defrayed out of joint funds; and the entire property was managed by some male member of the family. Muharram, Dihu, Wazir and Noori Mian successively managed the business and the property. The family became very prosperous during the management of Noori Mian, which lasted from 1902 to 1921, when he died leaving no less than three mills at three different places which yielded considerable income to the family. The gist of the plaintiffs' case is that the three sons of Hingan, their descendants and the heirs of such descendants constituted a joint family, similar in all respects to a joint Hindu family, with the difference that fresh interests were created not by birth but by death of those owning an interest, that there was commensality in mess, residence and business and that the entire property was joint and managed by the male co-owners on behalf of all interested in it. On these facts, according to the plaintiffs, the widow and sister of Ismail were entitled to 2|9ths of the entire property.

It is not disputed that some of the properties in question belonged to Dihu and his brothers and that Dihu's share therein devolved on his son Ismail, at any rate, in part. It is also not disputed that some other property, included in schedule A and acquired after Dihu's death, belonged to Ismail in common with Shukrullah, defendant No. 1, and others. The rest of the properties were acquired after the death of Ismail by Noori Mian, Shukrullah, defendant No. 1 and Khuda Bakhsh, defendant No. 2, who were the principal members of the family after the death of Ismail in 1907.

Apart from other defences, it was pleaded by the defendants that Mt. Zohra, the first plaintiff, relinquished all her rights which she might have had in the property left by her husband under an oral arrangement by which she accepted a small cash allowance of Rs.12 a month, besides Rs.610 in case she desired to go on a pilgrimage to Mecca. She did go on such pilgrimage and was paid that sum of money. If, therefore, the defendants' case as regards Mt. Jumman, the alleged daughter of Dihu, and the relinquishment by Mt. Zohra, plaintiff No. 1, be accepted, no other defence falls to be considered. They also pleaded that, according to a custom obtaining in the community of Iraqis, to which the family belongs, females, such as widows and daughters, are not entitled to inherit, being excluded by male collaterals. The pleas of limitation and adverse possession were also taken. It was further pleaded that, in view of the plaintiffs' allegations, the suit was virtually one for dissolution of partnership, and the only relief to which the plaintiffs were entitled was one for dissolution and rendition of accounts of partnership business, as to which their claim was barred by three years' rule of limitation. The most important part of the defence, however, relates to the acquisitions made after the death of Ismail. It is said that even if the plaintiffs be considered to be entitled to a share in the property which existed at the time of his death, they cannot have any right to what was acquired through the good management and personal exertion of Noori Mian and his male co-sharers.

We tried to ascertain from the learned counsel on either side particulars of the properties which existed at the time of Ismail's death but no definite information was forthcoming on that point. The learned counsel for the appellants threw the burden of giving particulars of the properties left by Ismail on the plaintiffs; while the learned counsel for the plaintiffs laid stress on the plaintiffs' allegation that every acquisition made since the earliest time was paid for out of the joint funds belonging to the three sons of Hingan, and after them to their descendants and heirs. According to the plaintiffs, any property acquired out of joint funds belonged, in the peculiar circumstances of the family, to all interested in such funds and the extent of their shares in any newly acquired property corresponded to their shares in the common fund. The principal contest between the parties has centred round the propositions of fact and law involved in the above allegations. Parties were at issue in the trial court on some other unimportant points arising out of their pleadings. The findings of the Subordinate Judge on those questions were not challenged in appeal. We have, therefore, not considered it necessary to refer to them in detail and have confined our narrative of the pleadings to the questions actually argued in appeal.

The learned judge found in favour of the plaintiffs on all the material questions on which issues were struck, and decreed the suit except as regards certain sums of money which the defendants were alleged to have misappropriated—a fact not borne out by the evidence.

As to whether Dihu left a daughter, Mt. Jumman, whether she was

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married to Rahimullah, plaintiff No. 3, and whether plaintiff No. 2 is the offspring of that union, the plaintiffs examined a number of witnesses. Most of them are members of the family, whose means of knowledge cannot be questioned. The learned Subordinate Judge has elaborately discussed the oral evidence produced by both the parties and the circumstances bearing on that question. He arrived at a clear finding that Mt. Jumman was the daughter of Dihu, was married to Rahimulla and gave birth to Mt. Zulekha, plaintiff No. 2. The learned Subordinate Judge has given good reasons in support of his finding. Though the learned counsel for the appellant did not give up this part of the defence, he made no serious attempt to impugn the view taken by the learned Subordinate Judge. We are in entire agreement with the finding of the learned Subordinate Judge and the reasons on which it proceeds.

No argument was addressed to us as regards the extent of share claimed by the plaintiffs, assuming they are entitled to a share in the property in dispute.

[Their Lordships then discussed the evidence on the question whether, under a custom obtaining among the Iraqis generally and in this family in particular, widows, daughters and sisters were excluded from inheritance, and upheld the finding of the Subordinate Judge that the custom was not proved, and continued as follows:—]

On the main question in controversy between the parties there is sufficient documentary evidence from which the facts hereinafter narrated clearly appear. The three sons of Hingan lived in commensality, having business and property in which they had equal shares. None of them had any separate property or had dealings on his own account. There can be little difficulty in arriving at the conclusion that each had interest in the business and properties then existing. Muharram died in 1892, and his one-third share devolved on his heirs, viz., his three sons and two daughters (assuming the latter were his heirs.). The sons alone took an active part in the affairs of the family and business and to that extent they stepped into the shoes of Muharram. The position of Dehu as a sharer to the extent of one-third remained unaltered.

Dehu died in 1900, leaving his son Ismail and daughter, Mt. Jumman, who inherited respectively two-thirds and one-third in what belonged to Dehu. It cannot be ascertained precisely as to what property then existed; but it is clear from the evidence that Ismail took the place of the father as regards the actual participation and management of the business and that properties were acquired and business increased between 1900, when Dehu died and 1907, when Ismail died, with the help of joint assets existing at the time of Dehu's death, the profits of the subsequently added property and of the increased business and the personal exertions of the male members, including Ismail. The only contribution which can be said to have been made by Mt. Jumman was that her one-third share in the property and business as they existed at Dehu's death was also employed in making fresh acquisitions. She was maintained by the male members of the family and married to Rahimullah, plaintiff No. 2. It is a question in the case whether, in these circumstances, she became entitled to all the acquisitions made between 1900 and 1907. After Ismail's death, no male descendant of Dehu was left. Ismail's heirs were his widow, Mt. Zohra, his sister, Mt. Jumman, and his uncle, Shukrullah, defendant No. 1. Actual possession and management thenceforward remained with Shukrullah, defendant No. 1, Noori Mian and Wazir Ali, after whose death in 1902 his place was taken by his son Khuda Bakhsh, defendant No. 2. We have no means of ascertaining that property existed at the time of Ismail's death in 1907, but there is no doubt that considerable addition was made to that property and the business greatly increased both as regards its volume and diversity—no less than three sugar mills and one colliery were being worked at the time of Noori Mian's death in 1921. It is not possible to say to what extent the prosperity of the business and increase of joint capital and property was due to skill and personal exertions of the male members; but there is no doubt that the assets as they were at the time of Ismail's death, which were themselves enlargements of those existing at Dehu's death, formed the nucleus, and that no separate funds belonging to any one individual were employed. The female heirs of Dehu and Ismail claim the same share in acquisitions as in the nucleus, though it is not disputed that they had no hand in the management and were not in possession of any property except so far that they might be regarded as in constructive possession through their male relatives, and that the only extent to which they were in the enjoyment of the usufruct was that they were maintained like all other females of the house, regardless of the fact whether they had any interest in the property. A noticeable example of the manner in which the female heirs were content to be treated was that Musammat Zohra, plaintiff No. 1, who had inherited part of her husband's property, lived, if anything, in a less expensive style than Noori Mian's wife, who had no interest in the property during her husband's lifetime. Musammat Zohra received from Rs.12 to Rs.16 a month at different times for her personal expenses besides food from common kitchen and clothing. As regards Musammat Jumman, the sister of Ismail, the evidence does not show how and where she lived after her marriage with Rahimullah, plaintiff No. 3. She died about three years after Ismail, leaving as her heirs her husband, plaintiff No. 3, and an infant daughter, now plaintiff No. 2. The latter lived with Ismail's widow, plaintiff No. 1. Rahimullah does not appear to have had any possession or enjoyment even of the kind the female heirs had. He examined a number of witnesses mainly in proof of the fact that he had been married to Musammat Jumman, who was the daughter of Dehu, (a fact which had been denied by the defendants) and that Musammat Zulekha was born of that union; but he did not give his own evidence which would have given us an idea of the manner in which he was in the enjoyment of the property. Similarly all that we know about Musammat Zulekha, plaintiff No. 2 is that she lived with Musammat Zohra, plaintiff No. 1 and was maintained by male members of the family.

It is important to note that the male members who had the actual control of the business and property, did not spend more than what was necessary to maintain themselves in the style which is usual in their society. After defraying all household expenses incurred in maintaining males and females living in the family, the savings were invested in making fresh acquisitions. There was no accounting or division of profits at any time. Most of the valuable properties stood in the name of Noori Mian.

Soon after the death of Noori Mian in December 1921, the harmonious relations which previously existed were disturbed. On January 10, 1922, a document, styled as a deed of partnership, was executed by Shukrullah, Khuda Bakhsh and the widow and adult daughters of Noori Mian, in which it was recited that the entire property existing at the time had been acquired with joint funds, that the share of Shukrullah was 8 annas, that of Khuda Bakhsh 4 annas and that of Noori Mian 4 annas. It was also stated that "there is no custom of the widow and daughters inheriting the property." On the same date, a 'mukhtar-namah' was executed by the same persons in favour of Khuda Bakhsh. These were followed by a deed of relinquishment executed by Musammat Halima and Salima, the sisters of Noori Mian. They declared that, under a custom obtaining in their brotherhood, females did not inherit and that accordingly they did not claim the property left by their father, Moharram, and their brother, Noori Mian. Thereafter two daughters and the widow of Noori Mian instituted, in the court of the Subordinate Judge of Gorakhpur, suit No. 431 of 1922, impeaching the deed of partnership as fraudulent and claiming possession of the whole property which was alleged to belong to Noori Mian alone. Shukrullah and Khuda Bakhsh filed a written statement, alleging that the property in dispute (then and now) jointly belonged to the male descendants of Hingan's sons and that their male descendants carried on "business and money-lending, etc., and increased them". The written statement proceeded to allege that females were excluded from inheritance by custom. In support of their allegations, they produced account books for a large number of years showing that the properties had been acquired with joint funds and that all the affairs of the family were joint, resembling in all material particulars those of a joint Hindu family. The litigation ended in a compromise, dated November 26, 1923, under which a 5 annas share was given to the widow and her two daughters, 1 anna 5 pie to Musammat Tagma, another daughter of Noori Mian by his first wife, 5 annas 4 pie to Shukrullah and 4 annas 3 pie to Khuda Bakhsh. This division completely ignored the heirs of Dihu and Ismail. The compromise, however, provided that

> if any party to the suit or any other person brings a claim in respect of any portion of the property mentioned in this compromise and that claim be held by the court to be valid, defendants Nos. 1 to 3 (Shukrullah, Khuda Bakhsh and Musammat Tagma) shall be responsible to give or make payment in respect of that share and they will make good that deficiency in the share or penalty out of their own share.

Not long after the aforesaid compromise, the present suit was instituted on the allegations already stated. The plaintiffs have had a plain sailing case so far as facts are concerned, relying as they do on the written statements of the present contesting defendants in the earlier case and the account books they had filed. Indeed the plaintiffs' allegations are substantially the same as the defence in the previous case. Of course, they have had to meet the pleas of exclusion of females under the alleged custom, limitation and adverse possession, the onus of which lay on the defendants.

The admissions of the defendants and the accounts for nearly 30 years, supplemented by the oral evidence of Musammat Zohra, plaintiff No. 1, and a few other witnesses, clearly establish the facts stated in the above narrative. The learned Subordinate Judge has made a careful analysis of the documentary evidence and the account books in reference to undivided properties, and has shown in detail that they were acquired out of joint funds. His findings on that part of the case have not been subjected to any criticism. On the other hand, the learned counsel for the plaintiff respondents took us through a large number of entries in the accounts which establish the facts we have already noted.

[Their Lordships then discussed the oral evidence on this part of the case and proceeded:—]

From the entire evidence and the probabilities of the case we are led to the conclusion that the joint state of the family as it existed on the death of Dehu Mian and Ismail continued up to the time when Noori Mian died, that the female heirs, who were content to live under the protection of the male members of the family, did not consider it necessary to assert or even to make a mention of their rights in the property and that the male members treated the female heirs in the same manner as they had done in the lifetime of Dihu and Ismail, defraying their usual expenses and allowing them to live in comfort like their own immediate female relatives. They hoped to retain possession of the entire property without giving any opportunity to the female heirs to put forward their claim to the property as it was when Dehu or Ismail died or to subsequent additions. It was not till after the death of Noori Mian that dissensions arose in the family and his own widow and daughters claimed the entire property as their own and succeeded in getting a part of it. The widow and other heirs of Ismail were alarmed by the manner in which the property was divided between Shukrullah and Khuda Bakhsh on the one hand and Noori Mian's heirs on the other. They were helpless in the matter of obtaining a formal recognition of their right, and sought the aid of financiers. The introduction of the assignee plaintiffs, who hail from Basti, is unfortunate, but was perhaps unavoidable. The contesting defendants are to a great extent responsible for the introduction of this foreign element in their affairs. They could have avoided this result if they had more tactfully handled the situation. Howsoever much we may dislike speculative transactions like the one before us, in which half of the plaintiffs' rights have been conveyed to strangers, the rights of the parties, if established, must be given effect to.

Sir Tej Bahadur Sapru, who argued the case for the appellants with great skill and ability and brought under contribution a large number of decided cases, made a vigorous attack on the frame of the suit and the *ratio decidendi* adopted by the learned Subordinate Judge. It is pointed out that the plaintiffs claim a share in the property in dispute on the ground that Hingan's descendants formed a joint family analogous to a joint Hindu family and that for that reason the plaintiffs, who claim to be members of such family, are entitled to certain shares in all properties belonging to the family at any given time. The plaintiffs' case, as gathered from the plaint and their counsel's statement on oral pleading, has been thus summarised by the learned Subordinate Judge:—

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> The case for the plaintiffs is that the common ancestor of plaintiffs Nos. 1 to 3 and the defendants, named Hingan, had a joint business with his three sons, named Moharram, Dehu and Shukrullah, *alias* Shukru Mian. Shukrullah is defendant No. 1 and Abdul Majid, defendant No. 10, is his son. The other defendants are descendants of Moharram and plaintiffs Nos. 1 to 3 represent the branch of Dihu. The case for the plaintiffs is that even after the death of Hingan, his 3 sons and after them their descendants and heirs continued that joint family business. That joint business flourished and out of the income of that joint business the family acquired zamindari property, sugar and rice mills, collieries and carried on trade in money lending, silver, gold and other business. Hingan and his descendants all lived and messed together and behaved like a Hindu joint family. They acquired properties indiscriminately in the name of one or the other members of the family out of the joint funds, and their personal expenses were met out of the joint funds according to their actual requirements. There was no specific share in the business, no division of profits from the time of Hingan up to the year 1921, when the family dispute arose. In short, according to the plaintiffs, the plaintiffs Nos. 1 to 3 are co-owners of all the properties in dispute along with the defendants and they have a right to sue for joint possession as the defendants now interfere with their possession.

The learned Judge proceeded to state the defendant's case as follows:—

> The case for the defendants is that no doubt Hingan and his three sons had a joint business but it was not a joint family business but of partnership within the meaning of Section 253 of Contract Act and therefore the plaintiffs' remedy was in a suit for dissolution of the partnership and not for joint possession. The defendants also plead that besides the joint business there was some business of individual members of family and the plaintiffs, therefore, could not, in any sense, claim any share in the property acquired out of that business.

The question emerging from these pleadings which the learned Subordinate Judge set down for trial is

> if the property in dispute is a joint family property, or it is a case of partnership contended for by the defendants.

After discussing a number of authorities, he observed that

> It will appear that none of the cases relied on by the defendants are any authority for holding that a Mohammedan family cannot live and trade on the analogy of a joint Hindu family. They are no authorities for holding that such a joint Mohammedan family cannot acquire joint properties, the succession to which will be regulated by the law of inheritance under Mohammedan law.

On a consideration of oral and documentary evidence which led the learned Subordinate Judge to the conclusion that Hingan's sons and their male descendants carried on business jointly, had a common mess and residence and acquired the properties out of joint funds, he held

> that the property in suit is joint property of the parties, being joint family properties of the descendants of Hingan and their heirs.

It is clear to us that a so-called Mohammedan joint family cannot be treated as a legal unit having a corporate existence and as such possessing property. In our opinion, for the determination of the rights of individuals supposed to belong to it any analogy drawn from the joint Hindu family system is misleading. The entire conception of a joint Hindu family, its constitution and the rights and obligations of its component parts are foreign to a Muslim joint family, which implies nothing more than a group of individuals living and messing in commensality and owning property and carrying on business jointly. The position of total strangers combining their labour and capital in acquiring property and agreeing to live and mess together will not materially differ from that of a joint Mohammedan family, if all other conditions are identical. A joint Hindu family, both under the Bengal and Benares law, is described by Mayne as a "family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In a so-called Mohammedan joint family there are many males and females who have no interest in the joint property, and on the other hand there may be many who have an interest in the joint property but are no part of the family, e.g., married daughters of a deceased male co-owners. It is only in a loose sense that property is said to belong to a joint Mohammedan family. The law does not recognise a Mohammedan joint family as a legal entity, and has not provided rules applicable to the family as such. The rights of its individual members, both as regards the original joint property and its subsequent enlargements, must be determined by an appeal to general law. Jointness in mess, residence and property and acquisition by one member in his own name with joint funds will go a long way in attracting the application of those provisions of law which entitle a person to a beneficial interest in the property acquired by another. In the generality of cases in which Mohammedans belonging to the same family live in commensality, own property as tenants in common, carry on business jointly and make fresh acquisitions, their rights and those of their heirs can be determined with reference to express or implied agreement, relation of principal and agent, partnership, constructive trust or the like. In support of each claim it must be shown that it is justified by some known principle of law. Mere *a priori* conclusions, based on the analogy derived from the law applicable to joint Hindu families, if they cannot be shown to be in conformity with a definite rule applicable to Mohammedans, cannot be accepted.

The fact that all the male descendants of Hingan had joint residence, mess, property and business for several generations and made acquisitions from time to time with joint funds is not conclusive as regards the right of every heir to every propositus, however high, in the properties subsequently acquired by the surviving male members with the aid of the profits of the property left by the ancestor. There may be circumstances which entitle an heir to no more than his share of the property as it was at the time of his ancestor's death. On the other hand, the surviving members may so intermeddle with the estate of their deceased partner or co-owner as to make themselves liable to such heir for not only his share of the property as it existed at the time of his ancestor's death but also to profits accruing therefrom or to acquisitions made therewith.

A large number of cases were quoted by both sides in course of the arguments, some of which merely lay down that there is no presumption, in cases of Mohammedan joint families, that a property acquired by one of the members in his own name was acquired with the aid of joint funds. The plaintiffs conceded this proposition of law, and established by definite evidence that such of the properties now in dispute as were acquired after the death of Dehu or Ismail were acquired with joint funds and that none of the members of the family had any source of income other than the joint business and property.

The learned advocate for the appellants criticised some of the observations of Sadasiva Aiyar, J. in *Hussain Saib* v. *Hasan Saib*[1]. The parties to that case belonged to a Navayat family described as

> new-comers, being the descendants of a party of Arab merchants who migrated to Bhatkal near Goa some 770 years ago and took for their wives converts from the Hindu Konkanis of the place.

The learned Judge referred with approval to the case of *Vellai Mira Ravuttan* v. *Mira Moidin Ravuttan*[2] in which it was held that

> Although the technical rules of Hindu Law are not applicable to families of this tribe, the same presumption must arise from facts of a similar kind and the same principle must be equally held to govern cases of family partnership among Hindus and Mohammedans.

Observations occurring in the judgment of Spencer, J. in a case which he decided as District Judge were also referred to by Sadasiva Aiyer, J. with approval. They are as follows:—

> All the circumstances of this case show that living in the midst of a country where Hindu usages prevail, and being probably also of Hindu origin, the family has been following the Hindu usage in practice, with regard to joint living and joint enjoyment of property. In this state of things, the courts have a discretion to apply such of the rules and presumptions of Hindu Law which are dictated by the circumstances of the case.

Sadasiva Aiyer, J. himself remarked:—

> I, therefore, venture to think that Sections 241, 249 and 253 (Clause 10) and similar sections of the Contract Act may not be inapplicable to the business carried on by a Navayat family as a family business though the principle of survivorship and that of right by birth ought not to be imported in considering the rights and liabilities of the persons to whom the business of a Navayat family has descended as heirs. I think that in most other respects the principles and considerations applying to the business of Hindu family firms can be made applicable.

With great respect, we are unable to accept the law so widely laid down in the above passages which appear to us to enunciate some propositions which cannot be supported with reference to the law applicable to Mohammedans.

Where male members of a family live in union so as to have jointness in mess, business and property, there can be little difficulty in tracing their relations *inter se* to an implied agreement which clothes each with a representative capacity in reference to his co-sharers. Each must be deemed to be acting not only for himself but for all in his dealings with regard to joint property and business. Accordingly any acquisitions made by any one member should be considered to have been made by all through the one who actually made it. In such a case, as among partners, each is the manager or agent of the others. The position is not so simple as regards the heirs whose rights are not recognized by any overt act of the surviving male members. The case of female and minor heirs and those not living on the spot, all of whom belong to this category, rests on a somewhat diffe-

[1] 31 I. C. 927

[2] 2 M. H. C. R. O. 414

rent footing. Their right to share subsequent additions can arise only if the circumstances are such that the male members can be considered to have continued the business and held the joint property on their behalf or in some way made themselves trustees for them in making fresh acquisitions so as to be liable to hold for them part of the resultant benefit.

In our opinion, the rights of plaintiffs Nos. 1 to 3 should be determined in the light of the foregoing remarks, and we are unable to conclude in their favour straightaway on the finding that the properties and the various business concerns in dispute were acquired with the profits accruing from the property left by Dehu and Ismail.

The defendants were at pains to establish by oral evidence that after the death of each male member in the family a fresh agreement of partnership was entered into among the surviving members and the male heirs of the deceased. The learned Subordinate Judge has rightly disbelieved the evidence on which such express agreement was sought to be established. At the same time, we see no difficulty in holding that the three sons of Hingan, who carried on business jointly and had a joint purse, were members of a partnership. Section 239, Indian Contract Act, defines partnership as "the relation which subsists between persons who have agreed to combine their property, labour and skill in some business and to share the profits between them." That the sons of Hingan had combined "their property, labour and skill" can admit of no doubt. That the understanding was that the profits would be shared by them equally is also clear. Under S. 253 of the same Act, the death of a partner has the effect of putting an end to the partnership. On the death of Muharram in 1892, the old partnership should be deemed to have come to an end and a fresh partnership to have come into existence between the surviving members and male heirs of Muharram. Similarly on Dehu's death, Ismail should be considered to have joined the partnership. After Ismail's death, the remaining male members of the family, who had an interest in the joint property, should be deemed to have agreed to form a pratnership among themselves. If there had been no other complications, the rights of the heirs to each deceased partner would have been governed by the provisions of S. 241 of the Indian Contract Act, which provides that

> in the absence of any contract to the contrary, property left by a retiring partner or the representative of a deceased partner to be used in the business is to be considered a loan.

If the heirs of a deceased male member agreed to become partners, they themselves became partners. If not, their share in the business is to be considered a loan. There is no evidence in this case which can justify the conclusion that the female heirs to each deceased male became partners by virtue of any agreement, express or implied. In these circumstances, if the rights of the parties rested on the theory of partnership, the defence might have prevailed and the plaintiffs' right would be limited to their shares in the business and properties as they were on the death of Dehu and Ismail. But the matter cannot be allowed to rest on that footing in view of the position of the parties and the conduct of the male members after the death of Dehu and Ismail. When Dehu died, his heirs were Ismail and his daughter Jumman. It was open to the surviving male members of the family to wind up the business and to pay off Jumman by valuing her interest in her father's share in the business. They preferred to carry on the business, retaining the entire assets, including her share. In this connection, Section 88 of the Indian Trusts Act seems to us to be fully applicable. It runs thus:—

> Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage he must hold for the benefit of such other person the advantage so gained.

It is argued by the learned advocate for the defendants that the surviving male members cannot be considered to be trustees, executors, partners, agents, directors or legal advisors. This is true; but in our opinion they were

> bound in a fiduciary character to protect the interests of the heirs to the deceased, as is shown by Illustration (*f*), which runs as follows:—
>
> *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A's* legal representative for the profits arising from *A's* share of the capital.

Reliance is placed on behalf of the defendants on *Taylor* v. *Taylor*[3] for the proposition that there is no fiduciary relation between the heir of a deceased partner and the surviving partners. It may be true that the mere fact that one person is an heir to a deceased partner will not clothe the surviving partners in relation to him with a fiduciary character; but taken with the additional circumstance referred to in S. 88, Illustration (*f*), namely, that the surviving partners, instead of winding up the business of the partnership, retained all the assets of the business and continued it, the position becomes materially different. This is specially so in a case like the one before us in which the female heirs, who are all " pardah nashin" ladies, lived under the protection of the surviving co-sharers of Dehu and Ismail. Section 88 is, however, applicable in regard to the business jointly carried on by the male members of the family and may not in terms apply to the immovable property and its profits; but as to such properties it cannot be disputed that they were co-owners, and the same result is arrived at by applying the provisions of S. 90 of the Indian Trusts Act, which provides that:—

> Where a co-owner or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

The combined effect of Sections 88 and 90 of the Indian Trusts Act is that the share of Mt. Jumman in the business and property left by Dehu having been retained by the male members of the family, who continued the business and availed themselves of the dominant position they had in relation to the business and property under their control, they must hold for the benefit of Mt. Jumman any profits accruing from such business or the advantage gained by the use of their position. It is argued in reference to Section 88, Illustration (*f*), of the Indian Trusts Act that the heir is entitled to the "profits" accruing from his share of the assets and not to acquisitions made therewith. We are unable to agree with this contention. The profits were merely converted into other properties or were invested in the business and it is open to the person entitled to such profits to claim the improved business and the properties acquired with their aid. Moreover, the terms of Section 90 clearly entitle the female heirs to any 'advantage' gained by her co-owners by availing themselves of their position as such. It cannot be doubted that it was in derogation of the rights of such heirs that the advantage was gained. The profits of their shares in the business and the property were made use of for improving the business and making acquisitions instead of being paid to them. In this view, Mt. Jumman was entitled to her share under the Muhammedan Law not only in the property and the business as they were at the time of Dehu's death but also in the improvements and acquisitions made between the time of Dehu's death and that of Ismail in 1907.

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[3] [1873] 28 L. T. 189

On the death of Ismail, his widow and his sister inherited a portion of what belonged to him. It should be noted that the sister had already a share by virtue of her position as the heir to her father Dehu. For the reasons already given, Mt. Zohra, the widow, should be considered to be entitled not only to a share in the properties and business as they were at the time of Ismail's death but also to a similar share in the improvements and acquisitions made after Ismail's death up to the time when Noori Mian died. Mt. Jumman should be considered to have likewise obtained an interest in the improvements and acquisitions made up to the time of her own death in 1910. Her rights devolved upon her daughter, plaintiff No. 2, and husband, plaintiff No. 3. The nature of the rights of plaintiff No. 2, who was an unmarried girl living with the plaintiff No. 1 under the protection of the defendants, is the same as that of her mother or of Mt. Zohra. Rahimullah, plaintiff No. 3, was somewhat differently situated but we think Section 88, Illustration (*f*), and Section 90 Indian Trusts Act, equally apply to him. It was open to the defendants to settle his claim by payment of cash equivalent of his share, or otherwise, they however preferred to retain his share of the assets in the business and employed the profits of his share of the assets with the rest of the funds in their hands in improving the business and making fresh acquisitions.

It is pointed out that the skill and personal efforts of the defendants, no less than the capital invested in the business, contributed to the prosperity of the business and to the acquisitions of new properties. It was open to the defendants to charge for the personal services a reasonable remuneration. They did not, however, do so and cannot now insist on account being taken of their personal services which it is impossible to assess in terms of money or a share in the improvement and acquisitions.

The learned advocate for the appellants objected to the decision of the case being made to rest on the provisions of Sections 88 and 90 of the Indian Trusts Act, which were referred to in course of the arguments. It is contended that the plaint and the counsel's statement in pleadings are absolutely silent as regards that aspect of the case. It is true the plaintiff's claim was based solely on the allegations that the property in dispute belonged to a joint family consisting of Hingan's descendants and their heirs and that, therefore, the plaintiffs were entitled to a share not only in the properties left by Dehu and Ismail but also in those subsequently acquired. We are, however, of opinion that all the facts necessary for the application of Sections 88 and 90 of the Indian Trusts Act are alleged in the pleadings. They might not have made allegations as regards the law rightly applicable to such facts. On the facts alleged by the plaintiffs being established, they are entitled to such reliefs as the law applicable to those facts entitles them to.

The only other question that remains to be considered is one of limitation and adverse possession. It is argued that the proper relief which the plaintiffs should have claimed was one of dissolution of partnership to which Art 106 of the Indian Limitation Act, providing a period of limitation of three years, would be applicable and that the plaintiffs cannot be allowed to circumvent the law of limitation by asking for joint possession. In our opinion if the plaintiffs are entitled to joint possession, as they claim, there can be no objection to the suit being so framed as to make a longer period of limitation applicable. On the frame of the suit as launched, Art. 106 of the Indian Limitation Act can have no application. The proper article applicable is Article 144, as to which it is said that the cause of action accrued to the plaintiffs more than 12 years before the institution of the suit. It appears that a suit was instituted by Shukru, Ismail and Islam against third persons for declaration of their right to certain immovable property. Ismail died during the pendency of the suit. The surviving plaintiffs or Noori Mian applied that Noori Mian be substituted for Ismail as his heir and legal representative. The defendants of that suit objected to Noori Mian being treated as "the sole heir of Ismail" and to Ismail's widow not being impleaded. Accordingly, Mt. Zohra was joined not as plaintiff but as a defendant. It is said that the male members who were plaintiffs in that case should be considered to have denied the right of the widow, and therefore, did not implead her as the legal representative of the deceased. We do not think that any denial of her right can be inferred from the proceedings above referred to. Noori Mian, though not an heir of Ismail, was set up as the legal representative, which term includes a person who intermeddles with the estate of a deceased person. The grounds on which the application for substitution was based and the reasons for not joining the widow do not appear from any of the certified copies taken from that record. In this state of the evidence, we cannot hold that the right of Ismail's widow as an heir was denied. Similarly the right of Mt. Jumman as the heir to her father or to her brother Ismail does not appear to have ever been called in question. The same remarks apply to Zulekha, plaintiff No. 2, and

Rahimulla, plaintiff No. 3. Accordingly we hold that the plaintiffs' suit is not barred by limitation and that the defendants have failed to establish adverse possession for more than 12 years of the properties now in dispute.

The result of our findings is that the appeal fails and is dismissed with costs.

Appeal dismissed

DHIRAJ LAL RAM PRASAD (*Defendant*)
versus
JACOB BEHRENS & SONS (*Plaintiffs*)*

Civil 1932 *July 26*

PULLAN, J. NIAMATULLAH, J.

Arbitration Act (IX of 1899), Sec. 19 and Sec. 32 Negotiable Instruments Act (XXVI of 1881)—C. I. F. contract—Bank endorses bills of exchange in favour of sellers—Suit based on accepted bills—When can be stayed—Legal position after acceptance.

Where in accordance with he terms of a C. I. F. contract, the sellers draw bills of exchange directing the purchasers to pay the invoice value of the goods to the Bank named in the bills and the purchasers accept the bills before maturity, the legal position is that the purchasers' liability to the sellers for the invoice value of the goods is discharged and a liability to the Bank under the bills is substituted therefor.

Where however the agreement between the parties empowers the sellers to claim the invoice value inspite of the acceptance of the bill, it is implied that if the sellers elect to sue for the invoice value on the basis of the original contract they would secure for the buyers immunity against any claim on the basis of the bill and, conversely, if the buyer's acceptance of the bill is enforced, they are absolved from their liability under the original contract.

Where the Bank endorsed the bills of exchange to the sellers and the sellers brought a suit based on accepted bills of exchange, and the purchasers made an application under Section 19 Arbitration Act (IX of 1899) for stay of suit on the ground that the agreement provided that disputes arising out of any contract entered into in connection with the agreement were to be referred to arbitration, *held*, that the plaintiffs (who did not avail themselves of the remedy reserved to them under the agreement of falling back on the original consideration) were in the position of the Bank and were suing as holders of the bills of exchange and the suit could not be stayed under Section 19 Arbitration Act as there was no agreement between the plaintiffs as holders and the defendants as acceptors of the bills of exchange containing any clause authorising a reference to arbitration.

FIRST APPEAL from an order of BABU RAJA RAM, First Additional District Judge of Cawnpore.

P. L. Banerji, I. B. Banerji and *Ram Narain Verma* for the appellant.
N. P. Asthana for the respondents.

The judgment of the Court was delivered by

NIAMATULLAH, J.—This is an appeal from an order of the First Additional Subordinate Judge of Cawnpore on an application by the

Niamatullah, J.

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*F. A. F. O. 32 of 1932

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Dhiraj Lal Ram Prasad v. Jacob Behrens & Sons

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defendants-appellants under Section 19 of the Indian Arbitration Act for stay of a suit brought against the appellants-defendants by the plaintiffs. The plaintiffs are Sir Jacob Behrens and Sons of Manchester, England, and the defendants Dhiraj Lal Ram Prasad, cloth dealers in Cawnpore. These parties have entered into an agreement known as a C. I. F. contract, in the terms of which the defendants purchased cloth from the plaintiffs. Under this contract transactions are carried out in the following manner:—

The purchaser orders certain goods. The seller, after accepting the order, despatches the goods, at the same time drawing bills of exchange directing the purchaser to pay the Chartered Bank of Cawnpore a sum representing the cost of goods, freight and insurance, up to the arrival of the goods in India. The Bank tenders to the purchaser the bills of exchange, invoices, bills of lading and other documents. The purchaser accepts the bills of exchange and gives the necessary instructions for the clearance of the goods. The bills of exchange are then presented on maturity to the purchaser who makes the payment and receives delivery of the goods.

In the present case several orders for dhotis were placed with the plaintiff firm by the defendants, and the procedure outlined above was adopted until the time came for the defendants to honour their acceptances of the bills of exchange and take delivery of the goods. In each case the defendants refused to do so. At first they asked for an extension of time, and subsequently asked that the matter might be referred to arbitration in accordance with the terms of the agreement. Ultimately a suit was instituted for recovery of a sum of upwards of one lac of rupees due on the bills of exchange accepted by the defendants. The defendants thereupon made an application under Section 19 of the Indian Arbitration Act for stay of the suit. The Subordinate Judge dismissed this application on the following grounds:—

First, he held that this is a suit based on accepted bills of exchange, and is not a suit for goods delivered.

Secondly, he held that in a C. I. F. contract no question of arbitration can arise as in such contracts it is the duty of the buyer to pay the drafts drawn against shipment, and the only defence which he can take is that documents tendered were not proper documents. In other words no defence can be entertained without previous payment.

Thirdly, he held that no dispute had actually arisen which could be referred to arbitration; and

Fourthly, he held that in any case if such a dispute could be said to have arisen, it had not been made within 30 days of the date of the acceptance of the bills of exchange, and therefore under the terms of the agreement could not be referred to arbitration.

Undoubtedly the learned Subordinate Judge was asked to give a decision on all these points, and arguments have been addressed to us also on all the matters dealt with in the judgment, but in our opinion the court should have confined itself strictly to a decision as to whether there was

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or was not an adequate reason for not allowing this application in the terms of Section 19 of the Arbitration Act. If the decision of the Subordinate Judge on the first point, to which we have referred above, is correct, it is not, in our opinion, necessary at this stage to give a decision on the other questions dealt with by him.

The agreement between the parties provides, *inter alia*:

> (*a*) If such firm offers are accepted by the sellers, they shall, after the despatch from Manchester of the goods, draw upon the buyers or the buyers indentors at sixty days' sight for the price so stated in such firm offer with documents attached through the National Bank of India Limited or such other bank as the sellers hereafter select or agree to.
>
> (*b*) Should the sellers, at the request of the buyers, draw any drafts on the buyers indentors the buyers shall be and remain liable as guarantors or sureties for the acceptance and payment of such drafts and the sellers shall hold and continue to hold the buyers and the buyers indentors equally liable.
>
> (*c*) The sellers shall also be entitled and remain entitled to recover the invoice value of the goods from the buyers whether or no the property in the goods has passed to the buyers *and whether or no the drafts have been accepted.*
>
> (*d*) Disputes of whatever nature arising out of any contract entered into in connection with this agreement including the question of the construction of such contract or of any trade usage governing the goods covered by such contract unless an amicable settlement can be arrived at must be referred to arbitration under the rules of the Delhi Piece Goods Association.

In the present case the bills of exchange directed the defendants to pay the invoice value to the Chartered Bank (which the plaintiffs selected as they could under the agreement). The defendants accepted the bills before maturity. The effect of such a transaction ordinarily is that the defendants' liability to the plaintiffs for the invoice value of the goods is discharged, and a liability to the bank under the bills is substituted therefor. The defendants could not be liable to both, that is, to the plaintiffs for the price of goods and to the bank for acceptance of the bills under Section 32 of the Negotiable Instruments Act which clearly provides that the acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity according to the apparent tenor of acceptance. Clause (*c*), however, quoted above, (the numbering is our own, adopted for the sake of convenience), empowers the sellers to claim the invoice value in spite of the acceptance of the bill. It is, of course, implied that if the sellers elect to sue for the invoice value on the basis of the original contract they would secure for the buyers immunity against any claim on the basis of the bill and, conversely, if the buyers' acceptance of the bill is enforced, they are absolved of their liability under the original contract. But for Clause (*c*) the legal position would have been only this: after acceptance followed by maturity of the bill the buyers would have been liable only to the bank which alone would be be liable to the sellers according to the terms of the agreement between them, under which the sellers drew the bill of exchange in favour of the bank. The sellers have, however, reserved to themselves an alternative remedy of falling back on the original consideration. It is only if they avail themselves of this remedy and their claim is contested that a dispute will arise "out of a contract entered into in connection with this agreement" within the meaning of the arbitration clause quoted above (marked (*d*)). If, on the other hand, the suit is based on the bill and a dispute arises in such suit, it cannot be said to arise out of any contract between the parties "in connection with the agreement" but it arises between one of the parties to it and a third person in connection with the acceptance of the bill, a transaction collateral to but not arising out of the agreement. In our opinion the agreement clearly gives to the seller an option to sue for the price of goods, but this option has not been exercised, and the main argument addressed to us is that this is actually a suit for the price of goods. If it were so, no doubt in the terms of the agreement the buyer would be able to refer to arbitration any objection which he had to make as to the quality or quantity of the goods supplied, but we are not of opinion that this is in any sense a suit for the price of goods. It is in form and in substance a suit based upon the acceptance by the defendant firm of the bills of exchange. It was open to the plaintiffs to sue for the price of goods, but it was also open to them to avail themselves of their position as holders of the accepted and dishonoured drafts, and to enforce against the defendants the terms of Section 32 of the Negotiable Instruments Act, XXVI of 1881.

Mr. Banerji for the defendants-appellants has argued that the decision of the Subordinate Judge is entirely based upon a judgment of the Lahore High Court in *Radha Bihari Diwan Singh* v. *G. B. Alexander*[1], and he has shown that that decision, although to some extent in point, is based upon a contract containing a clause whereby the sellers bound themselves "to accept the draft on presentation and pay at maturity notwithstanding any objection they might have regarding or on account of any variation in the terms of the "Indent." There is no such clause in the present agreement, and for that reason we prefer to leave out of account the judgment of the Lahore High Court which has been relied on by the learned Subordinate Judge.

Our view in the case is as follows:—

The draft was drawn in favour of the Chartered Bank, and it was the Chartered Bank who had in the first instance a right to recover the sum due on the draft from the acceptor. Had the Bank sued on the acceptance, clearly the acceptors could not have pleaded that under an agreement between themselves and a third party, namely, the sellers of the goods, they had a right to refer the matter to arbitration. No question as to the nature of the goods arose between the present appellants and the Chartered Bank, and there was no agreement between them containing any clause authorising a reference to arbitration. The Chartered Bank endorsed the bills of exchange to the plaintiffs, and the plaintiffs in bringing this suit on the basis of the bills of exchange are in the position of the Chartered Bank, and therefore entitled to frame their suit accordingly. Their position in this respect is the same as that of a total stranger to whom the

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[1] 2 Lah. 335

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Bank might endorse the bills. A suit brought by them for the price of goods will bring into operation the arbitration clause of the agreement between themselves as sellers and the defendants as buyers. But there is no agreement and no arbitration clause which can come into force as between the plaintiffs as holders and the defendants as acceptors of the bills of exchange.

In our opinion on this finding alone the plaintiffs' application to refer the dispute to arbitration under Section 19 of the Arbitration Act should have been dismissed. The effect of such dismissal is that the defendants would be at liberty to defend the suit in the court of the Subordinate Judge on such grounds as they may be entitled to take. They can there raise the plea allowed to them by Section 43 of the Negotiable Instruments Act that there has been a failure of consideration. It is also open to them to institute their own suit against the plaintiffs for any compensation to which they may be entitled for the alleged breach of the agreement in that the plaintiffs are said to have sent dhotis which are not of agreed dimensions, if such a defence is not open to them in this suit, a question on which we express no opinion. Consequently we deprecate those findings of the Subordinate Judge which appear to cut off from the defendants the defence which they might raise in the trial of the suit in the court of the Subordinate Judge or in a suit of their own. These are the third and the fourth findings to which we have referred above. On one of these findings we cannot agree with the view taken by the judge, and we think it proper to set aside that finding. He has held that no dispute has arisen which could have been referred to arbitration had the arbitration clause of the agreement come into operation. In our opinion such a dispute has arisen. Before the filing of the suit the defendants complained that on information received from customers they had reasons to suppose that the dhotis supplied in these consignments were not in accordance with the specifications in the invoice. The Judge appears to have overlooked the fact that this is one of the matters which the defendants wished to refer to arbitration, and as they clearly put forward this claim before the suit was filed, it cannot be said that there was no dispute which could have been referred to arbitration under the agreement if the arbitration clause in the agreement had come into operation.

The Judge has also held that the objection, if made, was beyond time, having been made more than 30 days after the acceptance. In our opinion this is a matter which should not be decided in the present proceeding. It is true that there is a decision of a Bench of this Court in the case of *Kedarnath Motilal* v. *Sukhamal, Bansidhar*[2], which seems to hold that a decision by arbitrators on an objection raised beyond a period allowed for making such objections in an agreement is void, though one of the Judges expressed the opinion that the arbitrators themselves should decide the question whether the objection was or was not made within time. We do not think it necessary in these proceedings to express any opinion on this matter. We consider that the finding of the Subordinate Judge is premature and that this matter may

[2] I. L. R. 44 All. 481

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be reopened if parties wish to do so in the trial of the suit or in another suit. We consider that at the present stage the duty of the Subordinate Judge, and therefore our own duty, was merely to decide whether this suit should be stayed in order that the matter may be referred to arbitration under the agreement between the parties or not. In our view no case for reference has been made out and the suit is therefore one which must be heard on its merits as a suit based on the acceptance of a bill of exchange. We do not wish to record any finding or to support any finding which might preclude the defendants from setting up any defence in the written statement now to be filed which is open to them in a suit of this nature, and we accordingly set aside all those findings of the Subordinate Judge, other than the finding which we affirm, that no reference to arbitration can be made in the terms of the agreement between the parties in the present suit as framed. Subject to this observation we dismiss this appeal with costs.

Appeal dismissed

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MUKERJI, J.
BENNET, J.

SAHU RAM KISHORE (*Applicant*)
versus
CHIRANJI LAL (*Opposite party*)*

Civil Procedure Code, Sec. 145—Application by plaintiff in a pending suit for stay of sale in execution of a decree—Sale stayed on appellant filing a bond in plaintiff's suit—Whether decree-holder can execute decree against appellant.

Where on the application of the plaintiff in a pending suit, a sale in execution of a decree was stayed pending the disposal of the plaintiff's suit, on an undertaking being given by the present appellant by execution of a bond *filed in the plaintiff's suit,* that if the plaintiff's suit was dismissed and the decree-holder suffered any loss, the loss might be made good from certain specified properties of the appellant. The plaintiff's suit was dismissed and the decree-holder, who had suffered a small loss, proceeded to execute the decree against the appellant, *held,* (1) that the decree could not be executed against the appellant as the undertaking was given in the plaintiff's suit and not in the execution proceedings relating to the decree sought to be executed; (2) that Sec. 145 C. P. C. was inapplicable to the present case.

Subbaraya Pillai v. *Sathanatha Pandaram,* 48 I. C. 940 *followed.*

EXECUTION FIRST APPEAL from a decree of MAULVI S. NAWAB HASAN, Subordinate Judge of Aligarh.

G. Agarwala, S. K. Dar and *Gopi Nath Kunzru* for the appellant.

Panna Lal for the respondent.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—All the necessary facts of this case could not be discovered when the appeal was before us on a former occasion, and we had to adjourn the arguments for summoning of records.

The facts materially are briefly these. One Chiranji Lal, the respondent before us, had a mortgage decree against Keshab Deo and others, being decree No. 424 of 1920, which was made final on August 20, 1921. To this suit one Gauri Shankar was a party. Gauri Shankar for some reason with which we are not concerned filed a suit No. 514 of 1922 and made an application for an injunction directing that the sale fixed for January 18, 1923 should not be held at the instance of the decree-holder, Chiranji Lal, pending the disposal of the suit. The court ordered that if Gauri Shankar furnished security to the amount of Rs.5,000, the sale should be stayed. An undertaking was given by the appellant before us, one Ram Kishore, by execution of a bond, dated January 29, 1923, that if the suit of Gauri Shankar was dismissed and Chiranji Lal suffered any loss, the loss might be made good from certain specified properties of Ram Kishore. This undertaking was given and the bond was filed in Suit No. 514 of 1922 instituted by Gauri Shankar but not in the course of the execution proceedings in decree No. 424 of 1920. Gauri Shankar's suit was heard and the execution proceedings in decree No. 424 of 1920 were stayed. Gauri Shankar's suit failed both in the court of first instance and ultimately in the High Court, on November 9, 1928. Chiranji Lal thereafter took out execution of the decree No. 424 of 1920 and got the property sold twice. The first sale that was held on December 5, 1924 was for Rs.68,000, but the sale was set aside and the sale that was ultimately held on March 3, 1926 was for Rs.55,000 only. The result was that the money received by the sale was not enough to satisfy the decree in its entirety. A small balance of Rs.1,000 and odd was left and Chiranji Lal obtained a personal decree against the judgment-debtors for the balance due. This decree he could not successfully execute because the judgment-debtors had nothing out of which the decree-holder could be paid.

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*E. F. A. 17 of 1931

Thereupon Chiranji Lal proceeded to execute decree No. 424 of 1920 against Ram Kishore.

Ram Kishore's objections were many. One was that the decree-holder suffered no loss and he was not liable to pay anything. Another ground was that the decree could not be executed against him, at any rate, by sale of the property mortgaged.

Both the points which did not find favour with the court below have been repeated here. In our opinion the first point has no force. It is true that if the first sale had held good, it would have wiped out the entire debt and there would have been no occasion for Chiranji Lal to ask for the recovery of the small sum that remains unpaid. But it was no fault of Chiranji Lal that the sale was set aside at the instance of the judgment-debtors. There can be no doubt that the delay due to Gauri Shankar's suit resulted in an increase of the interest on the decretal amount and the interest for the period of 18 months and 25 days during which the suit was pending ought to be made good by Ram Kishore. We say this without prejudice to the merits of the case that may be hereafter instituted by Chiranji Lal against Ram Kishore.

The next point is whether the decree No. 424 of 1920 may be executed against Ram Kishore. We are of opinion that it cannot be. The undertaking that was given was given in Suit No. 514 of 1922, and there is nothing on the record of the proceedings in suit No. 424 of 1920 by which any liability may be fixed on Ram Kishore whether the liability be personal or against his property.

The language of Section 145 has been relied upon by the learned counsel for the respondent. But, in our opinion, it does not help him. Section 145 is divided into three clauses and the liability is imposed on a person who has become liable as a surety. In the case before us Ram Kishore did not undertake to perform any decree or any part thereof. All that he said was that he would compensate the decree-holder in case the suit of Gauri Shankar was dismissed. The amount of his liability has to be computed. Further Gauri Shankar did not even appear in the execution of the decree No. 424 of 1920. So far as the record of that suit goes, including execution proceedings, he is a perfect stranger. Clause (*b*) does not apply for obvious reasons. Clause (*c*) again does not apply, because Ram Kishore has not made himself liable for payment of any money under decree No. 424 of 1920 or in any proceeding consequent on suit No. 424 of 1920. As we have said, Ram Kishore is entirely a stranger both to the suit No. 424 of 1920 and to its execution proceedings. If the undertaking given by Ram Kishore in suit No. 514 of 1922 could bring him in as a surety in execution of decree No. 424 of 1920, he might as well be treated as a surety in execution of suit No. 424 of 1920 if he had given a private undertaking to Chiranji Lal by execution of a bond in his favour. It can never be argued that in such a case Ram Kishore would have been liable. In *Subbaraya Pillai* v. *Sathanatha Pandaram*[1], a bond outside the court had been given by a surety to the decree-holder, and it was held (reversing the decree of a learned Judge of the Madras High Court) that the liability did not attach and the decree could not be executed against the surety. We agree with this decision.

For the reasons given above, we allow the appeal, set aside the execution order of the court below and dismiss the application for execution as against the appellant Ram Kishore with costs throughout.

Appeal allowed

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[1] 48 I. C. 940

Civil

1932

May 5

King, J.
Thom, J.

KANIZ FATMA (*Plaintiff*)
versus
YAD HUSAIN AND OTHERS (*Defendants*)*

Civil Procedure Code, Sec. 11—Rule of res judicata *as between co-defendants —Conflict of interest between co-defendants latent—One co-defendant did not defend suit—Whether Rule applicable.*

A house was bought by one *K* in the name of his wife. *K's* brother brought a suit claiming his share in the house on the allegation that the property belonged to *K*. The defendants to the suit were *K's* wife's brother's children and *K's* daughter. *K's* wife's brother's children were vitally interested in denying that the house belonged to *K*. (If the house belonged to *K* they would be entitled to a one anna share, whereas if the house belonged to *K's* wife, they would be entitled to an eight anna share). On the other hand it was to *K's* daughter's interest that the property should be held to have belonged to her father and not to her mother. (If the property belonged to her father, she was entitled by inheritance to a nine anna share whereas if the property belonged to her mother, she was entitled to eight annas only). *K's* daughter did not enter appearance in the suit but chose to stand by and let the plaintiff fight her battle. *Held* that the decision in the suit as to the ownership of the house operated as *res judicata* between the co-defendants. *Munni Bibi* v. *Triloki Nath*, 1931 A. L. J. 453 *applied.*

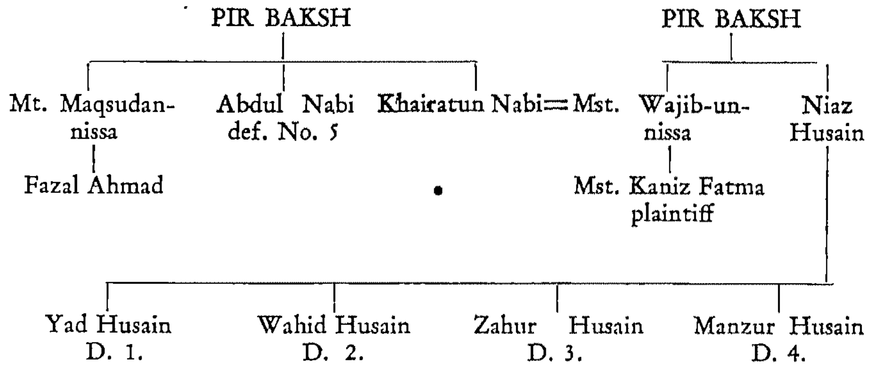
SECOND APPEAL from a decree of BABU KEDAR NATH MEHRA, Additional Subordinate Judge of Farrukhabad, confirming a decree of BABU SHYAM BEHARI LAL, Munsif of Farrukhabad at Fatehgarh.

M. Waliullah for the appellant.
Mukhtar Ahmad for the respondents.

The judgment of the Court was delivered by

King, J.

KING, J.—This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff is entitled to a 9 annas share out of certain property and that defendants 1 to 4 are entitled to a 1 anna share and defendant No. 5 to 4 annas. The relationship between the parties appears from the following pedigree:—



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*S. A. 1642 of 1930

The plaintiff, Mst. Kaniz Fatima, claims that the property in suit belonged to her father Khairatun Nabi and that she is entitled to an 8 annas share as his heir. Out of the 2 anna share which passed by inheritance to her mother Mst. Wajib-un-nissa, she is entitled to a further 1 anna share as heir of her mother. She alleged that it had finally been decided between the parties, in suit No. 514 of 1924, that the property belonged to her father.

The principal defence set up by defendants 1 to 4 who are sons of Niaz Husain, the brother of Mst. Wajib-un-nissa, was that it had been decided in a previous suit No. 4 of 1924 in which they were the plaintiffs, as against Kaniz Fatma and her transferees as defendants, that the property belonged to Mst. Wajib-un-nissa and that they are entitled to a half share and that Mst. Kaniz Fatma is precluded by the rule of *res judicata* from impeaching the correctness of that decision.

It is admitted that the decision in suit No. 4 of 1924 operates as *res judicata,* but it is contended for the plaintiff that the later decision in suit No. 514 of 1924 also operates as *res judicata* between the parties. These two previous decisions are conflicting. In suit No. 4, the sons of Niaz Husain alleged that the property belonged to Mst. Wajib-un-nissa and they claimed as her heirs. It must be explained that the property in suit was bought by Khairatun Nabi in the name of his wife. In suit No. 514 a dispute arose as to whether Khairatun Nabi was the real owner and his wife was a mere benamidar, or whether his wife was the real owner. In suit No. 4 that question was not in dispute, since Mst. Kaniz Fatma as defendant did not dispute the allegation that the property belonged to her mother but she claimed title to the whole property by virtue of a gift from her mother. The defence failed and the sons of Niaz Husain succeeded in establishing their claim to a half share in the property as heirs of Mst. Wajib-un-nissa. When suit No. 4 was pending, Abdul Nabi, the brother of Khairatun Nabi, applied to be made a party, but his application was not granted and he was excluded from the suit. On October 22, 1924, Abdul Nabi instituted suit No. 514 against Kaniz Fatma and the four sons of Niaz Husain alleging that the property belonged to Khairatun Nabi and that he was entitled to a four anna share as heir of Khairatun Nabi. Kaniz Fatma never put in any appearance as defendant, but her co-defendants defended the suit on the ground that the property belonged to Wajib-un-nissa. It was finally decided between the parties that the property belonged to Khairatun Nabi. It is apparent therefore that the decisions in suits No. 4 and 514 are conflicting. The former was decided upon the understanding that the property belonged to Wajib-un-nissa, and the latter decided that the property belonged to Khairatun Nabi. The proposition of law is admitted that when there are two previous conflicting decisions, both of which operate as *res judicata,* then the decision of the latter date must prevail. It is conceded that the decision in suit No. 4 operates as *res judicata;* so the point for determination is narrowed down to the question whether the decision in suit No. 514 operates as *res judicata.*

Both the courts below have held that the later decision did not operate as *res judicata*. There were certain other points at issue between the parties, but we are not concerned with them in second appeal.

The plaintiff argues that the courts below are wrong in holding that the decision in suit No. 514 has not got the effect of *res judicata*. In that suit, the present plaintiff Mst. Kaniz Fatma and the sons of Niaz Husain (who are defendants 1 to 4 in the present suit) were arrayed upon the same side as co-defendants. There are many rulings which lay down the conditions requisite for applying the rule of *res judicata* as between co-defendants, but we need only refer to the very recent decision of their Lordships of the Privy Council in *Munni Bibi* v. *Tirloki Nath*[1]. Their Lordships laid down that when there is a question of applying the rule of *res judicata* between co-defendants, three conditions are requisite:

> (1) There must be conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided.

We have to see then whether these conditions are fulfilled in the case of the co-defendants in suit No. 514.

In one sense it may be held that there was no conflict of interest between Kaniz Fatma and the sons of Niaz Husain in that suit. Kaniz Fatma never defended the suit. So there was no express and open conflict of interest betwen co-defendants as disclosed by conflicting pleadings. In another sense, however, there undoubtedly was a conflict of interest. The principal issue in the suit was "whether the property in suit belonged to Khairatun Nabi and he had purchased it benami in the name of his wife?" If this issue were decided in the affirmative (as it was) then, the decision would be rather in favour of Mst. Kaniz Fatma than against her. The case which she set up about a gift from her mother, had failed in suit No. 4 which was decided on October 24, 1924, two days after suit No. 514 had been instituted. If Kaniz Fatma was unable to rely upon the alleged gift and had to rely only upon her right of inheritance, then it was to her interest that the property should be held to have belonged to her father and not to her mother. If the property belonged to her father, she is entitled by inheritance to a 9 anna share. If the property belonged to her mother, she is entitled to 8 annas only. Probably for this reason, she was not interested in denying that the property belonged to her father and did not trouble to contest the suit. Her co-defendants, the sons of Niaz Husain, on the other hand, were vitally interested in denying that the property belonged to Khairatun Nabi. If that point were established, they would be entitled only to a 1 anna share, whereas if the property were proved to belong to Wajib-un-nissa, then they would be entitled to an 8 anna share, as held in suit No. 4. In our opinion therefore there was a conflict of interest between Kaniz Fatma and her co-defendants in suit No. 514, although the conflict between them was not open and express as Kaniz Fatma never defended the suit. The conflict of interest was, so to speak, latent and not apparent from conflicting pleadings.

Now the question arises whether a conflict of such a nature between co-defendants will satisfy the requirements of the rule of *res judicata*. In view of the Privy Council decision in *Munni Bibi* v. *Tirloki Nath*, we think the question must be answered in the affirmative. The main issue for determination in the previous suit which was under consideration in that case was whether B. Amar Nath was the owner of the disputed house. The plaintiff who held a money decree against Amar Nath sued for a declaration that the property in suit belonged to Amar Nath and was saleable in execution of his decree. He impleaded Kashi Dei and Mst. Kanno who were interested in denying that the house belonged to Amar Nath. Mst. Munni Bibi, the co-defendant, being the daughter of Amar Nath, was obviously interested in maintaining that the house belonged to Amar Nath. Munni Bibi however did not enter an appearance in the suit. So, the issue was fought between the plaintiff and the other defendants Kashi Dei and Mst. Kanno. Nevertheless, their Lordships held that the decision operated as *res judicata* between the co-defendants. Their Lordships remarked:

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[1] 1931 A. L. J. 453

> It is true that the appellant (Munni Bibi) did not enter an appearance in the suit and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position.

These remarks are directly applicable to the facts of suit No. 514. Kaniz Fatma did not enter an appearance in the suit but chose to stand by and let the plaintiff Abdul Nabi fight her battle. But this could not affect her legal position. The issue regarding the ownership of the house was fought out between Abdul Nabi and her co-defendants and it was necessary to decide that issue in order to give relief to the plaintiff. The question was certainly finally determined; so, in our opinion, the decision of that issue is *res judicata* between the co-defendants of suit No. 514.

The trial court held that the decision in suit No. 514 did not operate as *res judicata* because it was not in respect of the same subject-matter which is in dispute in the present suit. We do not think the reasoning is sound. It is true that in suit No. 514 Abdul Nabi claimed a declaration only in respect of a 4 anna share in the property, but the share was an undivided one. The sons of Niaz Husain and Kaniz Fatma were all impleaded and we think it cannot be held that the same property was not in dispute merely because the plaintiff only claimed a declaration in respect of a 4 anna undivided share in that property. The lower appellate court does not hold that the decision in suit No. 514 does not operate as *res judicata* on the ground that it is not in respect of the same subject-matter but only on the ground that there was no conflict of interest between the co-defendants. It has been argued that Kaniz Fatma cannot be held to have had a conflict of interest with the sons of Niaz Husain in suit No. 514, because in the previous suit she never disputed the contention that the property belonged to her mother, and suit No. 4 was decided on the assumption that the property did belong to her mother. We do not think that Kaniz Fatma's pleadings in suit No. 4 constitute a valid reason for holding that there was no conflict of interest between her and the sons of Niaz Husain in suit No. 514. In suit No. 4, the parties did not raise the question whether the property

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1932

KANIZ FATMA v. YAD HUSAIN

King, J.

belonged to Khairatun Nabi or to his wife, as they were both interested in asserting that it belonged to his wife. When Kaniz Fatma found that her defence regarding the alleged gift had failed, she may have been advised that it was to her interest not to contest the suit No. 514, since she would stand to gain if it were proved that the property belonged to her father. In any case, we hold that there was in fact a conflict of interest between Kaniz Fatma and her co-defendants and the decision regarding the ownership of the house must, in the light of the Privy Council ruling, be held to constitute *res judicata* between the co-defendants.

The appellant has also placed reliance upon *Mahip Narain Pandey* v. *Nannu Singh*[2]. In that case, the sons of Mahip Narain sued to set aside a sale of joint family property on the ground that the sale was without consideration. They impleaded their father Mahip Narain and the purchasers. Mahip Narain supported his sons, the plaintiffs, and asserted that no consideration had passed. The purchasers did not appear on the date fixed for hearing and the suit was decided against them *ex parte*. The purchasers then brought a suit against Mahip Narain for recovery of the sale consideration. It was held that the previous decision, namely, that no consideration passed, was *res judicata* as between the parties who were co-defendants in the previous suit. It is not clear from the report whether the purchasers had filed any written statement or had not entered any appearance from the outset. This ruling does no doubt support the plaintiff's contention, but not so clearly as the Privy Council decision.

On the other hand, we have been referred to *Kamta Prasad* v. *Bhulai Misir*[3]. This ruling however is distinguishable upon the facts, as there was no conflict of interest between the donor and donee who were co-defendants in the previous suit. It is expressly stated that both the donor and the donee successfully contested the suit.

The ruling in *Kallu* v. *Fiaz Ali Khan*[4] has also been cited, but this ruling is also distinguishable upon the ground that the issue raised in the second suit had not been necessary for determination in the previous suit for the purpose of giving relief to the plaintiff.

The case of *Muhammad Ahmad* v. *Zahur Ahmad*[5] has also been referred to on behalf of the respondents, but the facts of that case are not sufficiently clearly reported to justify us in relying upon it as supporting the respondents' contention. In the ruling cited, it is not clear who were the defendants other than Mohammad Ahmad in the suit of 1912. It is also not clear in what form the issue had been decided. Also it does not appear what interests Zahur Ahmad had in the property which was the subject-matter of Mohammad Ahmad's suit and it does not appear who were the other defendants. We cannot take this ruling as clearly supporting the respondents' contention. The case *Rukmini* v. *Dhondo*[6] relates to a question of *res judicata* between co-plaintiffs. It is moreover distinguishable on the ground that the question raised in the subsequent suit had not been necessary for decision in the previous suit for the purpose of giving relief against the defendants.

[2] I. L. R. 47 All 778

[3] A. I. R. 1927 All. 365

[4] 5 A. L. J. 367

[5] I. L. R. 44 All. 334

[6] I. L. R. 36 Bom. 207

In our opinion, the Privy Council decision is applicable to the facts of this case and we are clearly bound by its authority. The defendant-respondents are precluded from impeaching the correctness of the decision in suit No. 514 that the property belonged to Khairatun Nabi and the plaintiff was therefore bound to succeed. We accordingly allow the appeal, set aside the decree of the court below and decree the plaintiff's suit with costs throughout.

Appeal allowed

Civil

1932

June 21

Sulaiman, C. J.

KASTURI AND ANOTHER (*Plaintiffs*)
versus
BALMUKAND (*Defendant*)*

Provincial Small Causes Courts Act, Secs. 23 and 25—Order under Sec. 23 returning plaint—Whether appealable—Whether High Court can interfere under Sec. 25.

No appeal lies from an order purporting to be passed under Sec. 23 of the Provincial Small Causes Courts Act for the return of a plaint to be filed in the proper court. But if the order is illegal or irregular, the High Court would have jurisdiction to interfere under Sec. 25 of the Act because the return of the plaint terminates the proceedings in the court of small causes and a case is decided thereby.

Subal Ram Dutt v. *Jagadanunda Mazumdar*, 1 I. C. 288 *dissented from.*

Civil Revision from an order of Maulvi S. M. Saiduddin, Judge of Small Cause Court of Agra.

S. B. Johari for the applicants.

K. N. Malaviya for the opposite-party.

The following judgment was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—A preliminary objection is taken to the hearing of this revision. The court of small causes has returned the plaint for presentation to the proper court. It is urged that the order was appealable inasmuch as an appeal lay to the District Judge, and as none has been filed, there could be no revision. In the second place, it is urged that the order of the court of small causes returning the plaint does not come within the meaning of Section 25 of the Small Cause Courts Act and that therefore no revision lies. Reliance is placed on the case of *Subal Ram Dutt* v. *Jagadanunda Mazumdar*[1].

In my opinion, the order returning the plaint purported to have been passed under Section 23 of the Provincial Small Cause Court Act, and not under O. 7 C. P. C. Section 27 of the Act makes the order final. It cannot, therefore, be contended that an appeal lay from the order, because the Code of Civil Procedure was applicable under Section 17(1) of the Act only so far as it was not inconsistent with the provisions of the Act.

I also see no force in the second objection. Where a court has exercised discretion, the High Court would not interfere in revision with that discretion. But that is a matter quite different from saying that no case is decided and a High Court can never have any jurisdiction to interfere at all. It seems to me that if a court of small causes has acted grossly wrongly or with material irregularity, for instance, where the plaintiff's right does not in any way depend on the proof or disproof of title to immovable property or any other title and the court arbitrarily returns the plaint for presentation to the proper court, it must be treated as if a case has been decided which would give jurisdiction to the High Court to interfere under Section 25. If the learned Judges in the case of *Subal Ram Dutt* v. *Jagadanunda Mazumdar* meant to lay down as a general proposition that any order purporting to be passed under Section 23 of the Provincial Small Cause Court Act for the return of a plaint to be filed in the proper court is not an order passed in a case decided within the meaning of Section 25 of the Act, I am, with great respect, unable to agree with them. As stated above, if the question is merely one of an exercise of discretion, then there would be no interference. But if the order is illegal or irregular, the High Court would have jurisdiction to interfere because the return of the plaint terminates the proceedings in the court of small causes, and, in my opinion, a case is decided thereby. The word "case" is used in a wider sense than "suit", and must include the termination of a legal proceeding pending in a court which, so long as the order is not set aside, cannot be revoked. I accordingly overrule the preliminary objection.

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*Civ. Rev. 102 of 1932

[1] 1 I. C. 288

The plaintiffs' case was based on the supposition that they were the heirs of Gopal Das, who had put the defendant in possession as tenant. The defendant admitted that he was the tenant of Bhagwan Das and Gopal Das, but did not admit that the present plaintiffs were the heirs of his landlord. The court below has very properly considered that the question depends on the proof or disproof of a title to property, and that the case is a fit one to be tried on the original side. I am unable to interfere with the exercise of discretion by the court below. The application is dismissed with costs.

Application dismissed

CHANDERDEO CHAUBE AND ANOTHER (*Applicants*)
versus
MEGH NARAIN AND OTHERS (*Opposite parties*)*

Civil
1932
July 21
Niamat-ullah, J.

Civil Procedure Code, Or. 22, R. 6 and Limitation Act, Art. 176—Plaintiff dies between conclusion of hearing and pronouncement of judgment—Application for leave to appeal by legal representatives—Limitation.

Where a plaintiff dies between the conclusion of the hearing and the pronouncing of the judgment, the decree must be taken to have been passed in his lifetime (Or. 22, R. 6), and no application for substitution of names is necessary. Rule 3, Chapter II of the Rules of the Allahabad High Court require an application by the legal representatives of a party dying after the decree to apply for permission to appeal. For compliance with that rule there is no limitation and all that is necessary is that the appeal itself should be filed within time.

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*F. A. 321 of 1932

CIVIL
1932
CHANDERDEO CHAUBE
v.
MEGH NARAIN
Niamatullah, J.

A. P. Pandey for the applicants.

K. Verma for the opposite parties.

The following judgment was delivered by

NIAMATULLAH, J.—This is an application for permission to file an appeal on behalf of one Lachhman, who was plaintiff in the original suit and who died between the conclusion of the hearing and the pronouncement of the judgment in the court below. His suit was dismissed and his legal representatives, Chanderdeo and Inderdeo, have preferred an appeal along with this application asking for leave to appeal as the legal representatives of the deceased plaintiff.

The learned advocate for the respondents contests the application on the ground that it has been made more than 90 days after the death of Lachhman, a fact which is not disputed. I do not, however, think that the objection has any force. Or. 22, C. P. C. requires applications for substitution of a deceased plaintiff or defendant, in case any of them dies, during the pendency of the suit. The provisions of that order have been made applicable to cases in which one of the appellants or respondents dies during the pendency of the appeal. There is no law to be found either in the Civil Procedure Code or elsewhere which makes it necessary that any substitution proceedings should take place where one of the parties dies between the decree and the filing of the appeal. In this case Lachhman died before the decree and would have been deemed to have died during the pendency of the suit but for O. 22, R. 6 which provides that in such case the judgment should be considered to have been pronounced before his death. In other words, the decree must be taken to have been passed in his lifetime. This being so, a fiction has to be introduced to the effect that Lachhman died after the decree. As already stated, no application for substitution of names is necessary where a party dies between the date of the decree and the filing of the appeal. Rule 3, Chapter 11 of the Rules of this Court, however, requires an application by the legal representatives of a party dying after the decree to apply for permission to appeal if one is to be preferred. For compliance with that rule there is no limitation and all that is necessary is that the appeal itself should be filed within time. Art. 176 of the Indian Limitation Act does not apply to an application of the kind contemplated by the rule above referred to. The application is accordingly allowed.

CRIMINAL
1932
July 29
PULLAN J.
THOM, J.

KING-EMPEROR
versus
CHITTIRA*

Criminal Tribes Act, Sec. 23—Applicable only to convictions for offences specified in Sch. I—'Any other such offence'—Meaning of.

Section 23 of the Criminal Tribes Act refers only to convictions for offences specified in Sch. I and has no application to a conviction for an offence which is not contained in Sch. I. The words "any other such offence" used in the section mean one of those offences mentioned in the schedule.

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*Cr. A. 155 of 1932

CRIMINAL

1932

KING-EMPEROR v. CHITTIRA

Where a person was convicted under Section 454 Penal Code read with Section 23 of the Criminal Tribes Act and his previous convictions were one under Section 454 and two under Section 457, *held*, that Section 23 of the Criminal Tribes Act did not apply and the accused could only be punished as an old offender.

CRIMINAL APPEAL from an order of ABDUL HALIM ESQ., Sessions Judge of Budaun.

M. *Waliullah* (Assistant Government Advocate) for the Crown.

Jail appeal.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—Chatra, who is a registered member of a criminal tribe, has been convicted of an offence under Section 454 I. P. C. read with Section 23 of the Criminal Tribes Act and has been sentenced to transportation for life. The facts of the case are clearly proved. This Chatra entered a house through the roof in the day time and stole a 'hansli' and some money. The owner of the house returned in time and he was arrested with the 'hansli' and the money in his possession. There is, therefore, no question as to his guilt.

The sentence of transportation has been inflicted because in the opinion of the learned Sessions Judge, there was no alternative sentence under Section 23 of the Criminal Tribes Act. Section 23 of the Criminal Tribes Act lays down that a member of a criminal tribe who having been convicted of any of the offences under the Indian Penal Code specified in Schedule 1, is convicted of the same, or of any other such offence, shall, on a second conviction, be sentenced to not less than seven years' rigorous imprisonment and, on a third conviction, to transportation for life. Section 454, Indian Penal Code, under which the appellant has been convicted, is not included in Schedule 1 of the Criminal Tribes Act. The previous convictions of this person were one under Section 454 and two under Section 457. Section 457 is included in Schedule 1. Thus, had the present conviction been one under Section 457, the Judge would have been right in sentencing this man to transportation for life. But, in our opinion, Section 23 refers only to convictions for offences specified in Schedule I. It has no application to a conviction for an offence which is not contained in Schedule I. The Judge says that this is "an offence similar in nature to the one of which he has been convicted twice before". But these are not the words of the section. The words are "the same or any other such offence", and "any other such offence" means one of those offences mentioned in the Schedule. Thus Section 23 of the Criminal Tribes Act does not apply to this case, and the applicant can only be punished as an old offender, who has been twice convicted under Section 457 I. P. C. and once under Section 454, I. P. C. We accordingly alter the conviction to one under Section 454 read with Section 75, I. P. C. and reduce the sentence from transportation for life to seven years' rigorous imprisonment.

CRIMINAL

1932

August 30

PULLAN, J.
THOM, J.

KAUL AHIR
versus
KING-EMPEROR*

Arms Act, Sec. 19(f)—Conviction under—When justified—Loaded cartridges found in a house—Head of the family convicted—When conviction legal.

In the course of a house search two loaded cartridges were found in a corn bin in the house of the accused among ghee, butter and other articles. The accused was prosecuted for an offence under the Arms Act and the Magistrate convicted him on the ground that he was the head of the family and should therefore be held responsible for the arms recovered from his house. *Held,* that the view taken by the Magistrate was wrong and the conviction was not legal. In all such cases it is necessary to prove not only the presence of the article in the house but the possession of some particular person over that article in order to justify a conviction.

King-Emperor v. *Sikhdar overruled.*

CRIMINAL REFERENCE made by BABU HARI HAR PRASAD, Sessions Judge of Azamgarh.

The following is the Referring Order:—

IQBAL AHMAD, J.—I find it difficult to reconcile the decision of this Court in *Emperor* v. *Ram Autar,* I. L. R. 47 All. 511 with the decision of this Court reported as *King-Emperor* v. *Sikhdar,* 1932 A. L. J. 570. The question that arises for consideration in the present reference is of sufficient importance to merit a discussion before two Judges. Accordingly I refer this case to a Bench of two Judges.

L. M. Roy for the applicant.

M. Waliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—The learned Sessions Judge of Azamgarh has referred to this Court the case of one Kaul Ahir who has been convicted of an offence under the Arms Act. In the course of a house search two loaded cartridges were found in a corn bin in the house of this man Kaul among ghee, butter and other articles. Kaul and his son were prosecuted for an offence under the Arms Act. The son Lagan was acquitted, and the Magistrate has convicted Kaul on the ground that he was the head of the family and should therefore be held responsible for the Arms recovered from his house. There are many cases of this Court in which it has been laid down that it is improper to convict each and every member of a Hindu joint family because some illicit article has been recovered from the house, and the principle that the head of the family is responsible where there are other adult male members who had equal facilities of access to the article in question has never been affirmed as far as we are aware by any High Court in India. We have been referred to a decision of a single Judge of this Court in the case of *King-Emperor* v. *Sikhdar*[1]. In that case the learned Judge held that all the adult male members of a Hindu joint family could be presumed to be in possession of an unlicensed gun found in their house, and it was open to the police to prose-

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*Cr. Ref. 266 of 1932

[1] 1932 A. L. J. 570

CRIMINAL
1932
KAUL AHIR
v.
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Pullan, J.

cute one or all of them for the offence. This is a view which we are not prepared to accept. We believe that in all such cases it is necessary to prove not only the presence of the article in the house but the possession of some particular person over that article in order to justify a conviction. In a case such as the present it cannot even be said that the head of the house or any individual male member of his family was aware of the presence of these cartridges. For all we know they might have been dropped by some sportsman, picked up by a child and handed over to the child's mother. It is the women of the house and not the men who look after the grain bin and the ghee and the butter and other articles, and the possession of these cartridges may have been entirely innocent. We cannot accept the view that the head of the family is responsible for the presence of the articles, and we do not consider that the conviction for an offence under the Arms Act is legal. We accordingly accept this reference, set aside the conviction and sentence and direct that if the fine has been paid it shall be returned.

Reference accepted

FATTU AND OTHERS
versus
KING-EMPEROR*

CRIMINAL
1932
August 30
PULLAN, J.
THOM, J.

Civil Procedure Code, Or. 21, R. 37—Judgment-debtor—Warrant for arrest and notice under Or. 21, R. 37 issued simultaneously—Warrant did not disclose name or official designation of person to whom issued—Warrant defective and illegal.

Where a warrant for arrest which did not disclose the name or official designation of the person to whom it was issued for execution, was served on a judgment-debtor simultaneously with a notice under Or. 21, Rule 37 C. P. C calling upon him to appeal before the court on a specified date, *held,* that the warrant was defective in itself and its issue was illegal as the court by issuing a notice under Or. 21, Rule 37 C. P. C. had taken away its own right to issue a warrant of arrest and the question of arrest could only arise when the judgment-debtor fails to comply with the notice, and the persons who released the judgment-debtor from custody committed no offence under Sec. 225 *B* of the Penal Code. *Jagannath* v. *K. E.,* A. L. J. [1932] 179 and *Badri Gope* v. *K. E.,* [1926] A. I. R. 237 *relied on.*

CRIMINAL REVISION from an order of BABU TRILOKI NATH, Sessions Judge of Meerut.

The following is the Referring Order:—

YOUNG, J.—This is an application in revision from the decision of the learned Sessions Judge of Meerut. The applicant was charged under Section 225 (*b*) of the Indian Penal Code with resisting arrest. He has been found guilty and sentenced. The whole question in this application in revision is whether the warrant under which the applicant was arrested was a valid warrant or not. If it was a valid warrant, the offence clearly has been committed. If it was invalid, it is contended that no offence under Section 225 (*b*) could have been committed. There is a decision of a single Judge of this Court in

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*Cr. Rev. 95 of 1932

1932 A. L. J. 179, which decided that a conviction under similar circumstances could not be upheld. The learned Judge, however, in that case felt himself bound by a Bench decision in I. L. R. 18 All. 246. The facts, however, of this case are completely different to the facts in I. L. R. 18 All. 246, and I am myself inclined to hold that the mere failure to make a formal insertion in the warrant of the name of the person to whom the warrant is entrusted for execution would not be enough to invalidate the warrant and therefore the subsequent arrest based upon it. As, however, there is a single Judge case referred to above, I think it proper to have this matter decided by a Bench of two Judges.

Personally I would be inclined to refuse to exercise the powers of revision vested in me in this case, whatever the legal position might be, but I think the legal point is one which ought to be decided.

Masud Hasan for the applicants.

Kartar Narain Agarwala for the opposite party.

M. Walliullah (Assistant Government Advocate) for the Crown.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This is an application in revision from an order of the Sessions Judge of Meerut, who confirmed the conviction and sentences passed upon seven applicants for an offence under Section 225B of the Indian Penal Code. A warrant was issued by a Revenue Court for the arrest of one Sarup Singh. Sarup Singh was arrested, but he was rescued from the peons who arrested him. These facts may be taken as admitted.

This application in revision challenges the legality of the warrant. This objection is two-fold. In the first place, the warrant does not disclose the name or official designation of the person to whom the warrant was issued for execution, and secondly the warrant was served simultaneously with a notice under Order 21, Rule 37 of the Civil Procedure Code.

In our opinion the warrant was defective for both the reasons stated by the learned counsel. A warrant must be issued to some person for execution; and where no name or description of that person is given in the warrant, the person arrested can have no knowledge that the persons who present the warrant are legally authorised to do so. It may be that the person who is arrested is unable to read the warrant and has no knowledge as to whether the warrant is or is not properly filled up; but it is the duty of the Court to issue a warrant in proper form, and where a warrant is incomplete, it has been held by more than one High Court that the subsequent release of a person arrested under such a warrant is not an offence under Sec. 225B of the Indian Penal Code. There is a very recent decision on this point by a learned Judge of this Court reported in *Jagannath* v. *K. E.*[1]. In that case a warrant had been issued to the Nazir, and the Nazir without any endorsement made it over to a subordinate official. It was held that the warrant was defective and did not authorise the person who directed the peons to make the arrest, and that accordingly an escape from custody in such a case was no offence. In our opinion the learned Judge decided that case on correct principles, and the present case is a stronger one, for in this case the column which should contain the name of the person to whom the warrant was issued for execution is blank. There is a parallel case recently decided by the Patna High Court, *Badri Gope* v. *K. E.*[2] in which a warrant, otherwise complete, was defective, as it was afterwards found that the seal of the court was missing. Although this fact was not known to the persons who rescued the person arrested, the Court held that, as the warrant was defective, they had committed no offence under Section 225B.

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[1] [1932] A. L. J. 179

The second objection to this warrant raises a point which, as far as we are aware, has not previously been before any High Court. Under Rule 37, Order 21, C. P. C., a court may, instead of issuing a warrant for arrest, issue a notice calling upon the judgment-debtor to appear before the Court on a date specified in the notice and show cause why he should not be committed to the civil prison. The second clause of this rule reads as follows:—

> Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

In the present case the court adopted what is, in our opinion, a most improper procedure. It issued simultaneously a notice calling upon the judgment-debtor to appear before the Court on April 30, and a warrant for his arrest. Both the notice and the warrant were served on April 19. In our opinion this rule is clear. There were two courses open to the court; either it could issue a warrant of arrest, or it could issue a notice giving the judgment-debtor date on which to appear in court. If the court follows the second mode of procedure, the question of arrest could only arise when the judgment-debtor fails to comply with the notice. On April 19 the judgment-debtor had still eleven days within which to comply with the notice, and his arrest within that period was illegal, for the court by adopting this procedure had taken away its own right to issue a warrant of arrest before April 30.

We cannot emphasise too strongly our feeling that in all these matters of the arrest of a judgment-debtor the procedure laid down in the Code must be carefully observed by the Courts. The liberty of the subject cannot be trifled with, and every judgment-debtor can require by right that the court ordering his arrest shall observe to the letter the law as laid down in the Code. In the present case we consider that the warrant was defective in itself, and its issue was illegal. Consequently we have no hesitation in finding that the persons who released this judgment-debtor from custody were not rescuing a person who was under a lawful arrest, and therefore they committed no offence under Section 225B of the Indian Penal Code. We accordingly accept this application in revision, set aside the judgments of the courts below and quash the conviction and sentences.

Application allowed

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[2] [1926] A. I. R. 237

CRIMINAL

1932

Sep. 1

PULLAN, J.
THOM, J.

BADRI PRASAD
versus
JHAMMAN*

Criminal Procedure Code, Sec. 539A—Accused person making false allegations in application for transfer—Whether liable to prosecution.

Section 539A, Criminal Procedure Code, applies to an accused person and he is liable to prosecution in respect of any false statement which he may make in an affidavit supporting his application for transfer.

King-Emperor v. *Matan,* I. L. R. 33 All. 163 *referred to.*

CRIMINAL REVISION from an order of BABU RADHA KISHEN, Sessions Judge of Budaun.

The following is the Referring Order:—

KING, J.—This is an application in revision against an order passed by the learned Sessions Judge of Budaun rejecting an application for revision of an order of acquittal under Sections 193 and 199 of the Indian Penal Code.

It appears that one Jhamman was being tried before a tehsildar Magistrate for an offence under Section 323 of the Indian Penal Code and while the trial was pending Jhamman made in application to the District Magistrate asking that the case should be transferred from the court of the tehsildar on the ground that the tehsildar was siding with the complainant, who was an influential person, and that the tehsildar had openly stated in court that if the accused did not pay Rs.100 as compensation to the complainant, he (the tehsildar) would convict him. The District Magistrate obtained an affidavit from Jhamman in support of these allegations and then called for a report from the tehsildar from which it appeared that the allegations made by Jhamman were false. The District Magistrate accordingly rejected the application for transfer and ordered that Jhamman should be prosecuted under Sections 193 and 199 of the Indian Penal Code.

When Jhamman was tried for the offences mentioned above, the trial court found on the strength of certain rulings of this High Court that even if the facts alleged in the affidavit were false, nevertheless he was immune from prosecution. The matter was taken up to the Sessions Judge in revision but he also came to the conclusion, in view of the authorities cited, that the accused had been rightly acquitted.

For the applicant a case decided by a single Judge, *Buddhu Khan* v. *Emperor,* A. I. R. 1928 Lah. 182, has been relied upon and it is directly in point. In that case it was held that according to the practice approved by the Allahabad High Court an accused person can legally tender his own affidavit in support of an application for transfer, whether the affidavit is tendered and the application made in a subordinate court or in the High Court, and he can be prosecuted in regard to any false statement made in the affidavit. Several other rulings have been cited which take the same view, namely, *Ghulam Muhammad* v. *The Crown,* A. I. R. 1922 Lah. 113; *Emperor* v. *Pir Qadir Shah,* A. I. R. 1925 Lah. 312, and *Mst. Allah Wasai* v. *Emperor* A. I. R. 1926 Lah. 12. On the other hand we have a ruling of two Judges of this Court in *Emperor* v. *Matan,* I. L. R. 33 All. 163, which clearly supports the view taken by the two courts below to the effect that the accused is immune from any prosecution in respect of any false statement which he may make in an affidavit supporting his application for transfer. The same view was taken by single Judges of this Court in *Emperor*

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*Cr. Rev. 327 of 1932

CRIMINAL

1932

BADRI PRASAD v. JHAMMAN

v. *Bindeshri Singh*, I. L. R. 28 All. 331 and *Ram Prasad* v. *King-Emperor*, 10 A. L. J. 462.

As there is a clear conflict of opinion between the decisions of this High Court and one of the decisions is by a Bench of two Judges, I refer the case to a Bench of two Judges as it would not be proper for me to dissent from the judgment of a Division Bench of this Court.

A. P. Pandey for the applicant.

N. U. A. Siddiqui for the opposite-party.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This is an application made by one Badri Prasad for revision of an order of acquittal passed against Jhamman in a case of perjury. Jhamman was accused of some petty offence in the court of the Tahsildar Magistrate. He swore an affidavit in connection with an application for transfer of the case, in which he made certain allegations about the presiding officer. It is in respect of this affidavit that he was prosecuted for offences under Sections 193|199 I. P. C.

The Magistrate and, in revision, the learned Sessions Judge believed that the case should be decided in the same way as the case of *King-Emperor* v. *Matan*[1] was decided by a Bench of this Court in the year 1910. The opinion held by that Bench was that no accused person could be prosecuted in respect of any statement made by him for the purpose of his defence, and an application made for transfer was made by the accused person in pursuance of his defence. At that time an accused person could not take oath under any circumstances. We see no reason to differ from the view taken by the Bench of this Court in that case at that time; but Section 539-A has been enacted in the year 1923, and there is nothing to show that that section does not apply to an accused person. In our opinion it applies to any person who chooses to make allegations respecting a public servant and in support of those allegations swears an affidavit. If an accused person chooses to come within the scope of this section and swears an affidavit on false facts, we consider that he should be liable to punishment which can be inflicted upon persons who swear such false affidavits. As pointed out by the learned Judge of this Court who referred this matter to a Bench, this view has already been taken in other High Courts, and we are of opinion that in view of the change of law the judgment of the Bench in the case of *King-Emperor* v. *Matan* need no longer be followed.

In the present case we consider that the matter has gone far enough, and we do not propose that this case should go back for decision on the question which has not yet been tried, namely, whether the affidavit was or was not false. With these observations, we direct that the record be returned.

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[1] I. L. R. 33 All. 163

CRIMINAL

1932

Sep. 2

PULLAN, J.
THOM, J.

RAM CHAND
versus
KING-EMPEROR*

Penal Code, Secs. 395 and 380—Dacoity—No use of force or show of force as inmates did not resist dacoits—Whether offence committed.

The accused were charged originally under Section 395 I. P. C. but the Sessions Judge convicted them of an offence under Section 380 I. P. C. as he was of opinion that probably the inmates did not resist the dacoity seeing their large number and so peacefully and calmly without using any force or show of force the dacoits acquired the property, *held*, that the view taken by the Sessions Judge was entirely wrong. According to his view any dacoity in which no resistance is offered and no violence required will cease to be a dacoity and should be treated as a theft.

CRIMINAL APPEAL from an order of BABU GOVIND SARUP MATHUR, Sessions Judge of Mainpuri.

Appeal from jail.

Sankar Saran (Government Pleader) for the Crown.

The judgment of the Court was delivered by

Pullan, J.

PULLAN, J.—This is an appeal by three persons, Ram Chand, Reoti and Munshi who have been convicted of an offence under Section 380 I. P. C. and each sentenced to three years' rigorous imprisonment. They had been charged originally under Section 395 I. P. C., and when their appeals were read by a Judge of this Court notice was issued to all three appellants to show cause why their sentence should not be enhanced. This is a very clear case of dacoity. In the first report it was said that there were 14 or 15 dacoits, and the approver, whose evidence has been believed by the Judge, says that there were 12. They entered the house in the night and they took ornaments and a considerable sum of money. It is said that they took Rs.2,000 in cash and ornaments worth Rs.164. There is nothing in the method in which the offence was committed to distinguish it from an ordinary dacoity, and the evidence against all these persons is particularly clear. Munshi himself made a confession which he retracted, and he is also mentioned by the approver whose name is also Munshi. He was identified by several witnesses. The other two appellants were mentioned both by the approver and by Munshi Kachhi in his retracted confession, and stolen ornaments were found in the possession of both of them.

The Judge has laid down a proposition of law which cannot possibly be accepted. He has said:

> Probably the inmates did not resist the dacoits seeing their large number and so peacefully and calmly without using any force or show of force the dacoits acquired the property, and so the offence comes technically within the purview of Section 380 I. P. C.

If this were so, any dacoity in which no resistance is offered and no violence required will cease to be a dacoity and should be treated as a theft. This decision of the learned Judge shows that he has entirely

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*Cr. A. 45 of 1932 (connected with Cr. Rev. 522 of 1932)

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Pullan, J.

failed to understand a section of the Indian Penal Code which in the district of Mainpuri, where he is the Sessions Judge, he must have occasion to use almost daily. We cannot alter the section under which he has chosen to convict these persons, and no doubt they are guilty under that section as in the course of committing the dacoity they also committed theft from a building. All that we can do is to emphasise our opinion that the view taken by the learned Judge is entirely wrong, to dismiss the appeal and to enhance the sentence under Section 380 I. P. C. to five years' rigorous imprisonment in the case of each of the appellants.

CRIMINAL

1932

Sep 16

PULLAN, J.

QABUL
versus
KING-EMPEROR*

Criminal Procedure Code, Secs. 236 and 237 and Penal Code, Secs. 302 and 194—Accused acquitted of an offence under Sec. 302—But convicted of an offence under Sec. 194 (with which he was never charged)—Whether conviction under Sec. 194 should have been passed.

Where the Sessions Judge acquitted a person of an offence under Sec. 302 I. P. C. and convicted him of an offence under Sec. 194 I. P. C., with which he was never charged and to which no reference was made either in the charge-sheet or in his examination, *held,* that the conviction was not illegal but this was a case in which such a conviction should not have been passed.

Begu v. *King-Emperor,* I. L. R. 6 Lah. 226 *discussed.*

CRIMINAL APPEAL from an order of BABU KASHI NATH, Sessions Judge of Muzaffarnagar.

K. O. Carleton for the appellant.

Sankar Saran (Government Pleader) for the Crown.

The following judgment was delivered by

Pullan, J.

PULLAN, J.—Six persons were charged in the court of the Sessions Judge of Muzaffarnagar with the murder of one Ganga. No other charge was preferred against them, except the charge under Section 302 I. P. C. Two of these persons were acquitted, but four of them, although acquitted of the charge of murder, were convicted of offences under Sections 194 and 201 I. P. C. and sentenced to 7 years' rigorous imprisonment on each charge.

The facts of this case are somewhat unusual. A report was made by one of the present appellants, Jai Singh at the police station of Shamli at 7 A.M. on August 25, 1931 that his father Ganga was missing and that he was probably confined in the house of one Pirthi. There is nothing in the report to suggest that Ganga was murdered but it is said that on the way to the village Jai Singh informed the police of his suspicion that Ganga had actually been murdered. Pirthi's house was searched and the body of Ganga was found in an inner room. It was subsequently ascertained that Ganga had been hanged, and the police officer who investigated the case discovered marks on the roof of the adjoining house suggesting to his mind that the body had been carried over that roof from outside and deposited in the place where it was found. Pirthi, it may be observed, was discovered smoking at the door of his house, and there can be little doubt that he was entirely unaware of the fact that the body was in his house. In spite of this, Pirthi and three others were arrested; but very soon suspicion was turned on Jai Singh and his relations. The police enquiry was inconclusive, but ultimately Pirthi brought a complaint charging these six men with murder, and it is on this complaint that the case was committed to Sessions and decided in the manner described above.

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*Cr. A. 389 of 1932

Evidence was called to show that Ganga was on bad terms with Jai Singh and Qabul Singh, his two sons, but it is by no means clear that there was any acute enmity between them at the time. Ganga went to Muzaffarnagar and presented a petition on August 24, and the judge has not believed any of the evidence which has been called to show that he was seen alive after that. The medical officer, who conducted the post-mortem examination at 9-45 A.M. on August 26, was under the impression that the man had been dead for more than two days, but probably the medical officer failed to note the rapid progress of decomposition in the month of August for certainly the man's death cannot have been caused till late in the afternoon on August 24. It is, however, probable that it took place on that day, as the medical opinion is not likely to be so far out as to find that the corpse has been dead for more than 48 hours when actually it has been dead for less than 36 hours. The judge has disbelieved all the evidence which goes to suggest that Jai Singh, his brother, Qabul Singh, his cousin, Sant Lal, and Qadam Singh, who is not related to the family, were seen with Ganga on the evening of August 24 and he has not found it proved that Ganga was hanged in the house of Hoshiara, who is the father of the accused Sant Lal. Indeed there is no evidence as to where the man was hanged or who hanged him. The facts that are proved are simply these. Ganga was hanged, his body was found in Pirthi Singh's house and apparently it had been carried in from outside. Jai Singh made a report at the police station suggesting that Ganga would be found in confinement in the house of Pirthi Singh. It appears to me that there was no evidence on which Qabul Singh or Qadam Singh could have been convicted. As to Sant Lal, he has been convicted because the body is said to have been dragged over his roof. His brother Manphul was also charged, but was acquitted because he did not live in the house. But there is no evidence that Sant Lal was present in his house when the body was taken over the roof, and even if he was, that is no reason for supposing that he was an accomplice. As to Qadam Singh all that can be said is that he went with Jai Singh when the latter made the report at the police station. It is not an offence to accompany another person to the police station, even when the latter makes a false report, and in my opinion Qadam Singh also cannot be convicted. There remains only the case of Jai Singh. There is certainly in his case the presumption that he must have known both that his father was dead and that his body would be found in the house of Pirthi Singh, and as a corollary it may be presumed also that he knew that Pirthi Singh was not responsible for his father's death. But the question whether Jai Singh should on these presumptions only be convicted of an offence under Section 194 or 201 of the Indian Penal Code is far from clear. In the first place, it is not kown for certain that Ganga was murdered. All that is known is that he was hanged, and he may have hanged himself or he may have been hanged by accident. It is also not certain that Jai Singh knew how the man came by his death or how he was removed and placed in the house of Pirthi Singh. All that can be said is that he came to know in some way that Ganga would be found in the house of Pirthi Singh and reported that fact. I cannot see how in any case he could be guilty of an offence under Section 201 I. P. C. because the story believed by the Judge is not that he caused evidence of the crime to disappear, but that he tried to fasten the crime on to some other person.

I confess that I also find some difficulty in supporting a conviction of an offence under Section 194 I. P. C. with which this man was never charged and to which no reference is made either in the charge-sheet or in his examination. I have been referred in this connection to the case of *Begu* v. *King-Emperor*[1] in which their Lordships of the Privy Council dealt with the meaning of Sections 236 and 237 of the Criminal Procedure Code. Their Lordships sum up the meaning of these sections read together in the following words:—

> A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

In that case persons acquitted of an offence under Section 302 I. P. C. were convicted of an offence under Section 201 I. P. C. It may be that an offence under Section 194 stands on the same footing as an offence under Section 201 I. P. C. But an offence under Section 194 I. P. C. brings into the field an entirely different set of circumstances and involves the fabrication of a false charge against a third party, which is in no way involved in a case of murder or in a case of causing the evidence of murder to disappear. I am not prepared to say that the conviction of Jai Singh under Section 194 is, in view of the words of Sections 236 and 237, illegal, but I certainly consider that this is a case in which such a conviction should not have been passed where the accused person has not in any way been asked to plead to the charge of fabricating false evidence. In these circumstances I am of opinion that all these persons should be acquitted. I accordingly allow these appeals, set aside the conviction and sentence and declare all the appellants to be acquitted. Qabul Singh and Sant Lal, who are on bail, need not surrender to their bail.

CIVIL
1932
Oct. 13
SULAIMAN, C. J.
KISCH, J.

RAZA HUSAIN (*Defendant*)
versus
THE DISTRICT BOARD, BANDA THROUGH CHAIRMAN (*Plaintiff*)*

District Boards Act, Sec. 192—Interpretation of—Protection intended for defendant—Status of plaintiff immaterial—Sec. 192, Sub-section 3—Advance given to member of District Board for supply of lime—Failure to render

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*F. A. F. O. 72 of 1932

[1] I. L. R. 6 Lah 226

CIVIL

1932

RAZA HUSAIN
v.
THE
DISTRICT
BOARD OF
BANDA

proper accounts—Suit for recovery of balance—Filed more than 6 months after accrual of cause of action—Suit time-barred.

Section 192 of the District Boards Act is intended for the protection not only of the Board and its officers and servants, but also of the members of the Board. So long as the defendant is a member of the Board and the suit against him is instituted in respect of an act done or purporting to have been done by him in his official capacity, the section is applicable, no matter whether the plaintiff is a stranger or the Board or any other officer or servant. The protection is for a defendant and does not take into account the status of the plaintiff in the suit.

Where advance money had been given to defendant by the District Board for supply of lime in his capacity as member of the Board and on his failure to supply the full quantity of lime and to submit correct accounts, the Board, after obtaining the Commissioner's sanction but more than 6 months after the accrual of the cause of action, sued the defendant for the balance, *held,* that Sec. 192, Sub-section 3 applied and the suit was time-barred.

Held, further, that the action of the Board in giving such a contract to the defendant, while he was a member of the Board, was highly objectionable, was contrary to the express provisions of Sec. 34 of the District Boards Act and to the principle underlying Section 31(*c*) of the rules contained in the District Board manual.

FIRST APPEAL from an order of PANDIT KANHAIYA LAL NAGAR, Additional Subordinate Judge of Banda.

Mushtaq Ahmad for the appellant.

U. S. Bajpai for the respondent.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a defendant's appeal arising out of a suit brought by the District Board of Banda against the defendant who was at one time a member of the Board. In the plaint it was alleged that the defendant was a member of the Board from 1923 to 1925, and lime was required for use by the Board. "Consequently an advance of Rs.6,750 was given to the defendant for preparation of lime under the control and supervision of the defendant. The defendant was to supply the lime so prepared and render an account of the advance." The Board went on to allege that he did not supply the full quantity of lime, and that he submitted an account which was wrong. It accordingly claimed the balance. It alleged that the cause of action accrued on or about the end of October 1925 when the defendant stopped supplying lime and also on subsequent dates when he refused to render accounts. The suit was filed on October 26, 1928. The defendant in his written statement pleaded that the suit was bad because no previous sanction of the commissioner had been obtained, and also pleaded that the claim was barred by time. There were other pleas also with which we are not concerned. Interrogatories were served by the defendant on the Chairman of the District Board and the very first question asked was whether the amount had been advanced to the defendant in his capacity as a member of the Board or as an outsider. The answer given was that the amount was given to him for preparation of lime as an advance in his capacity as a member of the District Board.

The learned Munsif began his finding by stating that it is admitted by the plaintiff that the defendant was given the advance in his capacity as a member of the Board. He again referred to this in his finding on the next issue and remarked that the defendant was given the advance to get prepared lime and supply it in his official capacity as a member of the Board. He held that the sanction of the Commissioner was necessary under Section 33 of the Act, and in the absence of such sanction the suit must fail. He further held that the claim was barred by the rules of limitation laid down in Section 192, Sub-section 3 of the District Boards Act.

In the grounds of appeal before the lower appellate court the plaintiff did not challenge the remark that it had been admitted by the plaintiff that the advance had been given to the defendant in his official capacity as a member of the Board.

The lower appellate court also does not in its judgment say that the advance given to the defendant had not been given to him in his official capacity as a member of the Board. It seems to have been conceded that the money had been given to him in that capacity.

The Board filed an application before the lower appellate court supported by an affidavit stating that, as a matter of fact, the sanction of the Commissioner had been previously obtained, but it had been accidently put on a wrong file, and could not be found at the time. It explained that both the present Chairman and the Secretary were not holding the offices at the time when the sanction was obtained. The lower appellate court accepted this explanation and considered that there was sufficient ground for admitting fresh evidence and also held that the papers filed by the Board showed that previous sanction had been obtained.

The learned Judge came to the conclusion that there was no defect. He further held that Section 192, Sub-section 3, did not apply to the case, because the plaintiff was the District Board itself and not a stranger. He overruled the finding of the first court and remanded the case for disposal of the remaining issues.

In appeal it is first contended that the lower appellate court should not have admitted fresh evidence. We think that when the learned Judge accepted the allegations contained in the affidavit and was satisfied that there was good cause for not discovering these papers at an earlier stage, he was perfectly justified in admitting them as fresh evidence. There is no doubt that these papers conclusively show that the sanction had been obtained.

We, however, think that the learned Judge has gone utterly wrong in his interpretation of Section 192. He seems to be under the impression that that sanction would not apply if the District Board itself is a plaintiff. He thinks that the section is intended to be applicable where anyone other than the Board is a plaintiff. There seems to be no justification whatsoever for such a construction. The opening portion of the section runs as follows:—

> No suit shall be instituted against a member of a Board in respect of an act done or purporting to have been done in

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1932

RAZA HUSAIN
v.
THE DISTRICT BOARD OF BANDA

Sulaiman, C. J.

his official capacity until the expiration of two months next after notice etc.

The section is obviously intended for the protection not only of the Board and its officers and servants, but also of the members of the Board. So long as the defendant was a member of the Board and the suit is instituted in respect of an act done or purporting to have been done by him in his official capacity, the section would be applicable, no matter whether the plaintiff is a stranger or the Board or any other officer or servant. The protection is for a defendant and does not take into account the status of the plaintiff in the suit. We are, therefore, clearly of opinion that the view taken by the lower appellate court is wrong and cannot be supported.

The learned advocate for the Board felt compelled to fall back upon the contention that the act in question was not one done in his official capacity. If this question were open to the Board to be raised in a third court, we would have been inclined to ask for a finding on this point. But, as remarked above, the position taken up by the plaintiff Board was that the advance had been given to the defendant in his official capacity as a member of the Board. The point was conceded in the answer to the interrogatories by the Chairman, was admitted before the trial Court and the admission was not withdrawn before the lower appellate court. In these circumstances, we do not think that we should allow the Board to raise this point at this last stage, because it is at the least a mixed question of law and fact. We must, therefore, assume that the act complained of was done by the defendant in his official capacity.

This being the case, Section 192, Sub-section 3 applies, and the suit having been instituted more than six months after the accrual of the cause of action, is barred by time.

We may add that even if Section 192 did not apply, we would not have been able to accept the finding of the lower appellate court that the suit is not barred by the three years' rule without a clear finding as to the date on which the accounts stated in writing signed by the defendant were submitted. (Article 64 of the Limitation Act).

We should also like to point out that the action of the Board in giving such a contract to the defendant, while he was a member of the Board, appears to have been highly objectionable, was contrary to the express provisions of Section 34 of the District Boards Act, and was also contrary to the principle now embodied in Section 31 (*c*) of the rules contained in the District Board Manual.

We accordingly allow this appeal, set aside the order of the lower appellate court and restore the order of first court with costs in all courts.

Appeal allowed

Civil

1932

Oct. 13

Sulaiman, C. J.

Kisch, J.

SUKHDEOJI AND OTHERS (*Applicants*)
versus
RAM LAL (*Opposite-party*).*

Tenancy Act (III of 1926), Secs. 271(4) and 242(3)—Suit for ejectment—Issue on proprietary right—Decided in plaintiff's favour by Civil Court—Suit dismissed on different ground—Appeal—Question of proprietorship raised again by defendant in his cross-objection—Commissioner's jurisdiction ousted—Memorandum of appeal to be returned to plaintiff for presentation to proper court.

Where in a suit for ejectment the revenue court, accepting the finding of the civil court in plaintiff's favour on an issue involving the question of proprietary right, dismissed it on a different ground, and on appeal by plaintiff to the Commissioner the defendant filed a cross-objection attacking the finding that he was not the proprietor, *held*, that the Commissioner having come to the conclusion that his jurisdiction was ousted as the result of the cross-objection, the only way open to him was to return the memorandum of appeal to the appellant for presentation to the proper court. In the absence of any specific provision permitting the sending of an appeal direct to the civil court, the provisions of Or. 7, R. 10 read with Section 107(2) C. P. C. would be applicable.

ORDER on application of Sukhdeoji and others.

The applicants were not represented.

K. N. Laghate and *P. M. L. Verma* for the opposite-party.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a reference by the Commissioner of Jhansi under Section 267 of the Agra Tenancy Act (Act III of 1926).

It appears that the plaintiff Sukhdeoji sued in the court of the Assistant Collector under Section 44 of the Act for the ejectment of the defendant, treating him as a trespasser. The defendant resisted the claim on the ground that he was himself the proprietor and the plot was his khudkasht. An issue was framed as regards the alleged proprietary rights of the defendant and it was referred by the Assistant Collector to the Munsif for determination. The Munsif came to the conclusion that the defendant was not the proprietor and sent his finding to the Revenue Court. The Revenue Court, of course, accepted that finding but dismissed the suit on a different ground, namely, that the plaintiff being only one of the co-sharers was not entitled to maintain a suit for ejectment alone. An appeal was filed in the court of the Commissioner by the plaintiff. Naturally as the finding as regards the defendant's proprietorship was in favour of the plaintiff, he did not raise any question of proprietorship in his grounds of appeal. The defendant, however, filed an application styling it as a cross-objection in which he attempted to support the decree of the Assistant Collector by attacking the finding that he was not the proprietor. Before the learned Commissioner the question of jurisdiction was raised. It is clear that where there is a decree of a Revenue Court passed in a suit in which an issue involving a question of proprietary right has been decided by a Civil Court and the question of proprietary right is in issue also in appeal the decree is appealable to the Civil Court under Section 271 (4) of the Act and also under Section 242 (3). The learned Commissioner came to the conclusion that a question of proprietary right had been raised in the appeal before its hearing and in consequence the appeal could be decided only by the Civil Court under the first mentioned section. He accordingly held:

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*Mis. Case 296 of 1932

> My jurisdiction is ousted as the result of this cross-objection, and the appeal must now go to the Civil Court.

The learned Commissioner however felt some doubt as to the way in which the appeal is to be sent to the Civil Court. At the time when it was filed apparently the Commissioner had jurisdiction and in his opinion that jurisdiction was ousted as the result of the cross-objection. The learned Commissioner therefore felt doubt as to whether he should hand over the memorandum of appeal to the appellant for presentation to the proper court or whether he himself should send the appeal direct to the Civil Court. He has said:

> I am in doubt as to the manner in which I should direct that this appeal should now be sent to the Civil Court for decision.

It is this point which he has referred to the High Court. We do not think that he came to the conclusion definitely that he must direct the appellant to file the appeal in the court of the District Judge. It seems that he actually had a doubt whether he should direct the appellant to do so. The reference therefore is proper.

There is no doubt that the language of Section 271 is not quite happy and it seems very awkward that an appellant who may not anticipate that the respondent would raise a question of proprietary title by way of cross-objection should be prevented from filing an appeal in the court of the Commissioner when he himself does not raise any question of proprietary title at the time of the filing of the appeal and that although the Commissioner might have jurisdiction when the appeal is filed he would cease to have jurisdiction as soon as the cross-objection is filed. But in this case the respondent merely wanted to support the decree of the trial court by attacking a finding which was against him. We think that when the learned Commissioner came to the conclusion that his jurisdiction was ousted and that the appeal must go to the Civil Court the only way open to him was to return the memorandum of appeal to the appellant. In the absence of any specific provision permitting the sending of an appeal direct to the Civil Court the provisions of O. 7, R. 10 read with Section 107 (2) C. P. C. would be applicable. The question of ordering costs at the time of the return of the appeal would be a matter of discretion for the Commissioner. We order that the costs incurred by the defendants in this reference should be paid by the plaintiff. Let the record be returned.

CRIMINAL

1932

Sep. 23

PULLAN, J.

HIRA LAL
versus
KING-EMPEROR*

Criminal Procedure Code, Sec. 145 (1)—Provisions of—Mandatory—Magistrate fails either in his order or notice to say that there is danger of breach of peace—Whether proceedings liable to be set aside.

The provisions of Sec. 145 (1) of the Criminal Procedure Code requiring a Magistrate to make an order in writing stating the grounds for his being satisfied that a dispute likely to cause a breach of the peace exists are mandatory. *Dan Prasad* v. *Ganesh,* 11 A. L. J. 696 and *Banka Singh* v. *Gokul,* 25 A. L. J. *followed.*

Section 145 Criminal Procedure Code is enacted in order that a Magistrate may prevent a breach of the peace arising from a dispute as to immovable property. He has no jurisdiction in a matter primarily appertaining to civil court, unless he is fully satisfied that there is a danger of a breach of the peace and this must, therefore, be put in the forefront of his proceedings and he must give the parties notice that it is to prevent a breach of the peace that he is taking action under the section. If he fails to do so, the proceedings are vitiated, and the order passed under Sec. 145 must be set aside.

CRIMINAL REFERENCE made by L. V. ARDAGH ESQ., Sessions Judge of Agra.

Shiva Prasad Sinha for the applicant.

Krishna Murari Lal for the opposite parties.

M. Waliullah (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Pullan, J

PULLAN, J.—This is a reference made by the learned Sessions Judge of Agra requesting this Court to set aside an order of a Magistrate purporting to have been passed under Section 145 of the Criminal Procedure Code. The facts of the case are as follows. Certain dhobies made an application to the Joint Magistrate of Agra saying that they had a small plot of land on which they placed their tazias at the time of the Moharram and that one Hira Lal had built or commenced to build a wall on that plot, and when they objected, he was ready to assault them. They accordingly asked the Magistrate to take proceedings under Section 145 of the Criminal Procedure Code. The Magistrate issued a notice without giving any reason, and then made a local inspection and heard evidence. He passed an order in which he stated that in his opinion the dhobies were in actual possession of the land, that Hira Lal should bring a suit in the civil court and the wall which had been started should be left in its present condition. There is not in this order one word suggesting that there was any danger of a breach of the peace. In revision the learned Sessions Judge pointed out that the Magistrate had failed in his order in writing to state the grounds for his being satisfied that there was likely to be a breach of the peace, as required by Section 145 (1) of the Criminal Procedure Code, and following certain rulings of this Court he held that this failure on the part of the Magistrate rendered the proceedings liable to be set aside. He also took certain other objections to the Magistrate's procedure. In reply the Magistrate referred to an unreported decision of this Court which is said to have laid down the principle that the failure of a Magistrate to state that he was satisfied from a police report that there was a likelihood of a breach of the peace cannot vitiate the proceedings. He went on to defend his manner of conducting the enquiry, and in the last words of his explanation for the very first time he suggests that there was proof that a dispute likely to lead to a breach of the peace existed.

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*Cr. Ref. 501 of 1932

There can be no question that the reported rulings of this High Court support the view that the provisions of Section 145 (1) requiring a Magistrate to make an order in writing stating the grounds for his being satisfied that a dispute likely to cause a breach of the peace exists are mandatory, and this principle was affirmed in the case of *Dan Prasad* v. *Ganesh*[1], and more recently in the case of *Banka Singh* v. *Gokul*[2]. It appears to me that these rulings are not based upon a mere insistence on the letter of the section, but go to the root of the whole matter. Section 145 is provided in order that a Magistrate may prevent a breach of the peace arising from a dispute as to immovable property. He has no jurisdiction in such a matter, which primarily appertains to a civil court, unless he is fully satisfied that there is a danger of a breach of the peace, and this must therefore be put in the forefront of his proceedings and he must give the parties notice that it is to prevent a breach of the peace that he is taking action under the section. If he fails to do so, the primary intention of the section appears to me to be in danger of being lost, and in this case it clearly has been lost. The Magistrate has concerned himself entirely with the question whether the dhobies have a better right to this plot than Hira Lal, and he has passed his orders with the intention of maintaining the right of the dhobies and forcing Hira Lal to make the necessary move in the civil court. In my opinion, such action was only possible if the Magistrate was convinced that if he failed to do so, there would be a breach of the peace. Where the Magistrate has entirely failed either in his notice or in his order to say that he is of that opinion and where it appears from the evidence, all of which I have read, that there is not a word about a breach of the peace, I must come to the conclusion that the whole proceedings are uncalled for, and as they are also contrary to the specific provisions of the Act, they should be set aside. I accordingly accept the reference and direct that the order of the Magistrate passed under Section 145 of the Criminal Procedure Code be set aside.

Reference accepted
Order set aside

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[1] 11 A. L. J. 696

[2] 25 A. L. J. 246

HARISH CHANDRA AND ANOTHER
versus
KING-EMPEROR*

CRIMINAL

1932

Sep. 27

PULLAN, J.

Criminal Procedure Code, Sec. 307—Offence under Sec. 395 Penal Code—Accused found guilty by jury on admissible evidence—Jury's refusal to accept judge's view as to requisite amount of evidence necessary to corroborate approver's statement—Whether reference to High Court necessary.

> The appellant was charged with an offence under Section 395 I. P. C. In his charge to the jury the Sessions Judge pointed out that it would be improper to convict on the uncorroborated evidence of the approver and expressed his personal view that they should not hold any accused guilty unless they find that besides being named or identified by the approver, he was also identified by at least two other witnesses. The jury did not accept the judge's view, for the appellant was named by the approver and identified in jail by one witness only, and returned a verdict of guilty. The judge accepted the verdict and convicted the appellant under Sec. 395 I. P. C. *Held*, that the verdict of the jury was in accordance with law and it was not the duty of the judge to refer the case to the High Court.

CRIMINAL APPEAL from an order of T. N. MULLAH ESQ., Sessions Judge of Allahabad.

K. D. Malaviya for the appellants.

Sankar Saran (Government Pleader) for the Crown.

The following judgment was delivered by

Pullan, J.

PULLAN, J.—This is an appeal on behalf of two persons who were convicted by a jury of an offence under Section 395 I. P. C. They have each of them been sentenced to 5 years rigorous imprisonment. The first ground of appeal is

> That the jury's decision being against the rules and principles explained by the judge in the charge, the learned judge ought to have referred the case under Section 307 Cr. P. C.

and the second is

> That either the judge's charge to the jury is wrong and amounts to misdirection or the jury's verdict is perverse and against law.

These grounds of appeal are based upon certain passages in the judge's charge to the jury. This is one of those cases in which the basis of the prosecution evidence is the statement of an approver, and the judge pointed out that an approver's statement required corroboration and that it would be improper to convict on the uncorroborated evidence of the approver. He went on to develop this by saying that the corroborative evidence should be sufficient in quantity and of a reliable character and he stated correctly that the law has not fixed the quantity of evidence necessary to corroborate the testimony of an approver. He then went on to express his own personal view in the following terms:—

> I should like to lay down as a safe rule for your guidance that you should not hold any accused guilty unless you find that besides being named or identified by the approver, Mathura, he is also identified by at least two other witnesses.

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*Cr. A. 577 of 1932

CRIMINAL

1932

HARISH CHANDRA *v.* KING-EMPEROR

Pullan, J.

The judge does not say that this is the law and he has not directed the jury that it would be illegal for them to convict any person who has not been identified by two witnesses in addition to the approver's statement. It was for the jury either to accept the personal opinion of the judge as to the necessary quantum of evidence or to reject it. In the case of one of these appellants Gajadhar, the jury did not accept the judge's view, for this man was named by the approver and identified in jail by one witness only. The judge accepted the verdict and convicted this man Gajadhar along with the others. I cannot accept the contention of the learned counsel that because the jury did not accept the judge's view as to the requisite amount of evidence which could be held to corroborate the statement of an approver, it was his duty to refuse to accept the verdict and to refer the matter to this Court. On the contrary, the verdict of the jury was in accordance with law and based on the evidence which had been placed before the jury by the judge himself and he could only refer the matter to this Court if he held that the verdict was a perverse verdict and that on the evidence the man was shown to be not guilty. It was not the duty of the judge to refer to this Court a case where the jury have found a man guilty on admissible evidence and evidence which in the eyes of the law is sufficient to justify a conviction.

There is even less to be said about the other appellant Harish Chandra *alias* Babu who was identified in jail by numerous witnesses and made a sort of half-hearted confession himself. Clearly, if the jury believed that evidence, they were right in convicting this man and there is nothing in the judge's summing up to show that he directed them otherwise, and as in the case of Gajadhar he accepted the verdict and sentenced this man along with the others.

As to the sentence, the judge has pointed out that this was a dacoity in which great brutality was perpetrated on an old man and a woman and that the old man was stabbed with a knife and had his arm broken and the woman was wounded in several places with a spear. In my opinion, the sentence far from being excessive, is barely adequate. I accordingly dismiss these appeals and uphold the conviction and sentences.

Appeal dismissed

CIVIL

1932

Oct. 13

SULAIMAN, C. J.

KISCH, J.

BACHCHAN LAL (*Defendant*)
versus
NAROTTAM DATT AND OTHERS (*Plaintiffs*)*

Registration Act, Sec. 17(2) (vi) (as amended by Sec. 10, Transfer of Property Supplementary Act XXI of 1929)—Award—Purporting to divide up movable and immovable property—When compulsorily registrable.

By Section 10 of the Transfer of Property (Amendment) Supplementary Act of 1929 the words "and any award" have been deleted from Section 17(2) (*vi*) of the Registration Act of 1908 with the result that an award is no longer excepted and if it amounts to a non-testamentary instrument purporting to create, declare, assign, limit or extinguish, whether in the present or in future, any right, title or interest whether vested or contingent, of the value of Rs.100 or upwards to or in immovable property, it is compulsorily registrable.

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*F. A. F. O. 196 of 1931

Where the award in dispute amounted in substance to a deed of partition purporting to divide up considerable movable and immovable property among the parties to the arbitration and compensations were given by the arbitrators in cash for the differences in the values of the properties allotted to the parties, the entire property being treated as forming part of one estate and the document was not registered within the time allowed by law, *held*, that the award must be treated as one inseparable document incapable of being split up and being inadmissible in evidence for want of registration, it must be rejected.

Amir Begam v. *Badruddin Husain*, I. L. R. 36 All. 336 *referred to.*

FIRST APPEAL from an order of MAULVI MUHAMMAD TAQI KHAN, Subordinate Judge of Farrukhabad.

S. N. Sen, Iqbal Ahmad and *Damodar Das* for the appellant.

M. L. Chaturvedi for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is a defendant's appeal from an order filing an award which was delivered in an arbitration proceeding without the intervention of the court.

On behalf of the respondents the first objection taken was that in view of the provisions of Paragraph 21, Sub-section (2) no appeal would lie from a decree incorporating the award. This contention overlooks the express provision of Section 104(1) (*f*) which specifically provides an appeal from an order filing an award as distinct from a decree incorporating the award. There is accordingly no force whatsoever in this objection.

The award is dated March 11, 1931 and the application for filing it was made on May 7, 1931. The award was therefore governed by the amended Transfer of Property Act of 1929 and the amended Registration Act of 1929.

Before the amendment Section 17(2) (*vi*) of the Indian Registration Act of 1908 made an exception in favour of "any decree or order of a court and any award". Accordingly an award even though it divided up immovable properties was not compulsorily registrable.

By Section 10 of the Transfer of Property (amendment) Supplementary Act of 1929 the words "and any award" have been deleted from the section in the Registration Act. The result therefore is that an award is no longer excepted and if it amounts to a non-testamentary instrument purporting to create, declare, assign, limit or extinguish, whether in the present or in future, any right, title or interest, whether vested or contingent, of the value of Rs.100 or upwards to or in immovable property, it is compulsorily registrable.

There is no doubt that the award in dispute in this case amounts in substance to a deed of partition purporting to divide up considerable movable and immovable property and to allot them to the parties named therein, creating and extinguishing the rights of the other parties in the shares allotted. The document therefore required registration and apparently owing to some oversight or ignorance of the new amendment

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1932

BACHCHAN LAL *v.* NAROTTAM DATT

Sulaiman, C. J.

it was not presented for registration within the time allowed by law.

Under Section 49 of the Registration Act a document, which is compulsorily registrable, if not registered, cannot be received as evidence of any transaction affecting such property.

The court below, therefore, should not have acted upon it and should not have accepted it in evidence. The point that it was not admissible in evidence was raised in the court below, but the court held that registration was not necessary. Apparently its attention was not drawn to the recent amendment. We must accordingly hold that the document is not admissible.

The learned advocate for the respondent has next urged before us that the award is separable and that that portion of it which deals with movable properties should be enforced. There is no doubt that where part of an award is found to be invalid as being in excess of the arbitrator's powers and is separable from the rest, the remainder of the award, being good, can be maintained. *Amir Begam* v. *Badruddin Husain*[1]. But in the present case we find that it is not possible to split up the award into two parts. In the first place, Mst. Savitri, a daughter of the deceased, who has been given some rights under it, was no party to the proceedings and she and her heirs have been given interest in some cash and she has been given property in lieu of maintenance and a house for her residence. The immovable and movable properties have been divided among the parties to the arbitration and compensations have been given by the arbitrators in cash for the differences in the values of the properties allotted to the parties. Similarly some maintenance allowance has been provided for Mst. Phundo, another widow, and she also has been given a right of residence in the house, although she is not a party to the proceedings. It is obvious that the arbitrators in making the partition must have taken into account the value of the immovable properties as well as the amount of cash available and distributed them treating the entire property as forming part of the estate. It would not be fair to the parties to split up the award and to make a new award in favour of the respondents. We must treat the award as one inseparable document and being inadmissible in evidence for want of registration we must reject it. The result is that this appeal is allowed, the order of the court below is set aside and the application of the contesting respondents for the filing of the award is dismissed, with costs.

Appeal allowed

CIVIL

1932

Oct. 18

MUKERJI, J.
BENNET, J.

GAURI SINGH AND ANOTHER (*Defendants*)
versus
BECHU SINGH AND OTHERS (*Plaintiffs*)*

Mortgage—Usufructuary—"If possession of mortgagees interfered with, mortgagees entitled to sue for money due by sale of property"—Possession over some properties not given—Whether mortgagees entitled to institute suit for sale.

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*F. A. 246 of 1930

[1] I. L. R. 36 All. 336

A usufructuary mortgage deed provided as follows:—"If the possession of the mortgagees be interfered with in any way, the mortgagees shall have power to bring a claim for delivery of possession, damages and costs, or to realise the entire amount of the mortgage due under the mortgage with interest from my person, mortgaged property and other movable and immovable properties." Out of the properties mortgaged the mortgagees were not put in possession over some and they sued to recover the mortgage money with interest by sale of the mortgaged property. *Held,* that the clause pre-supposes the possession of the mortgagees and was inapplicable to the present suit in which the only relief the mortgagees can have is for possession and mesne profits.

Lal Nar Singh Pratab Bahadur Singh v. *Mohammad Yakub Khan,* 1929 A. L. J. 581 *distinguished.*

S. D. Sinha and *B. S. Shastri* for the appellants.

P. L. Banerji and *Gadadhar Prasad* for the respondents.

The judgment of the Court was delivered by

Mukerji, J.

MUKERJI, J.—This appeal is by the first two defendants, and arises out of a suit for sale and other reliefs, instituted on foot of a mortgage dated September 9, 1917. The defendant No. 1, Gauri Singh, on behalf of himself and his then minor son, the defendant No. 2, made the mortgage in suit for a sum of Rs.7,000 and odd. The mortgage was in favour of some of the plaintiffs, the other plaintiffs being joint members of the family with the mortgagees. The plaintiffs' case was that out of the properties mortgaged they were not put in possession over some, and therefore under a clause of the mortgage, they were entitled to recover the mortgage money with interest at 2 per cent per mensem from the date of the mortgage, by sale of the mortgaged property. They accordingly asked for sale in lieu of principal and interest and, in the alternative, they asked for possession and mesne profits.

The suit was contested by the two defendants, who are the appellants before us, but the suit succeeded, and a decree was made for sale in lieu of the principal mortgage money and a reduced sum of interest. The interest claimed was reduced on the ground that the clause relating to interest was penal.

In this Court it has been contended that the clause No. 7, under which the plaintiffs claim a right to sell, did not authorise the plaintiffs to that relief; and we have to construe clause No. 7.

The mortgage deed is printed at page 71 and subsequent pages of our book. The mortgagor says:—

> I, the executant, have therefore executed this mortgage deed promising to pay the same in five years. For payment of interest of the aforesaid sum I have mortgaged with possession to the aforesaid creditors zamindari shares, sir and Khudkasht lands and cultivatory holdings specified below .

The seventh clause is as follows:—

> If the possession of the mortgagees be interfered with in any way, the mortgagees shall have power to bring a claim for delivery of possession, damages and costs, or to realise the entire amount of the mortgage due under the mortgage deed with interest at the rate of 2 per cent per month from this date up to the date of payment from my person, mortgaged property and other movable and immovable properties . .

The contention for the appellants is that the seventh clause gave a right of suit for sale only in the case of the mortgagees being put in possession, and thereafter being dispossessed. It is argued that it does not cover a case where there was initially a failure on the part of the mortgagors to deliver possession.

The learned counsel for the respondents has urged that the clause No. 7 covers both the cases of failure to deliver possession initially and a case of subsequent dispossession.

We have looked into the vernacular, and we find that the official translation contained in our book is correct. The clause presupposes the possession of the mortgagees, and then provides as to what would happen when the mortgagees' possession is interfered with. This being our view of the clause, we find that there is no provision as to what would happen in the case of the mortgagors failing to deliver possession initially.

The learned counsel for the respondent has relied on a decision of their Lordships of the Privy Council, namely, *Lal Nar Singh Partab Bahadur Singh* v. *Mohammad Yakub Khan*[1]. He has contended that their Lordships have laid down, as a general rule of law that where, in the case of a usufructuary mortgage, a mortgagee has a right to sue for the mortgage money, he is entitled also to sue for the sale of the property. We have carefully read that judgment and are of opinion that their Lordships did not lay down any general rule of law, but confined their remarks to the peculiar language of the mortgage deed before them. At p. 581 of the Report their Lordships quoted clause No. 2, and pointed out that there was a hypothecation of the mortgaged property in lieu of the mortgage money and interest. That being the case, their Lordships remarked that as the mortgage money became payable by virtue of Sec. 66 of the Transfer of Property Act, the mortgage money was realisable under the contract by a suit for sale instituted under Section 67 of the Transfer of Property Act.

There being no clause providing specifically for a case in which the mortgagee is not given possession over a part of the property, the only relief which the mortgagees can have is for possession and mesne profits. These reliefs were asked for by the respondents in the alternative.

Holding that clause 7 does not apply to the present case, and it being admitted before us that on the finding of the court below the mortgagees are entitled to possession over the tenancies at fixed rate alone, we modify the decree of the court below and give the plaintiffs a decree for possession over the fixed rate tenancies in suit, and to three years' mesne profits prior to the institution of the suit, and to mesne profits from the date of the institution of the suit till recovery of possession, or three years from this date, whichever event may happen earlier. The court below will ascertain the amount of mesne profits which has accrued prior to the institution of the suit. As regards costs, we direct that the parties shall receive and pay costs in both the courts in proportion to their respective success and failure. As the assessment of costs payable would depend on the amount of mesne profits allowed to the plaintiffs prior to the institution of the suit, costs cannot be calculated properly in this Court. The court below will ascertain the costs payable by the parties and will insert the same in the decree. The decree of this Court will mention this direction and will state what costs have been incurred by each party in this Court.

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[1] 1929 A. L. J. 581

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1932
GAURI SINGH
v.
BECHU SINGH
Mukerji, J.

Decree modified

PANNA LAL SHAM LAL (THROUGH PANNA LAL) (*Objector*)
versus
ABDULLAH USMAN AND OTHERS (*Insolvents*)*

CIVIL
1932
Oct. 18
SULAIMAN, C. J.
IQBAL AHMAD, J.

Provincial Insolvency Act (V of 1920), Sec. 5 and Civil Procedure Code; Sec. 144 —Payment made under an order of insolvency court—Order set aside on appeal—Whether insolvency court has jurisdiction to order refund.

The insolvency court ordered the receiver after annulling the adjudication to distribute the assets of the debtor among the scheduled creditors. Before the High Court set aside this order as *ultra vires,* the receiver had made payments in pursuance of the order. *Held,* that Sec. 144 C. P. C. applied and the insolvency court had jurisdiction to order that the person who had received payments should be called upon to refund the amount to the receiver.

FIRST APPEAL from an order of L. V. ARDAGH ESQ., District Judge of Jhansi.

N. C. Vaish for the appellant.

B. Malik and *Hari Ram Jha* for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is an appeal by the firm Panna Lal Sham Lal and arises out of certain insolvency proceedings. It appears that this firm brought a suit against the debtor to recover Rs.1,200 and odd or in the alternative 100 bags of grain. It also appears that these bags were attached before judgment. While the suit was pending an application was made by some creditors for the debtor to be adjudged an insolvent and a receiver was appointed who took actual charge of the 100 bags along with other properties of the debtor. The appellants obtained their decree on March 14, 1927 while the application for insolvency was pending, and as a result their claim for the recovery of the amount and in lieu thereof of the 100 bags was decreed. This was followed by an order of adjudication with direction to the insolvent to apply for discharge within one year.

The appellants Panna Lal and Sham Lal filed an application in insolvency court claiming three alternative reliefs. They asked for the 100 bags to be given to them or in the alternative for their price or again in the alternative to be entered as scheduled creditors. For some reason or other, the court did not consider it expedient to grant the first two prayers, but ordered that the appellant should be entered on the schedule as creditors.

On the expiry of one year it was found that the insolvent had failed to apply for his discharge. The court accordingly annulled the order of adjudication. It went on to direct the receiver to retain possession of the assets of the debtor and to distribute them among the creditors who were entered in the schedule. It may be noted that the appellants were ordered to be entered as scheduled creditors and their prayer for the bags to be handed over to them was not granted. Two days later than the annulment of the order of adjudication, an application was made by other creditors to be entered in the schedule and their application was dismissed. When the matter came up in appeal to the High Court, the High Court dismissed the appeal inasmuch as no appeal lay, but on the revisional side intervened and set aside the order under which the receiver had been directed to distribute the assets. The Bench pointed out that such an order was illegal and *ultra vires* because the court could not have ordered the receiver after annulling the adjudication to distribute the assets and all that could be done under Section 37 of the Act was either to restore the property to the debtor leaving the ordinary remedy open to the creditors or to order the property to vest in some specified person.

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*F. A. F. O. 21 of 1932

When the case went back to the court below it was discovered that the receiver in pursuance of the order directing distribution of the assets made by the District Judge had already made some payments. Part of the amounts realized had been paid to the present appellants Panna Lal Sham Lal. The learned District Judge has therefore thought that these persons should be asked to refund the amounts which they received on distribution by the receiver and he has ordered accordingly. He has not allowed the prayer of the appellants for payment to them of the price of 100 bags sold by the receiver.

In appeal the order of the learned Judge is challenged.

It seems to us that the provisions of Section 5 of the Provincial Insolvency Act (Act V of 1920) give power to the insolvency court similar to those conferred on ordinary civil courts in the exercise of their original civil jurisdiction. Under Section 144 C. P. C. where a decree is varied or reversed the court of first instance has power to order restitution so as to place the parties in the position which they would have occupied, but for such a decree or order which was subsequently varied or reversed. It seems to us that the learned District Judge had jurisdiction to order that as a result of the setting aside of the order directing the receiver to distribute the assets, the persons who have received payments under the distribution should be called upon to refund the amount to the receiver. His order to that extent is therefore correct.

As regards the contention of the appellants that they are to be allowed to have the price of the 100 bags inasmuch as they had attached these bags before the adjudication of the insolvent, we are of opinion that this is not a matter with which we can deal in these proceedings. Now that the adjudication has been annulled and the debtor is no longer insolvent, the appellants are in a position to pursue their ordinary remedies. Their proper course may be to go to the execution court for redress.

We accordingly dismiss this appeal. The appellants must pay the costs of the receiver.

Appeal dismissed

Civil

1932

Oct. 18

Mukerji, A. C. J. Bennet, J

SARNAM PRASAD AND ANOTHER (*Defendants*)
versus
SUNDER SAHU AND OTHERS (*Plaintiffs*)*

Tenancy Act (II of 1901), Sec. 25—Sub-lease by occupancy tenant—When document necessary—Sub-lessee out of possession must prove title in order to regain possession—Omission of landlord to have illegal sub-lease cancelled—Effect of.

No document is necessary for the creation of a valid sub-lease in a case where the occupancy tenant sub-lets his land for one year, and at the close of one year he agrees that the tenant, who has already paid one year's rent, should hold the land for another year.

Where a sub-lessee is in possession, he can be ousted only by a person who has a better title and a right to maintain a suit. If the landlord comes to court for the cancellation of an illegal sub-lease after the expiry of one year, he would be put out of court on the ground of limitation and the sub-lessee without title would continue. Where the sub-lessee was out of possession, the mere fact that the landlord had omitted to sue within one year would not give him a title. He could succeed only if he could prove a title and a right to possession.

The plaintiffs took possession of certain plots in 1924 under an oral sub-lease from the occupancy tenant and remained in possession for over a year when they were dispossessed by the defendants. Nearly three years after dispossession the plaintiffs brought the present suit for possession and based their title on the oral sub-lease. *Held*, that the oral sub-lease could last for only one year and at the end of the year it expired, and the plaintiffs having no title could not succeed.

Letters Patent Appeal against the judgment of the Hon'ble Mr. Justice Kendall.

Ambika Prasad for the appellants.

A. Sanyal for the respondents.

The judgment of the Court was delivered by

Mukerji, A. C. J.

Mukerji, A. C. J.—This appeal is by the defendants Nos. 1 and 2, and arose under the following circumstances:—

One Rameshwar Koeri, the defendant No. 3, has a daughter Dariyai Kunwar, who is married to the defendant No. 1, Sarnam Prasad. Dariyai Kunwar's son is Hardeo. It appears that there was some dispute between Rameshwar Koeri, on the one side, and his daughter and daughter's son, on the other, as regards the occupancy holding of Rameshwar Koeri. The daughter and the daughter's son had no interest in the occupancy holding during the life-time of Rameshwar Koeri, but the daughter's son was entitled to succeed after the death of Rameshwar Koeri, provided the daughter's son shared in the cultivation at the time of the tenant's death. There was a compromise between Rameshwar, on the one hand, and the daughter and the daughter's son and son-in-law, on the other, on April 24, 1924, which was filed in the revenue court in proceedings relating to rectification of a Khatauni, and it was agreed that the names of the daughter and the daughter's son should be entered in the village papers, that Rameshwar would retain his right to let out the plots without the consent of his daughter or daughter's son and that his son-in-law, Sarnam Prasad, would pay off the entire debts contracted by Rameshwar Koeri and would relinquish the amount of the simple money decree which he had obtained against his father-in-law.

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*L. P. A. 32 of 1932

The plaintiffs, who are the respondent before us, and who unfortunately are unrepresented in this Letters Patent appeal, came to court for obtaining possession of certain plots being part of the occupancy holding of Rameshwar and for mesne profits and damages for taking the crops on these allegations. They said that Rameshwar had let out the lands to them and they raised the crop in Kharif and Rabbi of 1332 fasli. About the beginning of 1333 fasli, which would be July 1925, the defendants, namely, Sarnam Prasad, the son-in-law, and a relation of his, defendant No. 2, began to create mischief. The plaintiffs had grown bajra in July 1925 and the defendants cut the same in October 1925, and in November 1925 the defendants altogether dispossessed the plaintiffs. The plaintiffs accordingly claimed a decree for possession, for Rs.50 as damages for the value of the bajra crop sown by them and further they claimed mesne profits from Kharif 1333 fasli to the delivery of possession of the property in suit to the plaintiffs.

The suit was defended by the two principal defendants Nos. 1 and 2, the third defendant being Rameshwar himself. The defendant No. 1 stated that he was cultivating the land on behalf of his wife and son, and that Rameshwar Koeri was in collusion with the plaintiffs. Rameshwar Koeri filed a written statement supporting the plaintiff's case.

The suit succeeded in the court of first instance, which decreed the claim for possession and for Rs.50 as damages and directed investigation into the amount of mesne profits in the execution department. There was an appeal by the defendants Nos. 1 and 2, and it was unsuccessful, except in this that the lower appellate court reduced the amount of damages which had been decreed to the plaintiffs.

An appeal was filed in this Court, and the learned single judge has dismissed the appeal.

The principal point taken before us, which was also taken before the learned single judge, was that the plaintiffs had no title to the property. The argument is this. The occupancy holding could be sub-let under the law only by a registered instrument, if the lease was to be from year to year for a period exceeding one year. No document is forthcoming to establish the lease. If the lease was granted in July 1924 (early in 1332 fasli), it could last for only one year and at the end of the year it expired. A fresh lease for one year could be granted by Rameshwar, but it is not proved that it was granted. The plaintiffs were dispossessed in November 1925 or about the middle of the agricultural year 1333. The suit was filed in July 1928 when the agricultural year 1336 had commenced. When the plaintiffs were out of possession and the defendants Nos. 1 and 2 were in possession, it was not open to Rameshwar to make a lease for even one year when Rameshwar himself was out of possession. The ordinary practice no doubt is that a zamindar or occupancy tenant lets or sub-lets his land for one year, and at the close of one

CIVIL

1932

SARNAM PRASAD
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Mukerji,
A. C. J.

year he agrees that the tenant, who has already paid one year's rent, should hold the land for another year. In such cases a sub-lease is brought to an end at the end of the previous year. For such leases no document would be needed. But in this case the plaintiffs admit that they were in possession for 1½ years and they were dispossessed in November 1925. There could be no question, therefore, of any renewal of the lease for 1334, 1335 or 1336 fasli. The plaintiffs are claiming as if they held the lease which was granted to them in Kuar 1332 (*see* the statement of the plaintiff Imdad Ali) and that the lease subsists so that it entitled the plaintiffs to claim possession of the property.

We are of opinion that this argument is valid, and is supported by Section 25 of the N. W. P. Tenancy Act of 1901, which was in force when the alleged lease of Kuar 1332 fasli was granted.

In this view, the claim for possession must fail, and also the claim for mesne profits, but the claim for damages decreed by the court below must stand, which was in respect of the kharif crop of 1333 fasli.

We accordingly modify the decrees of this Court and the court below and dismiss the claim for possession and mesne profits. The decree granted by the lower appellate court for the sum of Rs.20 as the value of the bajra crop sown by the plaintiffs and misappropriated by the defendants Nos. 1 and 2 stands.

In view of the fact that this point of law which has succeeded in this Court was not taken in the court of first instance and was taken in the lower appellate court but was not properly pressed before that court, we direct that the parties shall bear their own costs throughout.

The above draft judgment was dictated without hearing the respondents. Mr. Sanyal, a learned counsel of this Court, then intimated to us that he had received instructions to appear in this case, but by an oversight had omitted to file his notice of engagement. We accordingly permitted him to argue the appeal for the respondents. We have heard the learned counsel, and his argument is this.

A lease for five years, although oral, is good against all the world if the landlord has omitted to sue to avoid the lease. The period of limitation for a suit by the landlord is one year. It may be true that if the period of the one year expires the landlord will have to submit to the lease for five years, for the simple reason that he has no right of suit after the expiry of one year. But from this it does not follow that the so-called sub-lessee has a title of his own. In the case where he is in possession, he can be ousted only by a person who has a better title and has a right to maintain a suit. If the landlord comes to court after the expiry of one year, he would be put out of court on the ground of limitation, and the sub-lessee without title would continue. In the case before us the alleged sub-lessee is the plaintiff, and he must prove his title. The mere fact that the landlord has omitted to sue within one year will not give him a title. Admittedly the plaintiffs are out of possession, and they can succeed only if they can prove a title and a right to possession.

We see no reason to alter the draft judgment which we dictated before, and we accordingly pass the order already dictated.

CIVIL

1932

Oct. 26

IQBAL AHMAD, J.
BAJPAI, J.

BOHRA PANNA LAL (*Defendant*)

versus

BASDEO (*Plaintiff*)*

Tenancy Act (III of 1926), Sec. 253 and Civil Procedure Code, Or. 9, Rules 8 and 9—Suit for profits—Dismissed for want of prosecution—Suit subsequently restored—Whether High Court can revise order restoring suit.

Where a suit for profits, which had been adjourned several times to enable plaintiff to produce evidence, was ultimately dismissed "for want of prosecution" and the court subsequently granted plaintiff's application for restoration, *held*, that the order dismissing the suit was one under Or. 9, R. 8 and could be set aside under Or. 9, R. 9 C. P. C. or under Sec. 151. In either case the order was not appealable to the District Judge and therefore no revision lay to the High Court under Section 253 C. P. C.

CIVIL REVISION from an order of BABU BISHESHAR NATH, Assistant Collector, first class, of Etah.

Binod Behari Lal for the applicant.

G. S. Pathak for the opposite party.

The judgment of the Court was delivered by

Iqbal Ahmad, J.

IQBAL AHMAD, J.—This is an application in revision by the defendant from an order of an Assistant Collector of the first class setting aside an order of dismissal of a suit for profits and restoring the suit to its original number. A preliminary objection has been taken to the hearing of this application on the ground that no revision lies to this Court.

The suit for profits was filed on July 18, 1931. The suit was adjourned on several occasions to enable the plaintiff to produce evidence and ultimately on November 20, 1931 the suit was adjourned with a view to enable the plaintiff to produce the patwari along with the Khatauni. The next date fixed in the case was January 18, 1932. On that date the plaintiff failed to produce the patwari or the khatauni, and the court dismissed the suit "for want of prosecution". On the same date, viz., January 18, 1932 the plaintiff filed an application for the setting aside of the dismissal of the suit and for its being restored to its original number. It was not stated in the application as to whether the application was an application for review under Order 47, or an application under Order 9, Rule 9 C. P. C. The application was put up before the learned Assistant Collector on the same date and he passed the following order:—

> The defendants, who are present, shall file objection, if any, by tomorrow.

The Assistant Collector proceeded to deal with the application on January 19, 1932. The defendant was not present in court and then the Assistant Collector recorded the following order:—

> The defendants have failed to file any objections. They did not even turn up when called today. The case is restored.

In the order quoted above the Assistant Collector did not state as to whether he was restoring the suit under Order 9, Rule 9 C. P. C., or that he purported to pass the order under Order 47, Rule 4 C. P. C.

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*Civ. Rev. 163 of 1932

The defendant being aggrieved by this order has come in revision to this Court. In support of the preliminary objection Mr. Pathak relies on Sections 248 and 253 of the Agra Tenancy Act, Act III of 1926. Section 253 of the Act provides that the High Court may call for the record of any suit or application which has been decided by any subordinate revenue court and in which an appeal lies to the District Judge and in which no appeal lies to the High Court provided the subordinate revenue court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. It is clear from the provisions of this section that the revisional powers of the High Court under the Agra Tenancy Act are restricted to cases in which the decree or the order sought to be revised is appealable to the District Judge. Section 248(3) of the Act provides for appeals against orders mentioned in Sections 47 and 104 and in Order 43, Rule 1 C. P. C. and the appeals against such orders lie to the court having jurisdiction under Section 242 of the Act to entertain appeals from the decrees in the suit, or in the case of applications for execution having jurisdiction to hear an appeal from the decree which is being executed. By Section 242 the District Judge is empowered to entertain appeals from certain decrees. It is manifest therefore that unless an order comes within Section 47 or Section 104 or Order 43, Rule 1 C. P. C. no appeal lies to the District Judge. In the present case it is contended by Mr. Pathak that the order dated January 19, 1932, passed by the Assistant Collector, was an order under Order 9, Rule 9 C. P. C. and as by that order he granted the application for restoration of the suit, no appeal against that order lay under Order 43, Rule 1 C. P. C. and, therefore, that order was not appealable to the District Judge, and as such the provisions of Section 253 of the Agra Tenancy Act have no application, and accordingly we cannot revise that order.

The learned counsel for the applicant, on the other hand, argues that the order dated January 18, 1932 was an order in substance if not in fact under Order 17, Rule 3 C. P. C. dismissing the suit on the merits and not an order under Order 9, Rule 8 of the Code, and therefore, the Assistant Collector could set aside that order only by exercising his powers under Order 47, Rule 4 and not under Order 9, Rule 9 C. P. C. He maintains that the learned Assistant Collector must be taken to have done that which he was competent by law to do, and as the counsel for the parties were present on January 18, 1932, the Assistant Collector could not dismiss the suit for default and that the only course open to him was to proceed to decide the case on the merits under Order 17, Rule 3, or to adjourn the same in accordance with the provisions of Order 17, Rule 1 of the Code. He, therefore, maintains that the order dated January 19, 1932 was an order under Order 47, Rule 4 C. P. C. and therefore appealable under Order 43, Rule 1 (*w*) C. P. C. and as the order was passed in a suit for profits valued at more than Rs.200 the order was appealable to the District Judge and as such is capable of being revised by this Court under Section 253 of the Act.

We are unable to agree with the contention of the learned counsel for the applicant. It is clear that if the order sought to be revised was an order under Order 9, Rule 9 C. P. C. granting an application for restoration of a suit dismissed for default the order was not appealable to the District Judge and therefore not capable of being revised by this Court. On the contrary if the order was an order under Order 47, Rule 4, the contention of the learned counsel for the applicant must prevail.

By the order dated January 18, 1932 the Assistant Collector did not decide the suit on the merits. We have quoted above the aforesaid order. The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case. He did not by that order examine the merits of the plaintiff's claim, nor did he deal with the validity or otherwise of the defence raised by the contesting defendant. He clearly in that order expressed himself as dismissing the suit "for want of prosecution." Such a decision cannot be characterized as a decision on the merits. The order professed to be an order dismissing the suit for default of the plaintiff. We, therefore, are unable to hold that the order was either in fact or in form or in substance a decision of the suit on the merits. It follows therefore that the order did not come within the purview of Order 17, Rule 3 of the Code. The only other rule in the Code under which the order could be passed is Rule 8 of Order 9 C. P. C. That rule allows a court to dismiss a suit for default of appearance by the plaintiff. It is true that the learned counsel for the plaintiff was present on the date that the order was passed and therefore the order dismissing the suit for default was not in accordance with the law, but we are not concerned with the question whether the order dismissing the suit was the proper order to pass. We have to decide the validity or otherwise of the preliminary objection by reference to the order actually passed by the learned Assistant Collector. It may have been a wholly wrong and indefensible order but if the order was one under Order 9, Rule 8 C. P. C., as we hold it was, it could be set aside by the Assistant Collector under Order 9, Rule 9 C. P. C. or under the inherent jurisdiction vested in courts by Section 151 C. P. C. In either case the order was not appealable to the District Judge and, therefore, Section 253 of the Tenancy Act has no application to the case. It follows therefore that the preliminary objection is well founded and ought to prevail.

Apart from this even if the order was revisable by this Court, we would be slow to interfere with the order of the court below in the exercise of our revisional jurisdiction. The suit was by the plaintiff against the *lambardar* for his share of the profits of the mahal. The Assistant Collector in dismissing the suit on January 18, 1932 did not bring to bear on the facts of the case a judicial mind. Indeed he never considered the merits of the plaintiff's claim. Even if an order is revisable by this Court, this Court is not bound to interfere with such orders and in the present case it seems desirable that the case should be tried on the merits.

For the reasons given above we dismiss this application. Costs here and hitherto shall be costs in the cause and shall abide the result.

Application dismissed

CRIMINAL

1932

July 19

PULLAN, J.

DAKHANI AND OTHERS
versus
KING-EMPEROR

Criminal Procedure Code, Sec. 418(1)—'Trial was by jury'—Meaning of—Offence triable with aid of assessors—In fact tried by jury—Appeal on matter of law only.

The words, "when the trial was by jury", in Sec. 418, Criminal Procedure Code, mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

Under Sec. 418, Criminal Procedure Code, where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors, an appeal lies on matters of law only and not on matters of fact.

K.-E. v. *Parbhu Shankar,* I. L. R. 25 Bom. 680 *followed.*

Where appellants were charged under Sec. 325|149 and Sec. 148 Penal Code and the Sessions Judge believing that this was a case which under Sec. 269 Cr. P. C. should be tried by a jury for one of the offences committed, and with the aid of the jurors as assessors for another, impanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under Sec. 325|149 Penal Code and took their opinion as assessors on the charge under Sec. 148 Penal Code, *held,* that the charge was not under Sec. 325 (which is triable by a jury) but Sec. 325|149 and the wording of the charge showed that the essential part of the offence was rioting, and the case was not therefore triable by a jury but by a judge with the aid of assessors and the opinion given by the jury was a verdict which could only be challenged on questions of law.

CRIMINAL APPEAL from an order of BABU HARIHAR PRASAD, Sessions Judge of Allahabad.

F. Owen O'Neill, R. C. Ghatak and *S. P. Sanyal* for the appellants.

Sankar Saran (Government Pleader) for the Crown.

The following judgment was delivered by

Pullan, J.

PULLAN, J.—The seven appellants have been tried in circumstances which give rise to certain questions of law. The charge framed against them was drawn up in the following terms:—

> That you on or about the 18th day of June, 1931, were members of an unlawful assembly and in prosecution of the common object of beating Bahadur and his son Mahabir, some of the members voluntarily caused grievous hurt to Bahadur and you are thereby under Section 149 I. P. C. guilty of causing the said grievous hurt and simple hurts to Bahadur and Mahabir and thereby committed an offence punishable under Sec. 325|149 and Sec. 148 I. P. C.

Certain offences are in the Allahabad Judgeship triable by a jury. The Sessions Judge believing that this was a case which under Sec. 269 Cr. P. C. should be tried by a jury for one of the offences committed, and with the aid of the jurors as assessors for another, impanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under Sec. 325|149 I. P. C. and took their opinion as assessors on the charge under Sec. 148 I. P. C. This procedure is rendered necessary

*Cr. A. 100 of 1932

by the terms of the Criminal Procedure Code where persons are charged with several offences, some of which are triable by a jury and others not. In the present case there is only one offence charged against these persons. It is an offence of rioting in the course of which they caused certain injuries. The judge had to consider whether that offence was one which could or could not be tried by a jury. In this province all offences of rioting, which are contained in Chapter VIII of the Indian Penal Code, are excluded from jury trial. The judge appears to have thought that by adding Sec. 325 which is triable by a jury, he brought this case within their jurisdiction. The judge was mistaken. The charge was not under Sec. 325 but Sec. 325|149, and the wording of the charge shows that the essential part of the offence was rioting. This is indeed inevitable in any case where Sec. 149 is employed for the basis of that section is that the persons who are held to be jointly responsible for an offence were committing that offence as members of an unlawful assembly, and were, therefore, where the offence was one involving the use of violence, as in the present case, rioting, within the definition of "rioting" given in the Penal Code. This case, therefore, was not triable by a jury. It was triable by a judge with the aid of assessors. Section 536 Cr. P. C. enacts that if an offence triable with the aid of assessors is tried by a jury the trial shall not "on that ground only be invalid". Opinions have been expressed in various High Courts that these words mean that a verdict given by a jury in a case which should have been tried with the aid of assessors can be regarded as the opinion of assessors, and the trial may stand not as a trial by a jury but as a trial with the aid of assessors. This view was held by one of two Judges in the case of *Pattikadan Ummaru* v. *Emperor*[1]and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress* v. *Mohim Chunder Rai*[2]. The difficulty in accepting this view is that a jury gives a single opinion. Assessors must give their opinions separately. Consequently the verdict of a jury given as such is not and cannot be the same as the separate opinions of the members of the jury. I have no doubt that on this point I should follow the decision of a Full Bench of five judges in the Bombay High Court in the case of *K.-E.* v. *Parbhu Shankar*[3]. I cannot do better than quote the observations of Jenkins, C. J. at p. 688 of the Report:—

> I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404 of the Criminal Procedure Code provides that 'no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force,' and under Section 418 'an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only.' At the same time it is provided by Section 536 that 'if an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.'
>
> These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the

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[1] I. L. R. 26 Mad. 243

[2] I. L. R. 3 Cal. 765

[3] I. L. R. 25 Bom. 680

> trial absolutely negative the view that the accused was tried by the Court of Sessions with the aid of the jurors as assessors.
>
> The offence, therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial; but did it attract the consequences of Section 418? This turns on the precise force in that section of the words 'where the trial was by jury'. Do they mean 'where the trial should have been by jury' or 'where the trial in fact was by jury'? In my opinion the words are themselves the clearest answer to this question: they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact.

Thus the opinion given by the jury in this case is a verdict which can only be challenged on questions of law.

I have been referred to no case where a trial has been from beginning to end conducted as a jury trial where there was no offence charged which could in law have been tried by a jury. This is, however, the case here, and one of the grounds of appeal is that there has been a misdirection of the jury. In my opinion this objection must prevail.

From beginning to end the charge is a misdirection as it required the jury to give an opinion on a riot which a jury cannot be required to give under the law as enacted in this province. It is not the case that the Judge made any attempt to confine the attention of the jury to the causing of grievous hurt. He states in his summing up that the law applicable is laid down in Sections 141, 142, 146, 147, 148, 149, 323, 325 and 320 I. P. C., and he read and explained all those sections to the jurors. The jury therefore were bound to consider this case as a case of rioting, and not as a case of individual assaults; and this is further emphasised by another error made by the Judge in the summing up when he failed entirely to point out to the jury that they were required to give an opinion as to the guilt of each of the persons charged. He has throughout regarded the accused as a body of men and not as individuals. And there is still a third error in his charge when he states that if the jury found the accused not guilty of the graver offence of 325 and 148 it will be open to them to find them guilty of the minor offences under Sections 323 and 147. But this Section 147 is absolutely excluded from trial by a jury. The jury then returned a verdict of guilty in the majority of 3 to 2, and this would normally mean that 3 of the jurors had found all the accused guilty and 2 of them found them as innocent. It was, however, explained by one of the jurors that this was not their verdict. Consequently the verdict contains a rider to the effect that one of the two dissenting gentlemen held that three of the accused were not guilty, and the others were guilty. In my opinion, therefore, the trial by a jury is vitiated by misdirection. In the circumstances of this case there can be no question of a retrial as the case was not triable by a jury at all, and the jury gave their opinion as assessors on the charge under Sec. 148 which, in my opinion, was the same charge as that which they had tried as a jury under another name. An appeal against this trial with the aid of assessors can be heard on questions of fact, and I have accordingly heard the arguments on behalf of all the seven appellants.

The facts may be stated very briefly. On June 18, 1931, at 6 o'clock in the morning two reports were made at the police station of Dhoomanganj. The first was made by Bahadur, who accused five men, Dakhani, Bhopua, Chunna, Parshadi and Anandi, of beating him and his son Mahabir with lathis. He said that these men attacked him and his son at 3 o'clock in the morning while they were asleep on their chabutra, and that his son was left there injured. He himself showed the marks of three injuries, one being a contused wound on the head. The second report was made by Baijnath who was accompanied by Dakhani, one of the persons accused by Bahadur, and in this report Bahadur and 11 other men named were charged with the murder of one Bachu. Both Baijnath and Dakhani showed trifling injuries. Investigation proved the injuries received by Mahabir and also the fatal injuries received by Bachu. Both parties were prosecuted, Dakhani and his friends for the assault of Bahadur and Mahabir, and Bahadur and his friends for the fatal assault on Bachu. The two affairs were clearly kept separate because the bed on which Mahabir was sleeping was covered with blood, and it was alleged on the other hand that Bachu was killed in a field. The Judge who tried the case under appeal also tried the persons charged for the murder of Bachu, and acquitted them. His judgment in the murder case, to which he makes reference in the present case, is before me. Clearly his opinion is, and it is also the opinion of the assessors, that an assault was committed on Bahadur and Mahabir while they were asleep and that their supporters retaliated by attacking Bachu, Dakhani, Baijnath and others and killing Bachu. The assault must have commenced with the attack on Bahadur and Mahabir as they were lying in bed, as the blood stains cannot be explained away on any other hypothesis. Mahabir is not mentioned as one of the persons who helped to murder Bachu. In the same way Bachu and Baijnath are not mentioned in the report by Bahadur. But this fact goes to suggest that the theory of the first attack by Dakhani's party and the subsequent retaliation by the party of Bahadur is a true version of the affair. When this case came into Court the names of Baiju and Gharib had been added, and from time to time inconsistent statements were made both by Bahadur and his son Mahabir as to the identity of the actual assailants. Bahadur after naming 5 persons in his first report named 9 before the police and 7 in Court; whereas Mahabir in his statement to the police mentioned 5 persons, and they were Gharib and Shamlal, who were not in the first report, and Anandi, Chunni and Bhopua, who were in the first report. As usual in such cases the evidence is not that of the persons who were named in the first instance as being present; but the reason of this is that the persons named as present were closely connected with Shamlal, one of the men charged principally with the murder of Bachu, and this accounts for the fact that Shamlal himself and his father Hannu avoided the witness box. In such case I always lay great

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stress on the report and look with suspicion on any names added afterwards. When the first report was made Mahabir had as good materials for naming the assailants as he had at a later date, and none of the five persons mentioned in the first report are able to satisfy me that they did not take part in this riot. The five assessors gave an opinion on this charge which is at variance with their verdict given as a jury. The first assessor found all the accused not guilty; the second assessor found them all not guilty under Section 148 but guilty under Sec. 147; the third assessor found Dakhani, Chunni and Parshadi not guilty under Sec. 148 but guilty under Sec. 147 and acquitted the other three; the fourth and fifth assessors found them all guilty under Sec. 147 but not under Sec. 148. The Judge having already sentenced these persons to nine months' R. I. on the verdict of the jury, which I have set aside, sentenced all of them to one year's R. I. under Sec. 147, I. P. C., the sentences to run concurrently. It is not a satisfactory decision because whatever offence these persons committed they certainly committed the offence of a criminal assault with lathis on the persons of Mahabir and Bahadur of which they must now be considered to have been acquitted. I do not know why the judge considered that a simple offence of rioting was more serious than the offence of causing hurt in the course of a riot, for that is the view which he has given expression to in the sentence inflicted. I do not, however, propose to interfere with the sentence as this appears to have been an unprovoked assault in the night on sleeping men. But the persons who are not mentioned in the first report should in my opinion be acquitted.

I accordingly allow the appeals of Baiju and Gharib, set aside their convictions and sentences and declare them to be acquitted. In the case of Dakhani, Bhopua, Chunni, Parshadi and Anandi I set aside their conviction and sentence under Sections 323|149 but uphold their conviction and sentence under Sec. 147 I. P. C. These five men will accordingly surrender to their bail and serve out the remainder of their sentence.

Appeals allowed

MANNU NAIK AND ANOTHER (*Applicants*)
versus
MATHURA PRASAD AND OTHERS (*Opposite parties*)*

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Oct. 14
SULAIMAN, C. J.
KISCH, J.

Civil Procedure Code, Or. 21, R. 89—Several items sold on same date—Judgment-debtor's application for setting aside of sale of one item only on payment of its price and penalty—Whether can be allowed.

Where several items were sold on one and the same date and the judgment-debtor applied to have the sale of one item set aside on payment of its price plus the penalty and claimed reduction on account of the prices paid by the auction-purchasers of the other items, *held,* that the amount which the judgment-debtor need not deposit is the sum which has been received by the decree-holder between the date of the proclamation and the date of the deposit or, at any rate, before the expiry of 30 days from the date of the sale, and inasmuch as the sale of the

*F. A. F. O. 193 of 1931

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other items cannot be confirmed before the expiry of the prescribed 30 days and the decree-holder has therefore no right to apply for the payment of the money to him, he cannot be taken to have 'received' the prices of the other items within the meaning of O. 21, R. 89 C. P. C.

Panna Lal v. *Bhola Nath*, 1930 A. I. R. All. 483 *considered.*

FIRST APPEAL from an order of C. DEB BANERJI ESQ., Subordinate Judge of Azamgarh.

K. N. Katju and *A. Sanyal* for the appellants.

K. Verma for the respondents.

The judgment of the Court was delivered by

Sulaiman, C. J.

SULAIMAN, C. J.—This is an appeal from an order disallowing an application under Order 21, Rule 89, for the setting aside of a sale. It appears that in execution of a mortgage decree 12 items of properties mortgaged were sold on the same date, namely, June 24, 1931 in 12 separate lots and they fetched different prices, which were noted. The auction-purchasers also were different. On July 21, 1931 the mortgagees from the judgment-debtors of one of the items filed an application under O. 21, R. 89 for the setting aside of the sale of the item which had been sold for Rs.5,500. They deposited the sum of Rs.5,500 plus the penalty of 5 per cent but did not deposit the whole of the decretal amount for which the properties had been put up for sale.

The learned Subordinate Judge confirmed all the sales in September 1931. He disallowed the application of the mortgagees on the ground that it was not open to them to apply under that rule to have the sale set aside of some only of the lots.

It is contended before us in appeal that inasmuch as the sales of the other lots were confirmed and, in fact, no applications for the setting aside of those sales were ever made it must be taken that the decree-holders had received the balance of the amount, and it was therefore open to the judgment-debtors to have the sale of this particular item set aside on payment of its price plus the penalty.

There is no doubt that when properties are sold for separate prices and in favour of different purchasers, there are so many different sales and a judgment-debtor may apply to have only one of the sales set aside. But O. 21, Rule 89 prescribes that he must deposit in court a sufficient amount not only for payment to the purchaser a sum equal to 5 per cent of the purchase money but also for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. This rule gives an indulgence to the judgment-debtor and allows him a further period of 30 days to pay the amount together with the penalty. But in order to avail himself of the provisions of this rule he must bring himself strictly within its purview and must fulfil all the conditions required by it. It is clear that the amount which he need not deposit is the sum which had been received by the decree-holder between the date of the proclamation and the date of the deposit or, at any rate, before the expiry of 30 days from the date of the sale.

It is obvious that the sale of the other items cannot be confirmed before the expiry of the prescribed 30 days. So long as the sale of the other items has not been confirmed the decree-holder has not even the right to apply to the court for the payment of the money to him. It is therefore impossible to hold that the decree-holder can be deemed to have received the amount deposited by the auction-purchasers before the sale has been actually confirmed. As a matter of fact, the view taken in some of other High Courts is that the word "received" must be taken in its literal sense and it is the actual receipt of money by the decree-holder and not the deposit of any amount by auction-purchasers in court which is contemplated. But in any case it is clear that so long as the decree-holder has not the right to take the money out of court before confirmation, it cannot be said that the money has been received by him merely because it has been deposited to his credit.

In this view of the matter it seems almost impossible for a judgment-debtor to take advantage of the fact that other sales have taken place on the same date and that auction-purchasers have deposited amounts, and to claim credit for those sums and deduct the same from the amount which he offers to pay. He has to pay the amount in court within thirty days whereas the confirmation of the sale of the other items cannot take place within that time. If the law were otherwise a judgment-debtor would be able to pick and choose and apply for the setting aside of the sale of only one of the several items which may have been sold cheap on payment of its sale price and penalty, claiming credit for the payment of the sale price of the other items.

The learned advocate for the appellants strongly relies on the case of *Panna Lal* v. *Bhola Nath*[1]. Apparently in that case also several items were sold on one and the same date and the judgment-debtor applied to have the sale of one item set aside on payment of the purchase money and penalty and claimed reduction on account of the prices paid by the auction-purchasers of the other items. The learned Subordinate Judge had referred to Calcutta and Madras cases, *Kripa Nath Pal* v. *Ram Lakshmi Dasya*[2] and *Obla K. Subbayyan* v. *Thoppai Muthayyan*[3] which relied on an earlier Madras case, but thought that the facts of those cases were not exactly the same, and that in the absence of any authority of this Court he was entitled to take an equitable view of the matter. The learned Judges of this Court in disposing of the revision did not dissent from the view expressed in the cases quoted above and presumably considered that the case before them was distinguishable. The decision appears to have been based on a statement made on behalf of the applicant before the Bench that the decree-holder had withdrawn the money fetched at the auction-sale in full satisfaction of his decree, which statement the learned advocate for the opposite party was not in a position to controvert. The learned Judges do not seem to have endorsed the view of the court below that the case could be disposed of merely on equitable grounds.

The learned advocate for the respondents before us contends that it

[1] A. I. R. 1930 All. 843
[2] [1897] 1 C. W. N. 703
[3] [1921] 42 M. L. J. 71

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Sulaiman, C. J.

was not possible for the decree-holder to have withdrawn the money in that case before the confirmation of the sale and that the assertion must have implied that the amount was withdrawn some time before the revision came up for hearing. It seems to us that the decision is based mainly on the ground that the decree-holder had withdrawn the money and that the decree had been fully satisfied in that way. It was apparently in this view of the matter that the learned Judges thought that the amount had been received by the decree-holder.

If the learned Judges meant to lay down that the withdrawal of the money by the decree-holder after the expiry of 30 days would fulfil the requirements of the rule, we regret we are unable to agree with that view. The judgment-debtor can take advantage of the provisions of O. 21, R. 89 only if he deposits the whole of the amount for which the property had been ordered to be sold minus what had been received by the decree-holder before the expiry of the prescribed time. We accordingly dismiss the appeal with costs.

Appeal dismissed

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June 23

Mukerji, J.
Bennet, J.

JAGANNATH PRASAD AND OTHERS (*Defendants*)
versus
CHUNNI LAL AND ANOTHER (*Plaintiffs*)*

Hindu Law—Joint family—All minors—Guardian of property appointed—Guardianship ceases on one of the minors attaining majority—Hindu Law—Joint family—Adults and minors—Appointment of certified guardian for minor members—Whether effects their separation.

Where in a joint Hindu family all the co-parceners are minors and a guardian of the property is appointed for them by the District Judge, the guardianship *ipso facto* terminates on the attainment of adult status by one of the minors. It is contrary to the Hindu Law that there should be a guardian certified by the Judge for a joint Hindu family where there is an adult member. *Bindaji Laxman* v. *Mathurabai*, 30 Bom. 152 *relied on*.

It is well established that if a Hindu family consisting of adults and minors remains joint, it is not open to the District Judge to appoint a certified guardian for the minor members for their share of joint family property, and it must therefore be assumed that the appointment of a certified guardian implies that *ipso facto* the minor members are being separated from the adult members.

Appeal from a decree of Maulvi Aqib Nomani, Additional Subordinate Judge of Meerut.

P. L. Banerji and *Vishwa Mitra* for the appellants.

K. N. Katju, *S. N. Verma* and *Banke Behari* for the respondents.

The judgment of the Court was delivered by

Bennet, J.

Bennet, J.—This is a first appeal brought by the following defendants: defendant No. 2 Om Prakash, his son defendant No. 3, Gandharab Singh a minor and defendant No. 5 Jagannath Prasad. The plaint sets forth in paragraph 8 that defendants 5 to 10 are the subsequent transferees of the property in Mauza Shikohpur and that they have been made

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*F. A. 139 of 1930

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pro forma defendants. This allegation is admitted by Jagannath Prasad, the defendant No. 5, who is one of the appellants before us, so far as it concerns himself. It has not been made clear from the record exactly what share the appellant Jagannath Prasad now holds. But he is a transferee from some of the defendants, defendants 1 to 4. The family pedigree is as follows:—

HARBANS (died 1920)

Fateh Singh
defendant No. 4
(eldest son)

Udai Prakash
defendant No. 1
(second son)

Om Prakash
defendant No. 2
(youngest son)

Gandharb Singh
defendant No. 3

The plaintiffs sued on a mortgage dated September 15, 1922 executed by Udai Prakash for himself and as guardian of Om Prakash minor. The mortgage was in favour of Chunni Lal plaintiff and Ratan Lal now deceased, the father of the minor plaintiff Ajit Prasad. The property hypothecated was in Mauza Biswanand and Mauza Shikohpur. But the plaint sets forth that as the property in Mauza Biswa is highly encumbered and there is no prospect of getting anything out of it, it is exempted from this suit. The mortgage-money was Rs.6,000 and the claim in the plaint is for Rs.25,088. Interest was at 2 per cent per mensem with six monthly rests. The plaint sets forth that defendants 1 to 4 were members of a joint Hindu family and that debts were contracted for legal necessity and antecedent debt. There was no written statement on behalf of defendants 1 to 4, but the case for defendants 2 and 3 has been argued before us along with the case for defendant 5 Jagannath. The written statement of defendant 5 sets forth that the document in question was executed on September 15, 1922 when Udai Prakash was a minor and therefore it was invalid. Further it was pleaded that there was no legal necessity and it was stated in paragraph 15 that Udai Prakash was not joint in family with his brothers; that Fateh Singh, the eldest brother, was the certified guardian of Udai Prakash and Om Prakash, the two executants of the document. The following questions arise in this case:—

1 (*a*) Did Harbans and Fateh Singh separate from the minor members of the family in 1915?
  (*b*) Did this separation effect the separation of the two minor members Udai Prakash and Om Prakash *inter se?*
2 Was Fateh Singh the certified guardian of Udai Prakash and Om Prakash on September 15, 1922 and if so, was Udai Prakash incompetent to execute the mortgage in question?
3 Was Udai Prakash a minor at the date of execution, September 15, 1922?
4 Has legal necessity been proved?

5 Has the mortgage in suit been ratified by Om Prakash on attaining majority on March 5, 1924?
6 Is the rate of interest excessive?
7 Is there any clerical error in the decree?

The history of this family on which reliance is placed for separation is as follows:—

On September 26, 1912, Harbans Singh made an application for his appointment as guardian of Udai Singh and Om Prakash which is printed on page 27. The statements in that document are admissible in evidence as Harbans Singh is now dead. In that document he sets forth that the creditors were making pressing demands for the payment of their debts and the property had been advertised for sale and that it was desirable to make arrangements to pay off the debts. That application was refused. Subsequently an application was made by the eldest son Fateh Singh to be the guardian of the two minor sons and that application was granted by the District Judge on May 26, 1915. Accordingly from that date Fateh Singh was the certified guardian of his two minor brothers. There is an order of the District Judge dated December 1, 1915 in this guardianship case in which the District Judge sanctioned a mortgage and in his order it is set forth "Harbans Singh and his major son Fateh Singh have sold their 5 biswas share", the village in question being Basod. It is further stated in an order of the District Judge of February 17, 1916 that Fateh Singh and his father had sold their shares outright in this village and that the main property of the family was in this village Basod. There was left only the share of the minors. Now the allegation is that Harbans and Fateh by having an application in guardianship made for the minor members of the family thereby effected a partition of the family property. It is well established law that if a family remains joint, it is not open to the District Judge to appoint a certified guardian for the minor members for their shares of joint family property. Therefore we must assume that the appointment of a certified guardian implies that *ipso facto* the minor members are being separated from the adult members. This presumption in the present case is further strengthened by the subsequent action of the adult members in disposing of their shares of the property after separating their shares from the shares of the minors. We therefore hold it established that in 1915 there was a separation effected between Harbans and Fateh on the one hand and Udai Prakash and Om Prakash on the other hand.

The next question is whether the action of Harbans and Fateh Singh did effect in law a separation between the two minors Udai Prakash and Om Prakash. In this connection we may set forth that no action was taken which would in fact make any separation between the shares of Udai Prakash and Om Prakash. The application to the District Judge was that a guardian should be appointed for the property of these two minors and that the guardian would administer the property of these minors as a single unit, and so far as the evidence shows this is what was done. Reference was made to *Palani Ammal* v. *Muthuvenkatachala Moniagar*[1] where it is stated:

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[1] I. L. R. 48 Mad. 254 at 258

> It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family that remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parcener had separated from them.

Reference is also made to *Bal Krishna* v. *Ram Krishna*[2] where their Lordships stated:

> The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others? Their Lordships are therefore of opinion that the question whether on Lalman's separation in 1907 the other members of the family remained joint was a question of fact.

This shows therefore that on the separation of some members it is a question of fact in each case as to whether the other members did or did not separate. There is no presumption either way as to separation or remaining joint and the onus of proof lies on the person who makes an assertion that the other members separated or that the other members remained joint. In the present case we have the circumstances of the application for guardianship and of the proceedings that took place on that application. Various applications were made to the District Judge and some were allowed by him to the effect that the property of the two minors was mortgaged jointly. There were therefore joint transactions and we consider that on the evidence in this case it is proved that the two minors Udai Prakash and Om Prakash remained joint when Harbans and Fateh Singh separated in 1915.

The next question is whether Udai Prakash was competent to execute a mortgage on behalf of himself and his minor brother when Udai Prakash attained majority. This question is not free from difficulty. In the present case it was not shown that any application was made to the District Judge at any time that Udai Prakash had become of full age. At the time of the mortgage in suit Fateh Singh apparently remained the certified guardian. But assuming that Udai Prakash was a major at the time of the mortgage in suit, the question before us is what became of the status of guardianship when Udai Prakash, one of the two minors, attained majority? Reliance was placed on a ruling of the Bombay High Court *Bindaji Laxuman Triputikar* v. *Mathurabai*[3] in which the only question before their Lordships was whether a guardian could be appointed for the minor members of a joint family, and it was laid down that a guardian could not be appointed for minor members whose only proprietary interest was that of co-parceners along with adults in joint family property. Their Lordships made an observation that if a guardian were appointed for minor co-parceners where there were no adults, then as soon as one minor became an adult the proper course would be for an application to be made to the District Judge to terminate the guardianship. That may

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[2] 1931 A. L. J. 499 (P.C.) at 502

[3] I. L. R. 30 Bom. 152

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be so and in the present case no such application was made. But the dictum of the Bombay High Court was merely in regard to procedure and we are concerned with the question of substantive right. It is we consider contrary to the Hindu Law that there should be a guardian certified by the Judge for a joint Hindu family where there is an adult member. On the attainment of adult status by one of the minors for whom a guardian had been appointed, we consider that *ipso facto* the guardianship terminates. Therefore we consider that in the present case Udai Prakash on attainment of majority would be competent to execute a mortgage for legal necessity on behalf of himself and on behalf of his minor brother Om Prakash notwithstanding the fact that Fateh Singh still continued to be recorded as a certified guardian appointed by the District Judge.

[After a discussion of the evidence their Lordships held that it was not proved that Udai Prakash was a minor at the date of the mortgage dated September 15, 1925 and found that legal necessity was proved to the extent of Rs.1,500.]

Now the above considerations relate to the case of legal necessity from the point of view of the interest of Om Prakash who was then a minor. The question remains as to what is the effect in the case of Udai Prakash. We have held that Udai Prakash along with Om Prakash formed a joint Hindu family at the time of execution of this bond. Reference has been made to *Balgobind Das* v. *Narain Lal*[4]. That was a case as stated at page 340 which related to an attempted mortgage of right and interest in joint ancestral estate by a co-sharer, and the distinction between voluntary and compulsory alienations by him, the latter being sales in execution of decrees against him. The joint family in the case consisted of Narain Lal son and Naunidh Lal, the father. Narain Lal had made a mortgage on which a suit was brought and in that case the father was a defendant and there were also as defendants Narain Lal and two persons who were auction-purchasers on decrees against Narain Lal. The question which was decided by their Lordships was whether a purchaser at auction sale of the interest of the mortgagor Narain Lal could challenge the validity of the mortgage made by Narain Lal when Narain Lal was one of the members of a joint Hindu family. It was held by their Lordships that the auction-purchasers could challenge the validity of the mortgage and that the father could challenge the validity in his capacity as taking by purchase at auction sale apart from his capacity of survivorship—see page 351. This ruling has also been referred to in *Madan Lal* v. *Chiddu*[5] where it is also held that an auction-purchaser could challenge the validity of a previous mortgage by the judgment-debtor whose interest he had acquired and a distinction was drawn between auction-purchasers and private transferees from the mortgagor. We therefore consider that it is open to Jagnnath Prasad as an auction-purchaser to challenge the validity of the mortgage in suit whether he was a transferee of the interest of Udai Prakash or of other members of the family. Therefore all the appellants before us are entitled to challenge the validity of the mortgage-deed in question so far as the interests

[4] I. L. R. 15 All. 339

[5] 1930 A. L. J. 1528 at 1533

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of Udai Prakash are concerned in addition to the interests of Om Prakash. We consider that as Udai Prakash was a member of an undivided family he was not entitled to execute the mortgage-deed in question for items which were not for legal necessity. Accordingly we hold that the mortgage-deed is altogether invalid except as regards the items which we held for legal necessity, that is, Rs.1,400 deposited in the Government treasury and Rs.100 paid before registration, total Rs.1,500.

The next question is ratification. The alleged ratification is contained in a bond dated March 5, 1924 executed by Om Prakash after he attained majority. He was an executant along with Fateh Singh and Udai Prakash. In that document there is a recital of a number of other documents which had been executed and among them is the mortgage-deed in the suit. Now the question arises of the position of the son of Om Prakash, Gandharb. In the plaint it is stated that he was about five years of age and the plaint was filed on January 5, 1929. Therefore the date of his birth would be January 5, 1924, that is, two months prior to the alleged ratification on March 5, 1924. Now attention is invited to the point that the plaint merely states that the age is about 5 years but, if Gandharab Singh had been conceived, it would be impossible for the ratification by his father to bind him. Therefore taking a period of 9 months from March 5, 1924, we come to December 1924 and, if Gandharab Singh were born on December 5, 1924, he must have been conceived at the date of ratification. Therefore we consider that the expression about 5 years of age must be taken to cover birth by December 5, 1924. Accordingly we consider that the ratification will not bind the interests of Gandharab Singh, but would only bind Om Prakash personally.

The next question which we shall examine is the rate of interest. The rate of interest in the mortgage-deed in suit was Rs.2 per mensem compound interest with six-monthly rests. The mortgage was executed in 1922 after the Usurious Loans Act of 1918, and we also consider that legal necessity is not shown for the high rate of interest. On these grounds we reduce the rate of interest to fifteen per cent simple interest. The last point is an alleged clerical error in the decree. This does not arise because the question of compound interest no longer remains. We have taken this rate in various other cases and we consider where sufficient security has been given that the rate of fifteen per cent simple interest is ample.

We accordingly allow the appeal to the extent indicated with proportionate costs in both courts. A decree will be framed by this Court under the provisions of Order 34, Rule 4, six months being allowed for payment by the defendants. Interest at fifteen per cent will run until the date fixed by the Court.

As regards the cross-objection, we have already indicated in our order which items we consider are not for legal necessity and the cross-objection is therefore disposed of by those findings. The cross-objection is dismissed except so far as we vary the rate of *pendente lite* interest and interest upto date of payment. As this amount is small, we dismiss the cross-objection with costs. *Appeal allowed in part*

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1932

June 24

Sulaiman, C. J.
Mukerji, J.

MUFTI MOHAMMAD HASNAIN (*Plaintiff*)

versus

RUSTAM ALI (*Defendant*)*

Mortgage—Part-owner of property (subject to a simple mortgage) sells entire property and vendee enters into possession—Vendee discharges mortgage debt—Suit by another part-owner for possession of his share—Whether vendee liable to be dispossessed unconditionally.

A part-owner of certain property, which was subject to a single mortgage executed by all the owners, purported to transfer the entire property to the defendant, who entered into possession and paid off a part of the mortgage debt with a portion of the sale proceeds left with him. About a year before the expiry of the limitation on the mortgage the present suit was instituted by another part-owner for possession of his share. The defendant contended that the plaintiff should not be allowed possession without payment of a proportionate amount of the sum the defendant had paid towards the discharge of the mortgage debt. *Held,* that the defendant could not set up the private payment of the simple mortgage as a shield against the plaintiff's claim for possession inasmuch as the defendant had become entitled to possession of the property as purchaser of the equity of redemption and not by virtue of the payment of the previous simple mortgage.

Bijay Saran Sahi v. *Rudra Bageshwari Prasad,* 1930 A. L. J. 531 (P.C.) *applied.*

Letters Patent Appeal from the decision of the Hon'ble Mr. Justice Niamatullah.

S. *Majid Ali* for the appellant.

Mushtaq Ahmad for the respondent.

The judgment of the Court was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for recovery of possession. It appears that Hatim Ali, a predecessor-in-title of the plaintiff, was the owner of the property and after his death all his heirs executed a simple mortgage deed in 1906 in favour of certain mortgagees, the period fixed for payment being ten years.

Hatim Ali had left a son, a widow and two daughters. The son Kazim Husain took possession of the entire property and then purported to transfer the whole of it on November 7, 1921 to Rustam Ali. The sale deed was for Rs.6,300 out of which Rs.4,300 were left in the hands of the transferee for payment of the previous mortgage debt. It is now found that as a matter of fact the vendee paid only Rs.1,550-5-0 towards the previous mortgage debt and that he discharged the other debts with which we are not now concerned.

The limitation on the mortgage which was for ten years would not have expired till 1928. About a year before that date, namely, 1927, the present suit was instituted by an heir of one of the deceased sisters of Kazim Husain for recovery of his share. The claim was resisted on various grounds. The defendant wanted to claim the entire property by adverse possession, by estoppel as well as on other grounds. He also pleaded that he was entitled to be paid a proportionate amount out of the sum which he paid towards the discharge of the previous mortgage debt.

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*L. P. A. 50 of 1931

The suit was decreed by both the courts below unconditionally. On appeal to this Court a learned judge has upheld the decree for possession but has made it subject to the condition of the payment by the plaintiff of proportionate amount out of Rs.1,550-5-0 paid by Rustam Ali towards the mortgage of 1906. He has also directed the payment of interest on this amount at the rate mentioned in the mortgage deed.

The point for consideration is whether Rustam Ali is entitled to resist the claim for possession and demand the payment of this amount.

No doubt it has been held on the strength of previous authorities including *Sukhi* v. *Ghulam Safdar Khan*[1] that where a prior mortgagee brings a suit on his mortgage and obtains a decree against his mortgagor without impleading a subsequent mortgagee and purchases a property at auction and actually obtains possession, he cannot be ousted by a plaintiff deriving title through a subsequent mortgagee without his mortgage debt having been satisfied. See *Ram Sanehi Lal* v. *Janki Prasad*[2]. But the present suit is not a case of that type. Here there was no suit brought on the basis of the previous mortgage, but the amount was paid off privately by the defendant who had become entitled to the possession of the property as purchaser of the equity of redemption, and not by virtue of the payment of the previous simple mortgage. No authority has been brought to our notice by the learned advocate for the respondent in which private payment of a simple mortgage has been held to justify the holding up of that payment as a shield so as to resist a suit for possession by the mortgagor's representatives. On the other hand, it seems to us that the principle laid down by their Lordships of the Privy Council in the case of *Bijai Saran Sahi* v. *Rudra Bageshwari Prasad*[3] applies to this case. There too, the defendants who were transferees had paid off a simple mortgage. Their purchase however was found to be invalid. Their Lordships remarked:

> Now admittedly these mortgages were not usufructuary mortgages, and as the plaintiffs (respondents) have been held to be and are the owners of the equity of redemption, it is impossible to see under what title the defendants (appellants) can claim to resist the decree for possession.

Inasmuch as the defendants in that case had got possession by virtue of the sale and the sale was invalid, they were ordered to surrender possession of the same because their mortgages did not give them any right to possession. It was remarked that whatever rights they had under their mortgages, they can no doubt enforce them in proper proceedings taken for the purpose, but there is no principle or authority which enables the defendants to set up their mortgages as shields against the plaintiff respondents' claim for possession. The same remarks apply to the present case.

There is no doubt that Rustam Ali by virtue of paying the previous mortgage stepped into the shoes of the previous mortgagee and had the same rights as the mortgagee to enforce the debt. It may be that he is

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[1] I. L. R. 43 All. 469

[2] [1931] A. L. J. 729

[3] [1930] A. L. J. 531

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Sulaiman, C. J.

entitled to enforce the charge created in his favour within an extended time. But on this point it is not necessary to express any final opinion. His remedy may lie in a separate suit to enforce his charge and not in the present suit for possession.

We accordingly allow this appeal, modify the decree of the lower appellate court and restore the decree of the court of first instance. Inasmuch as the defendant has admittedly paid off in part the liability of the plaintiff, we think that the parties should bear their own costs of both the appeals in this Court.

Appeal allowed

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July 8

BANERJI, J. IQBAL AHMAD, J.

KARAN SINGH (*Judgment-debtor*)

versus

SADHO RAM (*Decree-holder*)*

Civil Procedure Code, Sec. 68 and Or. 21, R. 66(3)—In the statement mentioned in Or. 21, R. 66(3) decree-holder stated property to be sold to be ancestral—Execution case transferred to Collector—Decision as to character of property res judicata.

The application for an order for sale under Or. 21, R. 66 was accompanied by the statement mentioned in Or. 21, R. 66(3) in which it was stated by the decree-holder that the property to be sold was ancestral, and after enquiry the execution case was transferred to the Collector. Before the Collector, however, the decree-holder stated that the property was non-ancestral and that he did not propose to proceed with the execution, and the record was therefore sent back to the Civil Court. Under orders of the Civil Court the property was put up for sale and purchased by the decree-holder. The judgment-debtor filed an application for the setting aside of the sale. *Held,* (1) that the property to be sold having once been declared as between the parties to be ancestral property, the decree-holder was barred by the principle of *res judicata* from asserting that the property was non-ancestral; (2) that the sale of such property by the court amin was entirely without jurisdiction as the Collector and the Collector alone could sell the property; (3) that the decree-holder himself being the auction-purchaser, it was open to the judgment-debtor to assail the validity of the sale on grounds other than those specified in Or. 21, R. 90 C. P. C.

EXECUTION FIRST APPEAL from a decree of S. M. MIR ESQ., Subordinate Judge of Meerut.

K. C. Mital for the appellant.

N. P. Asthana, Vishwa Mitra and *Nanak Chand* for the respondents.

The judgment of the Court was delivered by

Iqbal Ahmad, J.

IQBAL AHMAD, J.—This execution first appeal (No. 338 of 1931) is connected with execution first appeal No. 450 of 1931. Both these appeals are by a judgment-debtor and arise out of proceedings in execution of a final decree for sale.

In order to appreciate the points in controversy between the parties it is necessary to state the facts in some detail.

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*E. F. A. 338 of 1931 (connected with E. F. A. 450 of 1931)

Sadho Ram, the decree-holder respondent obtained on the basis of a mortgage-deed a preliminary decree for sale on August 27, 1928 against Thakur Karan Singh the appellant before us and his minor son Mahendra Singh who was impleaded as a defendant under the guardianship of his mother Mst. Kasturi. A final decree for sale was passed in favour of the decree-holder against the said judgment-debtors on May 4, 1929.

On June 11, 1929 the decree-holder filed an application for execution of the decree. The application was accompanied by a statement containing the particulars mentioned in Order 21, Rule 66(3) of the Code of Civil Procedure. It was stated in that statement by the decree-holder that the property to be sold was in possession of the judgment-debtor and his ancestors since the year 1860 and was ancestral property. In order to satisfy itself as to the accuracy of this statement of the decree-holder the execution court called for a report from the Collector. The Collector reported that the property was ancestral property and accordingly in pursuance of the provisions of Section 68 of the Code and Government Notification No. 1887|1|238 dated October 7, 1911 the execution case was transferred to the Collector. An enquiry was then instituted by the Sale Officer in order to draw up the proclamation of sale. One of the particulars entered in the sale proclamations is the estimated value of the property and the Sale Officer called for a report from the tehsil as to the value of the property to be sold. The report was that the value of the property included in the proclamation of sale was Rs.20,896. The decree-holder objected to this estimated value and the Sale Officer fixed the value of the property at Rs.18,000. This valuation was accepted by the decree-holder. But the judgment-debtor objected to the valuation and after further enquiry the estimated value of the property was fixed at Rs.25,444.

Then on February 7, 1931 the decree-holder filed an application stating that the property sought to be sold was non-ancestral and as such could not be sold by the Collector and that he did not propose to proceed with the application for execution. The statement of the decree-holder that the property was non-ancestral was diametrically opposed to the statement contained in the particulars submitted by the decree-holder in the execution court in pursuance of the provisions of Order 21, Rule 66 (3). However on this application the proceedings before the Collector terminated and the record was sent back to the Civil Court.

Three days after, viz., on February 10, 1931 the decree-holder put in a second application for execution before the execution court (Civil Court) and in the statement under Order 21, Rule 66 described the property covered by the decree for sale as non-ancestral property and the estimated value of the same to be Rs.10,000. Notices under Order 21, Rule 66 were issued to the judgment-debtors fixing February 25, 1931 for the hearing of the objections, if any, to the application for execution and to the statement containing the particulars prescribed by Clause (2) of Rule 66. It is common ground that these notices were not served personally either on the judgment-debtor appellant before us or on Mst. Kasturi the guardian *ad litem* of the minor judgment-debtor and that the service was effected by affixation. The judgment-debtor appellant maintains that the decree-holder fraudulently got a bogus report with respect to the service of the notices made by the process-server and that neither he nor Mst. Kasturi came to know of the application for execution dated February 10, 1931. We shall advert to the facts relating to service in a moment.

On February 25, 1931, the date fixed in the execution case, the judgment-debtor did not appear and the court fixed April 20, 1931 for the sale of the property, apparently without any enquiry into the question as to whether the property was ancestral or non-ancestral. The attention of the court was not drawn by the decree-holder either to his earlier statement that the property to be sold was ancestral property or to the report of the Collector that was to the same effect and the court therefore accepted the statement of the decree-holder that the property was non-ancestral property and directed the same to be sold as such by the amin of the court.

On April 14, 1931 the judgment-debtor appellant filed an objection to the application for execution dated February 10, 1931 and the statement of particulars of the property to be sold appended to that application. He alleged that by fraud of the decree-holder he had no notice of the date fixed in the execution case and therefore could not put forward objections to the particulars submitted by the decree-holder. He maintained that the property sought to be sold was ancestral property and therefore could not be sold by the Civil Court and that the value of the same was not less than Rs.30,000 and that the statements to the contrary made by the decree-holder were false. He also prayed that pending the decision of the objections filed by him the sale fixed for April 20, 1931 be postponed.

The court refused to accede to the prayer for the postponement of the sale and the property was actually sold on April 24, 1931. The decree-holder purchased the property for Rs.10,000 at the auction sale.

Thereafter on May 16, 1931 the objections filed by the judgment-debtor were heard and dismissed on the ground that the objections could be entertained only before the sale and as the sale had already taken place the objections could not be maintained. Execution first appeal No. 450 of 1931 is directed against this order of May 16, 1931.

On May 22, 1931 the judgment-debtor filed an application under Section 47 and Order 21, Rule 90 of the Code of Civil Procedure for the setting aside of the sale. In that application he referred to the previous statement of the decree-holder and the report of the Collector that the property to be sold was ancestral property and to the fact that the estimated value of the property sold was fixed by the Sale Officer at Rs.25,444 and maintained that the action of the decree-holder in getting the execution case abruptly terminated before the Collector by means of his application dated February 7, 1931, was deliberate and with a view to gain advantage over the judgment-debtor by perpetration of fraud. He submitted that the statement of the decree-holder that the property covered by the decree was non-ancestral and was of the value of Rs.10,000 only was false to his knowledge and that the order for the sale of the property as non-ancestral property was obtained by the decree-holder by practising fraud on the court. He again alleged that the service of notice of the application for execution dated February 10, 1931 was not effected on him because of the fraud of the decree-holder and thus he was prevented from asserting on the date fixed, viz., on February 25, 1931, that the property was ancestral property and could not be sold by the Civil Court. He further stated that the sale was not proclaimed in the village nor was proclamation caused to be made by beat of drum and that the sale was vitiated by the fact that the Sale Officer (amin) postponed the sale on April 20, 1931 without obtaining any permission from the court and sold the property on a date not fixed for the sale, viz., on April 24, 1931. He asserted that on account of the fraud practised by the decree-holder and the irregularities mentioned above the property was sold and purchased by the decree-holder for a very small amount. On these grounds he prayed that the sale be set aside. This application was also dismissed by the court on June 11, 1931. The order dismissing the application is brief and conspicuous by an absence of any discussion of the allegations of the judgment-debtor imputing fraud to the decree-holder in the proceedings culminating in the sale of the property. All that is stated in the order is that the learned Judge had been through the record and could discover no material irregularities or fraud and that the oral evidence of the witnesses produced before him was biassed and incredible and therefore the inadequacy of the price too, if true, was no ground to set aside the sale. Execution first appeal No. 338 of 1931 is against this order of the court below.

We are unable to uphold either of the two orders appealed against. We are satisfied for the reasons that shall presently appear that the judgment-debtor appellant was prevented by fraud of the decree-holder from putting forward objections in court to the application for execution dated February 10, 1931 and to the particulars submitted by the decree-holder along with that application.

[Their Lordships then reviewed the evidence relating to the service of notice on the judgment-debtor by affixation and proceeded:—]

It is abundantly clear from the facts stated above that the judgment-debtor was vigilant throughout and did not allow the execution proceedings against him to go by default. When the execution case was before the Collector he took exception to the valuation of the property at Rs.18,000 and it was in consequence of this objection that on further enquiry the value of the property was fixed Rs.25,000. It therefore appears incredible to us that if he was cognisant of the application for execution dated February 10, 1931 and of the particulars furnished by the decree-holder in which the decree-holder, contrary to his previous statement, had alleged the property to be non-ancestral and had contrary to the finding of the Collector that the value of the property was more than Rs.25,000 asserted that the property was worth only Rs.10,000, he would have kept quiet and not taken serious objections to these allegations of the decree-holder. His objections as regards these statements of the decree-holder would have been unanswerable. The property to be sold having once been declared as between the parties to be ancestral property, the decree-holder was barred by the principle of *res judicata* from asserting that the property was non-ancestral, vide *Shahzad Singh* v. *Hanuman Rai*[1] and *Bhikhan Saran* v. *Piare Lal*[2]. Further the objections as to valuation of the property would have been formidable. The finding of the Collector as to the value of the property based as it was on the report submitted by Tehsil though not conclusive, would have been entitled to grave weight and no court would have differed from that report on light grounds. In short, the objections by the judgment-debtor as regards the nature and value of the property would have been, in the circumstances of the present case, well-founded and not frivolous. Therefore the failure of the judgment-debtor to prefer those objections can be attributed to no other cause except to his ignorance about the execution case initiated by the application dated February 10, 1931.

[Their Lordships then referred to the circumstances attending the so-called service by affixation.]

For these reasons we hold that the assertion of the judgment-debtor that the decree-holder fraudulently got a bogus endorsement about the service of notice effected has been made out. In view of this finding arrived at by us, we hold that the court below was wrong in not entertaining the objections dated April 14, 1931 filed by the judgment-debtor. The reason assigned by the court below for dismissing those objections are entirely unfounded. The objections were dismissed by that court on the ground that they could not be entertained after the sale had taken place. But the court overlooked the fact that the objections were actually filed before the sale was held, and it was due to the action of the court in not acceding to the prayer contained in the objections for the postponement of the sale that the sale took place before the objections were taken up for disposal. The failure of the judgment-debtor to file the objections on the date fixed, viz., February 25, 1931 was due to the fraud of the decree-holder in connection with the service of notice issued by the court.

The result is that we allow Execution First Appeal No. 450 of 1931 with costs here and below and allow the objections dated April 14, 1931.

We now proceed to consider Execution Frst Appeal No. 338 of 1931. The finding of the court, before transferring the execution case to the Collector, that the property was ancestral property was binding between the parties to the present litigation. Therefore it must be assumed for the purposes of this case that the property to be sold was ancestral property. The sale of such property by the court amin was entirely without jurisdiction as the Collector and the Collector alone could sell such property, vide *Fatmatul Kubra* v. *Achchi Begam*[3].

[After reviewing the evidence their Lordships came to the conclusion that the allegation of the judgment-debtor that no proclamation was made in the village had been made out.]

Again, as stated above, the sale was, without any reference to court, postponed by the amin from the 20th to 24th of April, 1931. This the amin had no right to do. There is nothing on the record to show whether the intending purchasers who may have been present on April

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[1] I. L. R. 46 All. 562

[2] 1931 A. L. J. 103

[3] I. L. R. 36 All. 33

20, were informed that the sale would take place on April 24, 1931. It follows therefore there is much to be said in favour of the allegation of the judgment-debtor that, because of the adjournment of the sale in an irregular manner by the amin, the property did not fetch its proper value at the sale. That the property was sold at a grossly inadequate price is patent by the fact that that property was valued at Rs.25,400 by the Collector. Thus, we come to the conclusion that there was fraud in publishing the sale, there was irregularity in the conduct of the sale and as a consequence of the fraud and irregularity the property was sold at a very inadequate price with consequent loss to the judgment-debtor. Apart from this the sale was entirely without jurisdiction and therefore ought to have been set aside. It is to be noted that, as in this case the decree-holder himself was the auction-purchaser, it was open to the judgment-debtor to assail the validity of the sale on grounds apart from those specified in Order 21, Rule 90 of the Code of Civil Procedure, vide *Superior Bank Ld.* v. *Budh Singh*[4].

The result is that we also allow Execution First Appeal No. 338 of 1931 and set aside the sale dated April 24, 1931. The appellant is entitled to his costs both in this Court and in the court below.

The necessary consequence of our decision in the two Execution First Appeals is that the property covered by the final decree for sale is to be treated as ancestral property and the execution of the decree has to be transferred to the Collector. We accordingly direct that the court below should transfer the execution of the decree to the Collector.

Appeals allowed

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1932

July 22

NIAMATULLAH, J.

SATYA NIDHAN BANERJI (*Applicant*)
versus
MOHD. HAZABBER ALI KHAN *alias* GHULAM JABALI KHAN
(*Opposite party*)*

Tenancy Act (III of 1926), Secs. 253 and 271—'Subordinate revenue court'—Meaning of—Issue remitted to Civil Court under Sec. 271—Whether Civil Court deemed to be a revenue court.

Where the revenue court acting under Sec. 271 of the new Tenancy Act frames an issue on the question of proprietary right and submits the record to the Civil Court for the decision of that issue only, the latter cannot be considered to be a 'subordinate revenue court' within the meaning of Sec. 253.

CIVIL REVISION from an order of B. N. JHA ESQ., Assistant Collector, first class of Shahjahanpur.

S. N. *Verma* for the applicant.

M. A. *Aziz* for the opposite party.

The following judgment was delivered by

Niamatullah, J.

NIAMATULLAH, J.—This and the connected civil revisions Nos. 248 to 250 of 1932 arise out of four suits for profits, brought by the opposite party against the applicant, in the court of an Assistant Collector,

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*Civ. Rev. 36 of 1932

[4] 22 A. L. J. 413 at 415

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Niamat-ullah, J.

Shahjahanpur. The defendant raised a question of proprietary title, on which an issue was struck by the Assistant Collector and remitted to the munsif for trial and finding under Sec. 271 of the Agra Tenancy Act. On receipt of the finding which was in favour of the plaintiff and was binding on the Assistant Collector, the suits for profits were decreed.

The applicant preferred four appeals to the court of the District Judge impugning the correctness of the munsif's finding and the decision of the Assistant Collector. No appearance was entered on behalf of the applicant, who was the appellant before the District Judge, and his appeals were consequently dismissed. He applied for an order of restoration of the appeals, but his application was also dismissed. He appealed to this Court from the order of the District Judge refusing to restore the appeals, but was unsuccessful.

The present four applications for revision have been filed and the decrees of the Assistant Collector are sought to be revised under S. 253 of the Agra Tenancy Act. That section, like Sec. 115 of the Civil Procedure Code, confers very limited powers on this Court. It is only if the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise its jurisdiction so vested, or has exercised the jurisdiction vested in it illegally or with material irregularity that this Court can interfere. Of the ten grounds taken in revision there is none which can be considered to raise any question of jurisdiction, want of jurisdiction or the exercise of it illegally or with material irregularity. The learned advocate for the applicant desired to criticise the proceedings of the munsif which he contends should be considered as part of the proceedings before the Assistant Collector. I do not think the contention is correct. Sec. 253 of the Tenancy Act, under which the present revision has been filed, can only justify the examination of the orders of "subordinate revenue courts". The proceedings of the munsif cannot, by any stretch of imagination, be considered to be part and parcel of the proceedings of the subordinate revenue court before whom the suits for profits were pending and which referred the issue as to title to the Civil Court. The latter cannot be considered to be a revenue court only because it decides an issue remitted to it under Sec. 271, Tenancy Act. It was open to the applicant to have contested the munsif's finding before the District Judge in appeal, but he missed that opportunity and cannot now impugn it under cover of Sec. 253. The grounds taken in revision might have been such as could be urged in appeal, but they are not good grounds in revision which has, therefore, no force and is dismissed with costs.

CRIMINAL

1932

July 25

PULLAN, J.
NIAMATULLAH, J.

NASIR AND OTHERS
versus
KING-EMPEROR*

Criminal Procedure Code, Sec. 164 and Evidence Act, Sec. 24—Confessions—When inadmissible—Duty of Magistrates and Sessions Judges—Whether evidence of approver coupled with retracted confession sufficient for conviction.

The judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every judge is: "Why the accused made the confession?" It is very important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction.

The evidence of the approver, coupled with the retracted confession of a co-accused but uncorroborated by other evidence, is not sufficient for conviction.

CRIMINAL APPEAL from an order of H. P. VERMA ESQ., Additional Sessions Judge of Meerut.

Appeal from jail.

Sankar Saran (Government Pleader) for the Crown.

Seven persons were convicted by the Sessions Judge of Muzaffarnagar of an offence under Sec. 396 I. P. C. and were sentenced each to 8 years' rigorous imprisonment. The prisoners submitted appeals from jail against their conviction, and an application was made on behalf of the Local Government requesting the High Court to enhance the sentences passed upon these persons. The appeal was heard by Pullan and Niamatullah, JJ. who allowed the appeals of six persons, set aside their vonviction and sentences and declared them to be acquitted, and in the case of one person accepted the revision made by the Local Government and enhanced his sentence under Sec. 396 I. P. C. to transportation for life. Separate judgments were delivered by the learned Judges. Niamatullah, J., in his judgment made important observations on the duty of Magistrates and Sessions Judges when recording confessions, which are reproduced below.

Niamatullah, J.

NIAMATULLAH, J.—Section 24 of the Indian Evidence Act does not require the same cogency of evidence as is necessary to establish a fact. It merely requires that if it "appears" to the court that a confession was induced by threat or promise proceeding from a person in authority in relation to the charge against the accused, it shall be inadmissible in evidence. It has been held in numerous cases that if circumstances create a probability in the mind of the court that the confession was improperly obtained, it should be excluded from evidence. A very eminent Judge of this Court expressed himself on the subject of retracted confessions in the following terms:—

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*Cr. A. 1084 of 1931

> To repeat a phrase I used on a former occasion, instead of working up to the confession they (the police) work down from it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no tangible evidence of guilt. Moreover, I have said, and I repeat now, it is incredible that the extraordinary large number of confessions which come before us in the criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add that, during fourteen years' active practice in the Criminal Courts in England, I do not remember half a dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary, the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in havalat, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered.

Per Straight, Offg. C. J. in Q.-E. v. *Babu Lal*[1].

The remarks hold good today no less than they did when they were made by Straight, J. I respectfully agree with every word of what he said. In most cases of serious gravity or difficulty we are faced with the problem of retracted confession and the value to be assigned to it against the person making it or his co-accused. In a large number of such cases there is little or no reliable evidence in corroboration. To do lip service to the doctrine which requires corroboration and to accept such evidence in corroboration, for the sake of formality, as a Judge would not conscientiously believe is not in keeping with judicial integrity.

It has been stressed over and over again that, when a confession is made and subsequently retracted, the Committing Magistrate and the Sessions Judge should enquire into all the circumstances in which it was made and those in which it was subsequently retracted. One, however, seldom comes across a case in which any serious effort is made either by the Magistrate or the Sessions Judge to explain the phenomenon that a person who took every precaution of concealing his crime and suppressing evidence which could implicate him becomes so full of remorse and penitance when he comes face to face with the police that he makes a "free and voluntary confession", but subsequently, retracts it at the enquiry, the remorse and penitance, which are supposed to have acted on his mind before, ceasing to influence it in the slightest degree. While it is true that in some cases voluntary confessions are made and while it is permissible for police officers to resort to legitimate devices to obtain useful information from prisoners, it is inconceivable to me, as it was to Straight, J., that ordinarily a dacoit or murderer would make a voluntary confession. It is, therefore, necessary that, when a confession is first made and is subsequently retracted with allegations against the police, the Magistrate and the Sessions Judge should probe the matter for their own satisfaction. What is however done in practice is to record a confession with due formalities and subsequently to record the retraction thereof, leaving it to the accused to get over if he can the effect of the confession which stands against him inspite of retraction. It is impossible for the accused, even if he is defended, to adduce any reliable direct evidence of mal-treatment or inducement while he was in the police custody. His allegations, when put to the investigating officers, are naturally denied. But the matter should not be allowed to rest there. The Judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every judge is: "why the accused made the confession"? It is very important to ascertain, from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be satisfied.

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[1] I. L. R. 6 All. at 542 and 543

Another question which requires consideration in the present case is whether, if there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is sufficient for conviction. There is ample authority in support of the view that it is not. It has been expressed in the dictum that one tainted testimony cannot corroborate another tainted testimony. Numerous cases bearing on this point have been quoted in the Law of Evidence by Woodroffe and Ameer Ali under Section 30, at page 315, 9th Ed., wherein it is stated that

> the confession of co-prisoners to be rendered trustworthy must be corroborated *aliunde* by independent evidence and not by the testimony of accomplices or approvers as well in respect of the identity of all the persons affected by it as of the *corpus delicti.*

It stands to reason and common sense that if the approver's evidence itself is not sufficient for want of corroboration, the retracted confession of a co-accused, which again has been declared to be equally, if not more untrustworthy, does not furnish the requisite corroboration. The two together cannot obviate the necessity of corroboration from independent sources. The corroboration need not be full proof of guilt but should establish a sufficient degree of complicity. The whole principle of the rule which insists on corroboration of the approver or of the retracted confession of a co-accused is based on the assumption that, in the absence of a guarantee forthcoming from more trustworthy sources, the evidence of the approver or the retracted confession or both together cannot suffice for conviction.

Civil

1932

Oct. 24

Sulaiman, C. J.

Bajpai, J.

MOTI CHAND (*Plaintiff*)

versus

BALRAM DAS (minor, through MUSAMMAT SARASVATI DEVI) (*Defendant*)*

Civil Procedure Code, Or. 9, R. 13 and Or. 32, R. 3—Ex parte *decree against minor—Guardian* ad litem *negligent—Whether court has power to set aside decree and appoint another guardian—Position of minor in the suit.*

Where on the application of the minor the court set aside an *ex parte* decree against him on the ground that the minor's father who was his guardian *ad litem* did not properly represent him and removed the father from the guardianship and appointed the mother as the minor's guardian and allowed her to file a written statement, *held,* that the court had jurisdiction to pass the order that it did and it was right in not compelling the minor to file a separate suit.

When a minor is made a defendant in a suit, it is the minor who is a party to the suit and not his guardian *ad litem.* The guardian *ad litem's* name appears on the record in order to represent the minor but not in his capacity as a party to the suit. Where the guardian *ad litem* is negligent, it is open to the minor to appear in court through another guardian and ask the court to make proper orders for the protection of his interest.

Eda Punnayya v. *Jangala Kama,* 53 In. Cas. 184 *not followed; Bhagwan Dayal* v. *Param Sukh Das,* 39 All. 8 *relied on.*

Civil Revision from an order of Maulvi Owais Karney, Subordinate Judge of Gorakhpur.

P. L. Banerji and *N. Upadhiya* for the applicant.

Shiva Prasad Sinha for the opposite party.

The judgment of the Court was delivered by

Sulaiman, C. J.

Sulaiman, C. J.—The court below has set aside an *ex parte* decree passed against a minor in a partition suit on the ground that the minor's father, who had previously given his consent to a deed of partition by sale in the lifetime of the grandfather, was not a fit and proper person for being appointed a guardian, that he was careless and did not appear on the date of hearing to defend the suit on behalf of the minor. In connected application filed by the father on the ground that he was ill on the date and could not appear in court it has also set aside the decree as against him on the main ground that in a partition suit the decree must be set aside against all the defendants. It has also removed the father from the guardianship of the minor, and appointed the minor's mother as his guardian and allowed her to file a written statement on his behalf. We do not think that it can be said in revision that either the court had no jurisdiction to pass the order that it has done, or it has acted with material irregularity in the exercise of its jurisdiction.

The learned advocate for the applicant has relied strongly on the case of *Eda Punnayya* v. *Jangala Kama Kotayya*[1] and urged before us that the only remedy open to a minor who is not properly represented is to bring a separate suit, and that he cannot be allowed to be heard in the

*Civ. Rev. 131 of 1932

[1] 53 Ind. C. 184

suit itself because he is not a party. We may point out that the view which has prevailed in this Court has been that a minor against whom a decree has been passed without the appointment of a proper guardian has several remedies open to him; he may in that very suit, if the facts justify, appeal against the decree, apply for rehearing under Order 9, Rule 13, apply for a review of judgment or apply for an order under Order 32, Rule 5 (2) of the Code, and he has in addition, the ordinary remedy to bring a separate suit (*Bhagwan Dayal* v. *Param Sukh Das*[2]).

In our opinion when a minor is made a defendant in a suit it is the minor who is a party to the suit and not his guardian *ad litem.* The guardian *ad litem's* name appears on the record in order to represent the minor but not in his capacity as a party to the suit. A suit brought against a minor without a question would still be brought in time and the appointment of a guardian *ad litem* which must be made by the court after the institution of the suit would not be barred by time merely because the guardian is appointed by the court after the expiry of the prescribed period. Although, therefore, when a decree is passed against a minor who has not been properly represented it is open to him to treat it as if he was not a party to the suit and to avoid the decree, it does not follow that the minor who does appear in court through another guardian or next friend cannot be heard and it must be considered that he has no *locus standi* to appear except through the guardian who has been appointed by the court, however, incompetent, negligent and improper he may be. It is the duty of the court to protect the interest of the minor and we think that it is open to the court to entertain an application on the ground of the negligence of the guardian, and to remove him and appoint another, if he was not a proper guardian or was negligent. The summary remedy in the suit itself is very often the least expensive. There seems to be no justification for compelling the minor to file a separate suit and incur heavy expenditure and also run the risk of the proceedings being prolonged, and not to allow him to avail himself of the more expeditious summary remedy open to other defendants.

In this view of the matter we think that the court below did not act without jurisdiction in entertaining the application.

We accordingly see no force in this revision and we dismiss it with costs.

Revision dismissed

[2] 39 All. 8 on 10 and 11

THE END

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ABADI—*House in—Whether appurtenant to holding—Question of fact—No presumption of law—House appurtenant to holding—Meaning of.*

There is no presumption of law that the house occupied by a cultivator in a village is appurtenant to his holding, and either the house or the site must be given up, simply because the tenancy has either been lost or has lapsed by death in favour of the zamindar.

Per NIAMATULLAH, J.—When it is said that a house is an appurtenant to a holding, what is meant is that the site was let to the tenant for the construction of his residential house on the express or implied understanding that it would go with the holding and that, if he be ejected from the latter or voluntarily relinquished it, his right to occupy the site would cease.

There is no presumption that a tenant is entitled to occupy the site of his house so long as he retains his holding, and the landlord must establish by direct evidence or proof of circumstances which justify the inference that the defendant's right to the site is dependent on his right to retain the holding. GOPI SHANKER *v.* LILAWATI (*minor*) THROUGH SHIMBHU NATH NAZIR. 142

———*Site in—Customary right of transfer by tenant to stranger—When proved—Transactions relied on to be of the same nature.*

The most cogent evidence is required before a customary right of transfer of the sites of houses in a village can be held to be established.

Where in an agricultural village containing 600 houses, the transfer by a perpetual lease, was by an agricultural tenant in favour of a non-agricultural tenant, and the defendants justified the lease of the site by the production of 22 sale-deeds and 8 mortgages spread over 100 years, while the zamindar produced 14 kabuliats and 4 instances of "parjot," *held* that the custom was not established.

Where an agricultural tenant purports to transfer the right to a site in the village, and on the transfer being challenged by the zamindar, the transferee, who is a stranger to the village, sets up a custom in virtue of which a tenant has a right to transfer sites of house in the village, and relies on sale deeds and mortgages by tenants, he must satisfy the court that the transaction relied on by him were not transactions between two agricultural tenants, and the vendee or mortgagee, as the case may be, was a stranger to the village. GANGA KALWAR *v.* BENI MADHO PRASAD SINGH. 111

ACCOUNTS—*Examination of—Unconditional acknowledgment of indebtedness—Whether constitutes a new cause of action—Inclusion of time-barred debts in acknowledgment—Burden of proof—Limitation Act, Sec. 19—Stamp Act, Art. 1—Contract Act, Sec. 25.*

Per NIAMATULLAH, J.—Where two persons examine their mutual dealings and one of them formally acknowledges his indebtedness to the other to a certain extent in a document which complies with all the formalities of the law, for example, Stamp Act, the natural inference is that he promised to pay the amount. *The promise is a new contract, the consideration for which is the old debt, and such promise constitutes a new cause of action.* In short, an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. If in making the acknowledgment he has included time-barred debts which he might have well repudiated, it may still be open to him to plead failure of consideration to that extent. The creditor places himself in a disadvantageous position in this respect by omitting to take a bond containing an express promise to pay, which alone can successfully meet the plea of want of consideration. This is the effect of Sec. 25 Contract Act.

Per SULAIMAN, A. C. J.—A mere acknowledgment of liability is not always evidence of a new contract which can be the basis of a suit. There may be recitals in the written acknowledgment or there may be

other direct or circumstantial evidence, which may show that the transaction in which the acknowledgment was made amounted in reality to a novation of the contract for a valid consideration. ABDUL RAFIQ v. BHAJAN. 77

AGRA PRE-EMPTION ACT (XI of 1922).
See Pre-emption Act.

AGRA TENANCY ACT (II of 1901) and (III of 1926).
See Tenancy Act.

APPEAL—*Question of law raised for the first time—When to be entertained.*

When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. THE OFFICIAL LIQUIDATOR OF M. E. MOOLA SONS, LTD. v. MRS. PERRIN R. BURJORJEE. 706

ARBITRATION ACT (IX of 1899)—*Sec. 19 and Sec. 32 Negotiable Instruments Act (XXVI of 1881)—C. I. F. contract—Bank endorses bills of exchange in favour of sellers—Suit based on accepted bills—When can be stayed—Legal position after acceptance.*

Where in accordance with the terms of a C. I. F. contract, the sellers draw bills of exchange directing the purchasers to pay the invoice value of the goods to the Bank named in the bills and the purchasers accept the bills before maturity, the legal position is that the purchasers' liability to the sellers for the invoice value of the goods is discharged and a liability to the Bank under the bills is substituted therefor.

Where however the agreement between the parties empowers the sellers to claim the invoice value inspite of the acceptance of the bill, it is implied that if the sellers elect to sue for the invoice value on the basis of the original contract they would secure for the buyers immunity against any claim on the basis of the bill and, conversely, if the buyer's acceptance of the bill is enforced, they are absolved from their liability under the original contract.

Where the Bank endorsed the bills of exchange to the sellers and the sellers brought a suit based on accepted bills of exchange, and the purchasers made an application under Section 19 Arbitration Act (IX of 1899) for stay of suit on the ground that the agreement provided that disputes arising out of any contract entered into in connection with the

agreement were to be referred to arbitration, *held,* that the plaintiffs (who did not avail themselves of the remedy reserved to them under the agreement of falling back on the original consideration) were in the position of the Bank and were suing as holders of the bills of exchange and the suit could not be stayed under Section 19 Arbitration Act as there was no agreement between the plaintiffs as holders and the defendants as acceptors of the bills of exchange containing any clause authorising a reference to arbitration. DHIRAJ LAL RAM PRASAD v. JACOB BEHRENS & SONS. 1055

ARMS ACT (XI of 1878), *Sec. 19(f)—Conviction under—When justified—Loaded cartridges found in a house—Head of the family convicted—When conviction legal.*

In the course of a house search two loaded cartridges were found in a corn bin in the house of the accused among ghee, butter and other articles. The accused was prosecuted for an offence under the Arms Act and the Magistrate convicted him on the ground that he was the head of the family and should therefore be held responsible for the arms recovered from his house. *Held,* that the view taken by the Magistrate was wrong and the conviction was not legal. In all such cases it is necessary to prove not only the presence of the article in the house but the possession of some particular person over that article in order to justify a conviction. KAUL AHIR v. KING-EMPEROR. 1072

———*Section 19(f)—Unlicensed gun in the house—Presumption against all adult male members that it was in their possession and control—One or all the members liable to prosecution.*

The finding of an unlicensed gun in the house would raise a presumption against all the adult male members that it was in their possession and control, and they might one and all be tried on that charge. It would be for those persons to show that they were not in possession of the gun in question. It is open to the police to prosecute one or all of the adult male members for an offence of this nature. KING-EMPEROR v. SIKHDAR. 570

BUNDELKHAND LAND ALIENATION ACT (Local Act II of 1903), *Sections 16 (as amended by Act VII of 1929), 9 and 6—Mortgagor and mortgagee—Members of agricultural tribe—Suit for sale on mortgage instituted in 1924—No decree for sale could be*

BUNDELKHAND LAND ALIENATION ACT (Local Act II of 1903)—Section 16 *passed in view of Section 16—Section 9 inapplicable—Order of Subordinate Judge consigning the case to the record room—Effect of —Whether amending Act revived proceedings.*

The mortgagee, who was a member of an agricultural tribe within the meaning of the Bundelkhand Land Alienation Act (II of 1903), sued for enforcement of his mortgage executed by another member of an agricultural tribe but as a claim to a simple money decree was time-barred, he prayed for a decree under Or. 34, R. 4 C. P. C. for satisfaction of the mortgage money by sale of the mortgaged property. The Subordinate Judge, being of opinion that no decree for sale or for foreclosure could be passed, made a reference to the Collector with a view to the latter substituting a mortgage in the form prescribed by Section 6 in place of the mortgage then in suit. On the Collector's refusal to take action under Section 9, the Subordinate Judge referred the matter to the High Court under Or. 46, R. 1 C. P. C. and after the High Court's decision "that the law as it stood, left the mortgagee without a remedy" the Subordinate Judge on June 10, 1927 ordered the case to be consigned to the record room. After the Bundelkhand Land Alienation Act had been amended in 1929, the mortgagee, who was protected by the newly added proviso to Section 16, applied for a decree for sale under Or. 34, R. 4 C. P. C. *Held,* that the order of the Subordinate Judge dated June 10, 1927 operated as a final adjudication of the rights of the parties and was a decree determining the suit for sale; and the amending Act could not have retrospective effect so far as to revive proceedings in a suit which had terminated before it was passed.

Strictly speaking there is no provision in the Act requiring the Collector to 'return' the reference. If the Collector cannot take action under Section 9, the proceedings before him terminate. RAM SAHAI v. DEBI DIN. 584

———*Sections 16 and 11—Decree-holder prevented from putting property of judgment-debtor to sale—Whether decree can be executed by giving a lease which the deceased debtor could have given under Section 11.*

Where a decree-holder is prevented, by reason of Section 16 of the Bundelkhand Land Alienation Act, from putting the property of the judgment-debtor to sale, the decree can be executed by the giving of a lease which it would have been open to the judgment-debtor himself to give under Section 11 of the Act. MAJHLI DULAIYA v. MUNNA LAL. 562

BURDEN OF PROOF—*Bond—Evidence led by plaintiff showed that full consideration not paid—Defendant not precluded from urging that no consideration passed.*

Where the execution of the bond as a simple bond by the defendants was proved, and the plaintiffs' evidence showed that no consideration beyond Rs.50 had passed, *held,* that the defendants were not precluded from urging that no consideration passed. RADHA BALLAB v. DEOKI NANDAN. 207

CIVIL PROCEDURE CODE (V of 1908), *Section 2(11)—Deceased Mohammedan debtor —Suit by creditor against his legal representatives—One defendant exempted—Liability of remaining defendants.*

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———*Section 2(12)—Suit for possession— By setting aside deed of conveyance on ground of fraud—Suit decreed—Whether plaintiff entitled to mesne profits from date of suit or date of decree.*

By a deed dated November 25, 1924, plaintiff purported to make over a valuable estate to the defendant subject to certain conditions. On February 21, 1927 the plaintiff instituted a suit for possession by setting aside this deed on the ground that it was procured by undue influence and fraud. The courts in India found the allegations of undue influence and fraud proved and awarded possession. *Held,* that the plaintiff was entitled to mesne profits from the date of the deed, inasmuch as on the findings as to fraud, the possession of the defendant must be deemed to have been wrongful from the very date of the deed. SATGUR PRASAD *alias* BHAIYA HARI SARAN DAS v. HAR NARAIN DAS. 297

———*Section 11—Appeal—Abatement— Whether decision of trial court operates as* res judicata.

Where an appeal is not decided on the merits but abates, so that the appeal becomes infructuous and the decision of the trial court becomes conclusive, the latter will operate as *res judicata* as regards questions decided by it, in a subsequent suit between the same parties, assuming that other conditions of the rule exist. RAGHUNATH DAS v. GANESH DAS. 615

———*Section 11*—Res judicata—*As between co-defendants—When—Dismissal of previous suit depended upon an adjudication of conflict between co-defendants—Decision operates as* res judicata *between co-defendants.*

A Burmese woman died leaving her surviving two sons and two daughters. The sons having entered into possession of the mother's property, one of the daughters instituted a suit claiming a 1|4th share alleging that the succession was regulated by Burmese Buddhist law under which the sons and daughters took equal shares. In this suit both the sons and the remaining daughter were made co-defendants. The relief claimed included administration of the estate of the deceased, accounts against the sons as executors *de son tort* of the deceased, and the appointment of a receiver of the estate. The sons filed a joint written statement, pleading that the succession was governed by the Chinese customary law under which daughters were excluded from inheritance. The daughter-defendant filed no written statement but gave evidence on behalf of the plaintiff in support of her claim. The suit was dismissed on the finding that the Chinese customary law governed the succession and that under that law the sons only inherited and not the daughters. Subsequently the present suit was instituted by the other daughter against her two brothers for her 1|4th share in her mother's estate. *Held,* that the suit was barred by the rule of *res judicata* as applied between co-defendants. The rule is applicable even if the previous suit was dismissed, provided such dismissal depended upon an adjudication of conflict between the co-defendants. MAUNG SEIN DONE v. MA PAN NYUN. 735

———*Section 11—Rule of* res judicata *as between co-defendants—Conflict of interest between co-defendants latent—One co-defendant did not defend suit—Whether Rule applicable.*

A house was bought by one *K* in the name of his wife. *K's* brother brought a suit claiming his share in the house on the allegation that the property belonged to *K*. The defendants to the suit were *K's* wife's brother's children and *K's* daughter. *K's* wife's brother's children were vitally interested in denying that the house belonged to *K*. (If the house belonged to *K* they would be entitled to a one anna share, whereas if the house belonged to *K's* wife, they would be entitled to an eight anna share). On the other hand it was to *K's* daughter's interest that the property should be held to have belonged to her father and not to her mother. (If the property belonged to her father, she was entitled by inheritance to a nine anna share whereas if the property belonged to her mother, she was entitled to eight annas only). *K's* daughter did not enter appearance in the suit but chose to stand by and let the plaintiff fight her battle. *Held,* that the decision in the suit as to the ownership of the house operated as *res judicata* between the co-defendants. KANIZ FATMA v. YAD HUSAIN. 1063

———*Section 11—Rule of* res judicata—*As between co-defendants—Criterion—Evidence Act, Section 115—Estoppel—Conditions to be fulfilled.*

The plaintiffs, who were the heirs of the mortgagor under the personal law, instituted the present suit for redemption of a usufructuary mortgage of an occupancy holding. The mortgagees contested the suit on the ground that the plaintiffs were not the heirs to the mortgagor under Tenancy Law in force at the time the inheritance opened (Sec. 9 of Act XII of 1881). Prior to this the zamindar had instituted a suit in the revenue court against the present plaintiffs and defendants for possession of the occupancy holding on the allegation that on the death of the tenant (mortgagor) without leaving any heirs, the holding lapsed to her as zamindar. The present plaintiffs did not contest the suit. The present defendants however contested the suit on the ground that the tenant had died leaving the present plaintiffs as heirs. This plea found favour with the revenue court which dismissed the suit for ejectment. The plaintiffs contended that the decision of the revenue court operated as *res judicata,* and it was not now open to the mortgagees to take the plea that the plaintiffs were not the heirs to the mortgagor. *Held,* (1) that there was no conflict of interest between the present plaintiffs and defendants, who were arrayed as defendants in the revenue court, and the revenue court decision did not operate as *res judicata.* (2) that whether or not the plaintiffs were the legal heirs of the tenant (mortgagor) was as much within their knowledge as that of the defendants, and the attitude of the defendants in the revenue suit did not in any way mislead the plaintiffs or induce them to alter their position, and Section 115 Evidence Act did not apply. Sri Ram Singh v. Baldeo Prasad. 605

———*Section 11 and Tenancy Act (II of 1901), Section 199—Suit for money on a mortgage—In a former ejectment suit it was decided by the revenue court that plaintiff was not a mortgagee—Whether decision operated as* res judicata.

Before a matter can be held to be *res judicata*, it must be found, among other things, that the first court was competent to try the subsequent suit and not merely a subsequent issue.

There is nothing in Section 199 of Act II of 1901 to justify the suggestion that the revenue court deciding a question of title "must be deemed to be a civil court." Even if the revenue court might for the immediate purpose be deemed to be a civil court, it does not become a civil court competent to try a particular whole suit.

The plaintiff having lost possession as a usufructuary mortgagee, brought a suit for money on the mortgage. Previous to this suit the mortgagor had brought a suit against the present plaintiff in the revenue court to eject him from a plot. The present plaintiff pleaded that he was a mortgagee, and his plea was rejected and the suit decreed. It was contended in the present suit that this question of whether the present plaintiff was a mortgagee or not having been decided against him by the revenue court, the matter was *res judicata*. *Held,* that while the revenue court was competent to try the issue as to whether the present plaintiff was a mortgagee or not (Act II of 1901, Section 199), it was not competent to try the subsequent suit, and therefore the terms of Section 11 C. P. C. were not satisfied, and the decision of the revenue court did not operate as *res judicata*. Sarju Prasad Sonar v. Mahadeo Prasad Pandey. 511

———*Section 24—High Court or District Judge—Whether empowered to transfer case to another court which has pecuniary but not territorial jurisdiction—'Competent'—Meaning of.*

The High Court or the District Judge, acting under Section 24 C. P. C. has power to transfer a suit pending in one subordinate court to another subordinate court, which has pecuniary, but not territorial jurisdiction to try that suit.

The word "competent" as used in Section 24 C. P. C. must be taken to refer to pecuniary jurisdiction only. Kishori Lal v. Balkishan. 984

———*Section 47—Whether execution court empowered to substitute a compromise between the parties for the decree originally passed.* Gobardhan Das v. Dau Dayal. 365

———*Section 47 and Or. 21, R. 58—Suit filed after debtor's death against his daughter's son only—Decree—Execution—Daughter's objection that her property cannot be attached allowed—Objection under Or. 21, R. 58 and not under Section 47.*

Where, after the death of his debtor, plaintiff sued deceased's daughter's son *only* alleging that he was the sole legatee of the deceased under a will, and having obtained a decree against the assets of the deceased in the hands of the son, he tried to execute it by attachment and sale of the property in the hands of the daughter, but an objection by her that the property was her own was allowed, *held,* that the objection was under Or. 21, R. 58 and not an objection under Section 47 C. P. C. as there was no dispute between the parties to the decree or their representatives. No appeal therefore lay from the order. Jagannath Prasad v. Jamuna Bai. 125

———*Section 47 and Or. 21, R. 90—Decree-holder himself auction-purchaser—Judgment-debtor can assail sale on grounds apart from those specified in Or. 21, R. 90.* Karan Singh v. Sadho Ram. 1118

———*Section 48—Decree for money—Execution—Compromise—Decree payable by instalments—Last instalment not paid in full—Execution application after expiration of twelve years from date of original decree—Whether plea of limitation open to judgment-debtor—Estoppel.*

While an application for execution of a decree for money was pending and a warrant for the arrest of the judgment-debtor had been issued, the decree-holder and the judgment-debtor came to terms that the decretal amount be paid in nine instalments spread over four years. When the compromise was filed the execution court passed the following order:—"Parties have come to a compromise. Warrant may be cancelled". The court allowed the compromise to be placed on the record. Eight instalments were regularly paid. The decree-holder refused to accept the last instalment as the balance of the amount due was not paid in full, and the day after the expiry of the date fixed for payment he made an application for execution by attachment and sale of property. This application was made after the expiration of twelve years from the date of the original decree. *Held,* (1) that the order of the execution court amounted to an order substituting the compromise for the decree originally passed; (2) that the execution court had no power to pass such an order; (3) that the parties could not extend the period of limitation under Section 48 C. P. C. by means of a compromise, and it was open to the judgment-debtor to plead that the decree-holder's application was barred by limitation; (4) that the action of the judgment-debtor in pleading limitation did not amount to fraud within the meaning of Section 48(2) (*a*) C. P. C. GOBARDHAN DAS v. DAU DAYAL. 365

———*Section 48 and Limitation Act, Art. 182—Final decree—Amendment of—Application for execution of amended decree—Made more than 12 years after the date of final decree—Whether time-barred.*

An application for execution of an amended decree made more than 12 years after the date of the final decree is barred by limitation under Section 48 C. P. C.

On a correct reading of Art. 182 of the Limitation Act, it is obvious that where execution is barred by Section 48 of C. P. C. execution cannot be allowed under Art. 182 of the Limitation Act. In other words, Art. 182 is subject to the provisions of Section 48. An amendment of a decree therefore does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by Sec. 48, that is, that the period of 12 years under Section 48 is final and cannot be extended by any amendment of the decree whether that amendment is made before the expiry of the period of 12 years or after the expiry of 12 years. FAQIR CHAND v. KUNDAN SINGH. 471

———*Section 48, and Or. 20, R. 11—'Subsequent order'—Meaning of—Must be an order of the court which passed the decree—'Subsequent order' not confined to orders passed under Or. 20, R. 11.*

The execution court has no power to vary the terms of the decree under execution. The "subsequent order" in Section 48 C. P. C., which provides a fresh starting point for limitation, must be an order of the court which passed the decree, and not an order of the court executing the decree. The 'subsequent order' in Section 48 is not confined to orders passed under Or. 20, R. 11. GOBARDHAN DAS v. DAU DAYAL. 365

———*Section 48 (2) (a)—Fraud—Meaning of—Decree for money—Execution—Compromise—Decree payable by instalments—Last instalment not paid in full—Execution application after expiration of twelve years from date of original decree—Judgment-debtor pleads limitation—Whether action amounts to fraud.* GOBARDHAN DAS v. DAU DAYAL. 365

———*Section 53—Decree against Hindu lambardar for amount collected and also remaining uncollected—Lambardar dies before attachment—Son brought on record—Whether decree can be executed as against son.*

A suit was brought against a Hindu lambardar and a decree was obtained against him, which was both for the amount collected by him and also for the amount remaining uncollected on account of his negligence. Before any property could be attached, the lambardar died. His son was brought on the record as his legal representative and execution was sought against him by the attachment and sale of the joint family property. *Held,* that in view of the provisions of Section 53 C. P. C. the decree can be executed as against the son to the extent of the joint family estate in his hands. SRI RAM v. JAI KISHUN LAL. 873

———*Section 60(c)—Judgment-debtors belonging to agriculturist caste and doing cultivation—Permission obtained to build houses on a portion of the leased land—Whether ceased to be agriculturists.*

Where the judgment-debtors came of an agriculturist caste and cultivated the soil and had no other occupation, the mere fact that they had obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy did not necessarily imply that they had themselves ceased to be agriculturists or that they no longer occupied the houses (sought to be attached and sold in execution of the decree against them) in the capacity of agriculturists; and consequently the house was exempt from attachment and sale under Section 60 (*c*) C. P. C. SAMPAT v. RAM PRASAD. 499

———*Section 60(1) (c)—Decree against assets of deceased person in the hands of his successor—Deceased not an agriculturist—Successor an agriculturist—House occupied by suc-*

cessor attached—Whether exempted from attachment.

A decree was passed against the assets of a deceased person (who was not an agriculturist) in the hands of his successor-in-interest (who was an agriculturist). The decree-holder attached a house, which was occupied by the successor, with a view to auction sale; *held,* that it is the occupation of the person in whose hands the assets are at the present time, which should be considered, and the house is therefore exempt from attachment and sale under Section 60 (1) (*c*). BADRI CHANDAN v. INDRAJIT PERTAB BAHADUR. 675

———*Section 64—Partition of undivided property made through award—Subsequently filed in court—Not a private transfer.* MOHAMMED AFZAL KHAN v. ABDUL RAHMAN. 909

———*Section 68—Sale of ancestral property by Civil Court—Whether without jurisdiction.* KARAN SINGH v. SADHO RAM. 1118

———*Section 68 and Or. 21, R. 66(3)—In the statement mentioned in Or. 21, R. 66(3) decree-holder stated property to be sold to be ancestral—Execution case transferred to Collector—Decision as to character of property* res judicata.

The application for an order for sale under Or. 21, R. 66 was accompanied by the statement mentioned in Or. 21, R. 66(3) in which it was stated by the decree-holder that the property to be sold was ancestral, and after enquiry the execution case was transferred to the Collector. Before the Collector, however, the decree-holder stated that the property was non-ancestral and that he did not propose to proceed with the execution, and the record was therefore sent back to the Civil Court. Under orders of the Civil Court the property was put up for sale and purchased by the decree-holder. The judgment-debtor filed an application for the setting aside of the sale. *Held,* (1) that the property to be sold having once been declared as between the parties to be ancestral property, the decree-holder was barred by the principle of *res judicata* from asserting that the property was non-ancestral; (2) that the sale of such property by the court amin was entirely without jurisdiction as the Collector and the Collector alone could sell the property; (3) that the decree-holder himself being the auction-purchaser, it was open to the judgment-debtor to assail the validity of the sale on grounds other than those specified in Or. 21, R. 90 C. P. C.

KARAN SINGH v. SADHO RAM. 1118

———*Section 73—'Where assets are held by a court'—Meaning of—Judgment-debtor deposits a certain sum to secure postponement of sale—Whether money so lying in court is an 'asset' available for rateable distribution.*

The first seven words in Section 73 C. P. C., viz., *where assets are held by a court,* must be given the plain and ordinary construction, and the word 'assets' is not confined to 'assets' realised by sale or otherwise in execution of a decree.

The property of a judgment-debtor was about to be put up for sale at the instance of a decree-holder when the judgment-debtor deposited a certain sum in court in order to secure the postponement of the sale. Thereupon another decree-holder, who had, before the above-mentioned payment by the judgment-debtor, made an application to the court for the execution of his decree for the payment of money passed against the same judgment-debtor, claimed to have a rateable distribution of the aforesaid sum held by the court; *held,* that the money so lying in court was an 'asset' available for rateable distribution. SIDH NATH TEWARI v. TEJ BAHADUR SINGH. 359

———*Section 80—Insolvent—Receiver—District Judge, on being moved by creditors, orders receiver to attach property alleged to be insolvent's—Receiver attaches property—Plaintiff sues for a declaration that property belongs to him—Whether notice to receiver necessary.*

Where, in the first instance, plaintiff sued for a declaration that a deed of gift executed by her be set aside as it was obtained from her by fraud; but finding that the property in respect of which the gift had been executed, had been attached by the official receiver of an insolvent's estate under order of the District Judge, who was moved by the creditors, as the property of the insolvent, the plaintiff claimed a second declaration that the property gifted belonged to her and could not be attached, and she made the donees, the receiver and the creditors parties to the suit, *held*:—

Per PULLAN, J.—that the cause of action arose from the execution of the deed of gift and in the first instance the plaintiff sought relief against the donees who had defrauded her, and as the receiver was impleaded in order that the plaintiff may obtain an ancillary relief, no notice to the receiver under Section 80 C. P. C. was necessary.

Per NIAMATULLAH, J.—that the first relief claimed by the plaintiff was clearly one which had no reference to any act done by the receiver; and as regards the second relief, the suit cannot be considered to be one in respect of any act done by the receiver, the material portion of the plaintiff's cause of action having arisen from the act done by the creditors in successfully moving the District Judge to treat the property as the property of the insolvent, and notice to the receiver under Section 80 C. P. C. was therefore not necessary. SHIYAM DEI v. BANKEY LAL. 797

———*Section 80—Notice under Section 77, Railways Act does not dispense with the necessity of a notice under Section 80.*

Section 80 of the Civil Procedure Code is imperative and therefore a notice under Section 77 of the Railways Act does not dispense with the necessity of a notice under Section 80 C. P. C.

Where a postal receipt of acknowledgment is filed by the plaintiff which purports to be with reference to some document transmitted to a railway authority it cannot be predicated with certainty that the document in question was a notice which fulfilled the requirements of Section 77 of the Railways Act. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. FAZAL UDDIN BADRUDDIN. 1033

———*Section 92—Temple—Maintained by public subscriptions—Open to public for "Darshan"—Suit by worshipper for removal of manager—Trust for public benefit—Whether temple private or public—No presumption.*

There is no presumption that any particular temple is public or private, and whether it is public or private depends on the facts proved in each case.

A temple, which had been held by professed ascetics in succession from Gurus to Chelas, came to defendant by his being a Chela of his Guru and not by any deed of gift or will. The temple was maintained by public subscriptions and it was open to the members of the public attending it for "Darshan" or "worship" to make offerings. On a suit brought by plaintiffs, who were in the habit of worshipping at the temple and of making offerings and giving subscriptions, the defendant was removed from the office of manager on the finding that he had wasted the temple property. *Held*, that the endowment was a public endowment and the temple was a trust for the benefit of the public and therefore Section 92 C. P. C. applied and plaintiffs were entitled to maintain the suit. SAHDEO DAS v. RAJA RAM. 886

———*Section 93—Construction of—Projected suit under Section 92—Previous sanction of Local Government necessary—To enable Legal Remembrancer to exercise his powers.*

On a true construction of Section 93 of the Code of Civil Procedure the previous sanction of the Local Government in relation to every projected suit under Section 92 of the Code is necessary to enable the Legal Remembrancer to exercise his powers. Where a suit was instituted merely with the sanction of the Legal Remembrancer and it was not shown that any sanction of the Local Government had been obtained for the institution of such suit, *held*, that the suit was incompetent and must fail PREM NARAIN v. RAM CHARAN. 182

———*Section 104(b)—Civil suit—Defendant ordered to produce a lady in court for internal medical examination—Lady not produced—Defendant ordered to be arrested and detained in civil prison—Order* ultra vires.

In a civil suit one of the points for decision was whether a lady had ever given birth to a child. On the plaintiff's application the learned judge ordered the defendant to produce her in court 'so that she may be required to undergo medical examination'. As she was not produced on the date fixed, the learned judge concluded that the defendant was responsible for her non-appearance and ordered that the defendant who was present in court 'be arrested atonce and detained in the civil prison'. A commissioner, who was appointed for the purpose, produced the lady in court. The learned judge examined the lady and noted that she was willing to submit herself to medical examination by a lady doctor. The medical examination of the lady took place at the Zenana Hospital; *held*, (1) that the learned judge did not profess to act on the assumption that the defendant was in contempt, and his order for the arrest and detention of the defendant in the civil prison was *ultra vires*, (2) that the circumstances in which she was brought to court and detained showed that her consent was wrung out of her because of the fear under which she was placed; and an internal examination of a lady, if not voluntarily submitted to by her, would amount to assault. PADARATH TEWARI v. DULHIN TAPESHA KUERI. 221

———*Section 109—'Final order'—Meaning of*

—Order passed on appeal by High Court setting aside the ex parte *decree—Whether amounts to 'final order'.*

A final order within the meaning of Sec. 109 C. P. C. need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, it is a final order within the meaning of that section.

On appeal to the High Court from an order of the lower court rejecting an application under Or. IX, R. 13 C. P. C. for setting aside an *ex parte* decree, the High Court allowed the appeal and set aside the *ex parte* decree with the result that the original suit was restored to its original number to be tried *de novo. Held,* that the order of the High Court is a final order within the meaning of Section 109 C. P. C. and is therefore appealable. KISHAN CHAND v. LACHHMI CHAND. 838

———*Section 109 (a)—"Final order passed on appeal"—Construction of.*

The words "final order passed on appeal" in Sec. 109 (*a*) should be construed broadly, and include an order directing the dismissal of an appeal consequent upon the appellant's failure to furnish security for costs of the respondent. MAHADEO SAHAI v. THE SECRETARY OF STATE FOR INDIA. 254

———*Section 109 (a)—Order granting an application for review of judgment—Not a 'final' order appealable to Privy Council.*

An order made on an application for review of judgment that the appeal be re-heard in the light of new and additional evidence in the shape of a deed of gift, does not finally dispose of the dispute between the parties but re-opens the decree that was passed originally by the court, and therefore the order for review is not a final order within the meaning of Sec. 109(*a*) C. P. C. which is appealable. AMBIKA PRASAD v. DEVI DAYAL. 235

———*Sections 109 (c) and 151—High Court passes order of suspension against an advocate—Leave to appeal to Privy Council granted—Whether High Court can order that suspension should remain in abeyance.*

Where leave to appeal to Privy Council is granted to an advocate from an order of suspension passed against him by a Full Bench, the

High Court has inherent jurisdiction to order that the order for suspension should remain in abeyance till the appeal is disposed of by the Privy Council. AN ADVOCATE OF BENARES—*In the matter of.* 861

———*Section 110—Appellant's failure to furnish security for the costs of respondent—Order dismissing appeal—Whether "affirms decision of court below".*

Where on the application of the respondent under Or. 41, R. 10 the High Court ordered the appellant to furnish security for the costs of the respondent, and on his failure to do so, the appeal was dismissed, *held,* that the order of the High Court dismissing the appeal is an order affirming the decision of the court below within the meaning of the last paragraph of Sec. 110 C. P. C. The words in Sec. 110 C. P. C. are "affirms the decision of the court", and not "affirms the decision of the court on the merits". MAHADEO SAHAI v. THE SECRETARY OF STATE FOR INDIA. 254

———*Section 110—Application for leave to appeal—From decree in a suit for partition—Valuation—Whether value of whole estate to be taken into account.*

Where an application is made for leave to His Majesty in Council from a decree in a suit for partition, the value of the whole estate is the value to be taken into account. The suit for partition could not be decreed without considering the value of the entire estate and the method in which the partition should take place and the decree therefore at least indirectly involved a question respecting the whole estate. MOHAMMAD ASGHAR v. ABIDA BEGUM. 730

———*Section 115—Munsif dismissing case behind back of parties on date not fixed for hearing—Whether revision lies.*

Where the munsif took up a case on a date which was not fixed for hearing and dismissed the suit behind the back of the parties by accepting the sworn testimony of the referee, *held,* that the munsif's order was irregular and without jurisdiction, and was open to revision under Sec. 115 C. P. C. BASDEO SINGH v. RAM RAJ SINGH. 71

———*Section 115 and Land Acquisition Act, Section 18—Order passed by Collector under Sec. 18 refusing to make reference to the District Judge—Whether High Court can revise order.* BHOJANI LAL v. SECRETARY OF STATE. 769

———*Section 115 and Municipalities Act, Sec.*

318—Order of District Magistrate—Passed in exercise of appellate jurisdiction conferred by Sec. 318—Whether revision lies to High Court. BISHAMBHAR NATH v. ACHAL SINGH. 8[illegible]6

———*Section 115 (c)—Interpretation of—When High Court can interfere.*

Per BOYS, J.—Under Sec. 115, Clause (*c*) C. P. C. any illegality or material irregularity may be a basis for revising the order of the lower court, and it is left entirely to the Revision Court, to determine whether there has been such illegality or material irregularity as will dispose it to interfere. If a question of jurisdiction is involved, the Court may act under Clause (*a*) or (*b*).

Per NIAMATULLAH, J.—In view of authoritative judicial pronouncements the words of Sec. 115 (*c*) must be interpreted as implying that a mere error of law in deciding a case cannot be said to be an illegal or irregular exercise of jurisdiction. THE DISTRICT BOARD OF FARRUKHABAD v. IKHLAQUE HUSAIN. 803

———*Section 122—Rules framed under—Can only regulate procedure of subordinate courts—Jurisdiction cannot be taken away.*

The mere fact that a rule made by the High Court under Sec. 122 C. P. C. is imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the subordinate court and make it helpless in the matter. Under Sec. 122 the High Court can only regulate the procedure of the subordinate courts, and cannot take away their jurisdiction. ABDUL WAHID v. TRIBHAWAN DAS. 13

———*Section 144—Payment made under an order of insolvency court—Order set aside on appeal—Whether insolvency court has jurisdiction to order refund.* PANNA LAL SHAM LAL v. ABDULLAH USMAN. 1095

———*Section 144—Suit for dissolution of partnership in two factories—Defendant in possession—Suit decreed—Decree included appointment of receiver—By agreement each party agreed to manage one factory—Decree set aside on appeal as no valid partnership existed—Defendant dies—His son entitled to possession of factory placed under plaintiff's management.*

A suit for dissolution of partnership in two factories was decreed and the decree included the direction that a receiver be appointed, but the parties came before the court and agreed that one factory be managed by defendant and the other by plaintiff. On appeal by defendant, the High Court set aside the decree holding that there was no valid partnership. Defendant having died, his adopted son applied for restitution under Sec. 144 C. P. C. seeking *inter alia* to be put in possession of the factory which was under the agreement placed under plaintiff's management. *Held*, that as the defendant was in possession when the suit was brought, he could recover possession by restitution, and as there was no proof that his possession terminated with his death, his son was entitled to represent him after his death and to recover possession and profits, if any, accruing from the factory during plaintiff's management. SHANTI LAL v. RAM GOPAL. 239

———*Section 145—Application by plaintiff in a pending suit for stay of sale in execution of a decree—Sale stayed on appellant filing a bond in plaintiff's suit—Whether decree-holder can execute decree against appellant.*

Where on the application of the plaintiff in a pending suit, a sale in execution of a decree was stayed pending the disposal of the plaintiff's suit, on an undertaking being given by the present appellant by execution of a bond *filed in the plaintiff's suit*, that if the plaintiff's suit was dismissed and the decree-holder suffered any loss, the loss might be made good from certain specified properties of the appellant. The plaintiff's suit was dismissed and the decree-holder, who had suffered a small loss, proceeded to execute the decree against the appellant, *held* (1) that the decree could not be executed against the appellant as the undertaking was given in the plaintiff's suit and not in the execution proceedings relating to the decree sought to be executed; (2) that Sec. 145 C. P. C. was inapplicable to the present case. SAHU RAM KISHORE v. CHIRANJI LAL. 1060

———*Section 151 and Or. 41, R. 5—Appeal from preliminary decree—Final decree passed during pendency of appeal—No appeal from final decree—Whether appellate court empowered to stay execution of final decree.*

The High Court has power, under Sec. 151 C. P. C., to order stay of execution of a final decree during the pendency of an appeal from the preliminary decree, if, having regard to the ends of justice, it is expedient. JANKI DAS v. SHEO PRASAD. 43

———*Section 151 and Or. 41, R. 5—Appeal from preliminary decree—Proceedings for preparation of final decree—Whether should be stayed.*

It is generally expedient that proceedings for the preparation of the final decree should not

be stayed pending an appeal from the preliminary decree because the mere passing of a final decree will not, in any way, affect the rights of the parties to the appeal from the preliminary decree. Janki Das v. Sheo Prasad. 43

———*Sections 151, 152 and 153—Property mortgaged—Misdescribed in mortgage deed, plaint, decree, sale certificate and* dakhalnama *owing to accidental slip—Court empowered to make corrections necessary for ends of justice.*

The language of Section 152 C. P. C. is wide enough to cover the correction of mistakes made by the parties themselves. The power of the court to make corrections necessary for the ends of justice is not confined only to powers exercisable under Sec. 152. Extensive powers may also be exercised under Secs. 151 and 153.

Where by an accidental slip the property mortgaged in village "Nawadiya Zamania Nagla" was described in the deed as "Nagla Zamania Nawadiya", but this misdescription was discovered only when the mortgagee, who in his suit upon the mortgage had purchased the property, obtained sale certificate and formal delivery of possession, applied for mutation, *held,* that this was eminently a case in which the accidental slip in the plaint, decree, sale certificate and *dakhalnama* should be corrected as the correction was necessary for the ends of justice. Aziz Ullah Khan v. The Court of Wards, Shahjehanpur. 784

———*Order 1, R. 10 (2)—Order exempting defendant from suit and allowing his name to remain in decree—Order tantamount to dismissal of suit as against him.* Said Ahmad v. Raza Husain. 1036

———*Order 6, R. 16—Hindu son's suit—To set aside alienation by father—Plaint alleges that father was 'extravagant and dissolute'—Paragraph to be struck out.*

In a suit by a Hindu son to set aside an alienation by his father on the ground that the debt contracted was tainted with immorality, the immorality must be pleaded with particularity, that is, the exact nature of the immorality must be specified, and it must be shown with precision exactly how it came about at the particular time that the particular money was needed and used for the particular immorality charged. No judge should allow a general charge of immorality (e.g., that the father was 'extravagant and dissolute') to remain on record; and if, on the application of the opposite party, the whole statement is struck out, such opposite party should have the costs. Jagdish Narain v. Hazari Lal. 309

———*Order 7, R. 11—'Cause of action'—Meaning of.*

The cause of action as used in Or. 7, R. 11 C. P. C. does not mean a claim which is still enforceable under the law of limitation. Bhajja v. Mohammad Said Khan.. 489

———*Order 9, R. 4—Suit dismissed in default of appearance—Plaintiff present but went to fetch vakil—Restoration—When should be granted.*

The courts should not ignore the somewhat natural tendency among the litigants of hurrying to their pleaders, when their cases are called on, with the object of fetching them. Where a pleader is not forthcoming or is busy elsewhere and the case is dismissed in the meantime, the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice which it is intended to subserve.

Applicant's suit having been dismissed in default of appearance, he immediately applied for restoration and his affidavit stated that he was present when his case was called on but he went to search his vakil who was busy in another court and that on his return he learnt that his suit had been dismissed. *Prima facie* the allegations in the affidavit were not open to suspicion nor was there any counter-affidavit. *Held,* that applicant's suit should be restored. Rama Shankar v. Iqbal Husain. 480

———*Order 9, Rules 8 and 9—Suit for profits—Dismissed for want of prosecution—Suit subsequently restored—Whether High Court can revise order restoring suit.* Bohra Panna Lal v. Basdeo. 1100

———*Order 9, R. 13—Decree specifies liability of each defendant—As against one* ex parte*—Other defendants appeal—Appeal dismissed—No notice served on defendant against whom* ex parte *decree passed—Whether he can apply to court of first instance to set aside* ex parte *decree.*

The decree passed in a suit for contribution specified the liability of each defendant. The decree as against one defendant, viz., the present applicant, was *ex parte.* An appeal by the other defendants was dismissed by the Additional Subordinate Judge. The present applicant was made a party in the appeal but no notice was served on him. His application for setting aside of the decree having been disallowed by the munsif on the ground that no such application could be entertained by him, he appealed against this decision and on the same day applied to the Subordinate Judge for rehearing the appeal against the original decision of the munsif. Both the appeal and the application was dismissed. *Held*, that there was still a subsisting decree against applicant in the munsif's court and he was acting rightly when he applied to that court to have the decree against him set aside; that Section 14 of the Limitation Act applied to this case and the Subordinate Judge was wrong in dismissing the application for rehearing the appeal in his own court on the ground that it was too late. RAGHUNANDAN CHAUBE v. BHUWAL TEWARI. 257

———*Order 9, R. 13 and Or. 32, R. 3*—Ex parte *decree against minor—Guardian* ad litem *negligent—Whether court has power to set aside decree and appoint another guardian—Position of minor in the suit.*

Where on the application of the minor the court set aside an *ex parte* decree against him on the ground that the minor's father who was his guardian *ad litem* did not properly represent him and removed the father from the guardianship and appointed the mother as the minor's guardian and allowed her to file a written statement, *held,* that the court had jurisdiction to pass the order that it did and it was right in not compelling the minor to file a separate suit.

When a minor is made a defendant in a suit, it is the minor who is a party to the suit and not his guardian *ad litem.* The guardian *ad litem's* name appears on the record in order to represent the minor but not in his capacity as a party to the suit. Where the guardian *ad litem* is negligent, it is open to the minor to appear in court through another guardian and ask the court to make proper orders for the protection of his interest. MOTI CHAND v. BALRAM DAS (MINOR, THROUGH MUSAMMAT SARASVATI DEVI). 1128

———*Order 10, R. 4(2)—Power 'to make such order in relation to the suit as it thinks fit'—Whether includes power to dismiss suit for default of appearance under Or. 9.*

The power given to a court under Or. 10, R. 4(2) 'to make such order in relation to the suit as it thinks fit', includes a power to dismiss the suit for default of appearance under Or. 9. NANDAN SAHU v. HARI SHANKAR. 726

———*Order 21, R. 1—Judgment-debtor makes payment to receiver—No order of court authorising payment—Payment to receiver at judgment-debtor's risk.* BRIJ INDAR KUAR v. JAI INDAR BAHADUR. 747

———*Order 21, R. 16, Proviso to—Applicability of—Decree under Or. 34, R. 6 against heirs of mortgagor—A judgment-debtor dies—Decree-holder inherits an interest in his estate—Whether right to execute decree extinguished.*

The proviso to Or. 21, R. 16 applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case it is obvious that the person who acquires a decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors, and there is complete merger. In such an event, the execution cannot proceed against the latter.

Where the decree-holder, who had obtained a decree under Or. 34, R. 6 against the heirs of the mortgagors, was entitled to recover the whole amount against the estate of the mortgagor in the hands of his heirs, including the decree-holder's husband, and the subsequent death of her husband only made her inherit a part of the share which the deceased had got in the assets of the original mortgagor, *held,* that inasmuch as this inheritance did not make her jointly and personally liable for the payment of the whole decree which she held, her right to execute the decree was not extinguished simply because she became an heir to one of the heirs of the original judgment-debtor. But inasmuch as part of the assets of the original judgment-debtor became vested in her by operation of law, she was bound to give credit for a proportionate amount of the decree, and accordingly the amount had to be reduced *pro tanto.*

The substitution of the expression "for the payment of money", for the words "for money" in the proviso in the new Code was intended to emphasize that the proviso was confined to cases of personal decrees. The proviso cannot apply to a case where the decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors. In such a case at no time the decree can be said to have been transferred to a person who is one of two or more persons against whom a decree for the payment of money exists. ASIA BIBI v. MALIK AZIR AHMED. 230

———*Or. 21, R. 24(2)—Warrant of arrest sent to Nazir for execution—Nazir's power of delegation.*

There is nothing in the Civil Procedure Code which would prevent the officer to whom the warrant is issued from delegating his authority to some other subordinate officer for executing the warrant. Jagannath v. King-Emperor. 179

———*Order 21, R. 37—Judgment-debtor—Warrant for arrest and notice under Or. 21, R. 37 issued simultaneously—Warrant did not disclose name or official designation of person to whom issued—Warrant defective and illegal.*

Where a warrant for arrest, which did not disclose the name or official designation of the person to whom it was issued for execution, was served on a judgment-debtor simultaneously with a notice under Or. 21, Rule 37 C. P. C. calling upon him to appear before the court on a specified date, *held*, that the warrant was defective in itself and its issue was illegal as the court by issuing a notice under Or. 21, R. 37 C. P. C. had taken away its own right to issue a warrant of arrest and the question of arrest could only arise when the judgment-debtor failed to comply with the notice, and the persons who released the judgment-debtor from custody committed no offence under Sec. 225B of the Penal Code. Fattu v. King-Emperor. 1073

———*Order 21, Rule 49—Partner—Judgment-debtor—Interest charged—Receiver appointed—Whether receiver can be appointed manager of entire partnership.*

While charging the interest of a partner who is a judgment-debtor and vesting it in the receiver under Order 21, Rule 49 C. P. C., the court cannot appoint the receiver as the manager of the entire partnership as this will involve the dispossessing of the other partners. Lachhmi Narain v. Piarey Lal. 516

———*Order 21, R. 53 (6) and Sec. 64—Decree-holder seeks to execute decree by attachment of another decree—Judgment-debtor of attached decree, who had applied for leave to appeal to Privy Council, compromises with his decree-holder, who accepts a reduced amount—Application for leave to appeal dismissed—Whether attaching creditor is bound by compromise.*

A simple money decree-holder sought to execute his decree by the attachment of another decree for the payment of money, which his judgment-debtor had obtained against a third person. When these execution proceedings were taken, an application for leave to appeal to the Privy Council by the judgment-debtor bound by the decree attached was pending in the High Court, and he entered into a compromise with his decree-holder under which the decree-holder agreed to give up a portion of the decretal amount, and this compromise was filed in the High Court, and the reduced decretal amount having been paid, the High Court dismissed the application for leave to appeal to Privy Council.

Held, that the compromise, which was not invalid by virtue of the provisions of Sec. 64 C. P. C., was in the nature of an adjustment of the attached decree and came within the purview of Or. 21, R. 53 (6) C. P. C., and no adjustment of the attached decree with notice or knowledge of such attachment can have any effect as against the attaching creditors. Lachhmi Narain Girdhari Lal through Lachhmi Narain v. Mansa Ram Murlidhar through Ram Saran (*minor*) under the guardianship of Satla Prasad. 792

———*Or. 21, R. 63 and Tenancy Act (III of 1926), Secs. 264 and 247—Order of Assistant Collector under Or. 21, R. 58—Appeal to Collector—Appellate order against claimant—Whether claimant has a right to institute a suit under Or. 21, R. 63.* Bikram Singh v. Dip Singh. 514

———*Order 21, R. 66—Proceedings under—Order fixing valuation to be entered in the sale proclamation—Whether appealable.*

An order passed by the Executing Court in proceedings under Or 21, R 66 to the effect that "in the sale proclamation the valuation be fixed at 50 times of the land revenue", does not amount to a decree and is not appealable. Ram Charan Sahu v. Jumna Prasad Sahu. 859

———*Order 21, R. 86—Decree-holder himself declared purchaser for a sum exceeding decretal amount—Amount due not paid into court within time—Court to resell property—Any interested person can move the court to do its duty.*

Once the initial step has been taken by the decree-holder and an application for execution of decree has been made and a sale in pursuance thereof has taken place but the sale becomes abortive in consequence of the decree-holder not fulfilling his obligation as an auction-purchaser, the law casts an imperative duty on the court to have the property re-sold and to recover the balance from him as a defaulting auction-purchaser. There is nothing in law to justify the view that re-sale should not take place unless the court is moved by the decree-holder. Anyone who is interested in having the property re-sold can move the court to do what is its duty. Chitar Singh v. Lachmi Narain. 501

———*Order 21, R. 89—Application for setting aside sale—R. 89 complied with—Poundage fee as required by R. 15, Chapter XVII, General Rules (Civil) not paid—Effect of—A mere irregularity—Court has power to entertain application and grant time.*

Where all the conditions required by Or. 21, R. 89 were complied with by the applicant but as he failed to pay the poundage fee by affixing stamps to the application for setting aside the sale as required by R. 15 of Chapter XVII of General Rules (Civil) framed by the High Court under Sec. 122 C. P. C., the lower courts rejected the application on the ground that they had no jurisdiction *held,* that the failure to comply with R. 15 of Chapter XVII was a mere irregularity, and would not prevent the court from entertaining the application under Or. 21, R. 89, and granting time to deposit the poundage fee. Abdul Wahid v. Tribhawan Das. 13

———*Order 21, R. 89—Several items sold on same date—Judgment-debtor's application for setting aside of sale of one item only on payment of its price and penalty—Whether can be allowed.*

Where several items were sold on one and the same date and the judgment-debtor applied to have the sale of one item set aside on payment of its price plus the penalty and claimed reduction on account of the prices paid by the auction-purchasers of the other items, *held,* that the amount which the judgment-debtor need not deposit is the sum which has been received by the decree-holder between the date of the proclamation and the date of the deposit or, at any rate, before the expiry of 30 days from the date of the sale, and inasmuch as the sale of the other items cannot be confirmed before the expiry of the prescribed 30 days and the decree-holder has therefore no right to apply for the payment of the money to him, he cannot be taken to have 'received' the prices of the other items within the meaning of Or. 21, R. 89 C. P. C. Mannu Naik v. Mathura Prasad. 1107

———*Order 21, R. 90 and Or. 21, R. 69(1)—Reasons of adjournment of sale not recorded in writing—Whether constitutes material irregularity.*

Where, on the date fixed for sale of property, in execution of a decree on a mortgage, the sale officer verbally announced to those present that the sale was to take place on the following day but he did not record his reasons in writing for the adjournment nor notify the hour when the sale was to take place, nor was there any mention in the sale proclamation of any incumbrance upon the property although it was subject to a prior incumbrance, and the property, which had been once purchased by the decree-holder himself, in 1918, for Rs.10,000, was eventually sold in 1931, for Rs.2,700, *held,* that the property was sold for an inadequate consideration as a result of material irregularity in publishing and conducting the sale. Gulab Singh v. Raghubir Saran. 357

———*Order 21, Rule 92 and Sec. 151—Whether sale can be set aside outside the provisions of Order XXI—Auction-purchaser under honest mistake—That amount for which property was knocked down included mortgage money also—Whether court can set aside sale.*

Where the court set aside a sale on the ground that the auction-purchaser was under an honest mistake that the amount for which the property was knocked down included the mortgage money also, and the auction-purchaser was not misled by anything done or said by the sale officer, *held,* that there is no inherent jurisdiction in a court to set aside a sale outside the provisions of Order XXI, and the order of the court was *ultra vires.*

Where the Collector is appointed the sale officer by the court, it is he who has to sell the property and to declare the purchaser. Sridat v. Mohar Singh. 392

———*Order 21, R. 93—Property sold under mortgage decree—Subsequently third party declared true owner of property—Auction-purchaser loses property—Whether suit to recover money maintainable.*

The doctrine of *caveat emptor* applies to court-sales. The right given to the auction-purchaser being a creation of the statute, the remedy to enforce that right must be confined to that prescribed by the statute. The remedy is to apply for a return of the purchase money under Or. 21, R. 93.

Where a person purchases immovable property at an auction sale in execution of a mortgage decree and subsequently loses the same under a decree passed in a suit brought by a third party against the mortgagor and the mortgagee in which the third party was declared the true owner and entitled to possession, such a purchaser is not entitled to bring a suit for recovery of his purchase money as against the mortgagee decree-holder. Sahu Deputy Shankar (minor) through Bhagwati v. Mangal Sen. 1007

———*Order 21, Rule 103 and Sec. 47—Order under Or. 21, Rule 98—Order came under Sec. 47 also—Whether appeal lay—Order exempting defendant from suit and allowing his name to remain in decree—Order tantamount to dismissal of suit as against him.*

Order 21, Rule 103 merely lays down that where an order is passed against a person under Rule 98, Rule 99 or Rule 101, the order is conclusive, subject to the result of the separate suit; it does not say that where the order falls under some other section as well (e.g., Section 47 C. P. C.), the order would still be conclusive and no appeal would lie therefrom.

In a suit for partition, the appellant was exempted from the suit by the Court but his name appeared in the decree which was subsequently passed. In the execution department the plaintiff sought delivery of possession of the very house which the appellant had been claiming. The attempt was resisted by the appellant, who pleaded that he was the owner of the property. The execution court in a summary proceeding held that the appellant had failed to prove his title, and also went on to hold that he had been set up by the judgment-debtor. His objection was accordingly dismissed and possession was ordered to be delivered to the decree-holder. The appellant preferred an appeal to the District Judge, who dismissed the appeal on the ground that the proceedings were under Or. 21, Rules 97 and 98 and no appeal lay to him. *Held,* (1) that the order exempting the appellant and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him and in view of the explanation to Section 47 C. P. C. he must be deemed to be a party for all purposes under that section and was entitled to put forward his title to the property, (2) that even if it be conceded that the case in part fell under Or. 21, Rules 97 and 98, the main dispute between the parties really came within the scope of Section 47 C. P. C., and the order of the execution court being under Section 47 (read with Section 2) C. P. C., an appeal lay to the District Judge. Said Ahmed v. Raza Husain. 1036

———*Order 22, R. 3—Court disallows substitution of names in place of deceased plaintiff —Order not appealable.*

- Where a court rightly or wrongly comes to the conclusion that certain persons cannot in terms of Or. 22, R. 3 C. P. C. be substituted in place of a deceased plaintiff, such an order is not a decree nor is it an order from which an appeal has been provided in the C. P. C. Puttoo Lal *v.* Munshi Lal. 308

———*Or. 22, R. 4—Plaintiffs were owners of a firm—But suit brought in the names of individual owners—Interest of each not specified in plaint—Suit decreed—Second Appeal—One respondent dies—Legal representatives not brought on record within time—Appeal abates as against all respondents.*

Plaintiffs jointly owned a firm but the suit for recovery of money was brought in the names of individual owners, and the interest of each was not specified in the plaint. The lower appellate court passed a decree in favour of all the plaintiffs jointly, and the record was silent as regards their right *inter se.* The defendant filed a second appeal. One of the plaintiff-respondents died during pendency of appeal and his legal representatives were not brought on record within limitation. *Held,* that the appeal abated as against all the respondents. Shri Chand (*minor*) through Laraiti v. Bansidhar. 219

———*Order 22, R. 6 and Limitation Act, Art. 176—Plaintiff dies between conclusion of hearing and pronouncement of judgment—Application for leave to appeal by legal representatives—Limitation.*

Where a plaintiff dies between the conclusion of the hearing and the pronouncing of the judgment, the decree must be taken to have been passed in his lifetime (Or. 22, R. 6), and no application for substitution of names is necessary. Rule 3, Chapter II, of the Rules of the Allahabad High Court, requires an application by the legal representatives of a party dying after the decree to apply for permission to appeal. For compliance with that rule there is no limitation and all that is necessary is that the appeal itself should be filed within time. Chanderdeo Chaube v. Megh Narain. 1069

———*Order 22, R. 9—Application under—Ignorance of death of a respondent—No negligence or omission on the part of appellant—Whether amounts to 'sufficient cause' within Sec. 5 Limitation Act.*

Section 5, Limitation Act, is expressly made applicable to an application to set aside the abatement of an appeal so far as a deceased respondent is concerned and the period of limitation prescribed by Art. 171 can be extended, when 'sufficient cause' is shown.

Ignorance of the death of a respondent, in the absence of any negligence or other act or omission for which the appellant can be held responsible, is "sufficient cause" within the meaning of Sec. 5, Limitation Act. LAKSHMI CHAND v. BEHARI LAL. 18

———*Order 22, R. 9—Preliminary decree—Death of decree-holder—Application by sons for making final decree without any prayer for setting aside automatic abatement—Final decree passed—Whether passed without jurisdiction.*

On the death of the decree-holder after the passing of the preliminary decree, his sons made an application to the court for making the final decree without any prayer for setting aside the abatements which had automatically taken place on the failure of the sons to obtain a substitution of names within 90 days of the death of their father, and a final decree was passed. *Held,* on a suit for declaration that the final decree was a nullity, that the nature of an abatement is not a final disposal of the case either by dismissal or by decreeing it and the court does not cease to have jurisdiction in the matter in which an abatement takes place, and the final decree is not therefore bad for want of jurisdiction. BADRI NATH v. RAJA RAM. 883

———*Order 23, R. 3—'Lawful compromise'—Meaning of—Compromise as between parties that suit be dismissed—Purchaser of plaintiff's rights thereupon asks court not to record compromise, and make him a party—Whether he can object to passing of a compromise decree.*

In a contested suit the parties filed a compromise (after the arguments were concluded) that the suit be dismissed. The present respondent, who had purchased the rights of the plaintiff during the pendency of the suit, thereupon presented an application asking that he should be made a party to the suit and that the compromise should not be accepted. The court took evidence as to the execution of the sale deed in favour of the respondent, made him a party, refused to accept the compromise and decided the suit on its merits in favour of the respondent; *held,* that the compromise was not in its terms or nature 'unlawful', and a compromise is not unlawful because it is alleged by some third person that his rights were infringed by the compromise, and a decree must be passed in accordance with the compromise, and the application of the respondent should have been rejected by the court *in limine.* LARAITI v. SHIAM SUNDER LAL. 509

———*Order 23, R. 3—Parties agreeing to abide by statement of a certain individual—Effect of agreement—When agreement may be resiled from.*

The agreement to abide by the statement of a certain individual nominated by the parties to a pending action, amounts to an agreement to accept an adjustment of the case which might ensue as the result of the statement made by the nominee, the said statement furnishing the agreed data whereon the adjustment is to be founded; and one party or the other has the right to resile from the agreement any time during the pendency of the suit and so long as no *proper* statement is made by the referee in terms of the agreement. BASDEO SINGH v. RAM RAJ SINGH. 71

———*Order 26—Whether court can issue commission to a person—To hear a woman sing and report whether she was a public prostitute.*

There is nothing in the Code of Civil Procedure authorizing a court to issue a commission to a person directing him to hear a woman sing and then report not only as to her skill as a singer but also as to her occupation in life so far as it could be deduced from her musical talents. MUNICIPAL BOARD, THROUGH THE CHAIRMAN v. ASGHARI JAN. 117

———*Order 30, R. 4—Inapplicability of—Firm owned by plaintiffs but suit brought in names of individual partners.* SHRI CHAND v. BANSIDHAR. 219

———*Or. 32, R. 3—*Ex parte *decree against minor—Guardian* ad litem *negligent—Whether court has power to set aside decree and appoint another guardian—Position of minor in the suit.* MOTI CHAND v. BALRAM DAS. 1128

———*Order 33, R. 5 (d)—Application for permission to sue as a pauper—By a mere Sanyasi—Neither nominated as successor by last Mahant nor placed on* Gaddi *by electoral body—No cause of action disclosed.*

A person, who is a mere Sanyasi of the math and who has not been nominated as the successor by the last mahant, or elected by the mahants, the members of the sect and the *raises* and placed upon the *gaddi* after due performance of rituals is not competent to maintain a suit for ejectment and does not possess the necessary cause for action and therefore an application for leave to sue in *forma pauperis*

by such a person is liable to dismissal under Or. 33, R. 5(*d*) C. P. C. PARMARATH GIR v. RAM SARUP SINGH *alias* TRIGUNANAND. 303

———*Or. 33, R. 5(d)—Application under—Not to be rejected merely on the ground of limitation—When applicant found to be a pauper—Or. 7, R. 11—'Cause of action'—Meaning of.*

When the court finds that the plaintiff is a pauper and is unable to pay the court-fees, it ought not to reject the plaint on the mere ground that, in its opinion, the claim, if entertained, would be barred by time. That is a question which can properly be decided after the plaint has been admitted. BHAJJA v. MOHAMMAD SAID KHAN. 489

———*Or. 34, R. 6—Applicable only to cases where there has been a sale.*

In a suit for sale on a mortgage, a final mortgage decree was passed, but the mortgagee never brought the property to sale because one *D* brought a suit for a declaration that the mortgaged property belonged to him and this suit was decreed in favour of *D*. The mortgagee then applied for a decree under Or. 34, R. 6 C. P. C. *Held*, that Or. 34, R. 6 C. P. C. applies only to cases where there has been a sale and where the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff. When there has been no sale, an application under R. 6 of Or. 34 does not lie. BABU LAL v. RAGHUNANDAN. 311

———*Or. 34, R. 6—Decree under—Against mortgagor who has obtained an order of discharge by insolvency court—Whether can be passed.*

The mortgagor was adjudicated an insolvent with reference to debts provable in insolvency. In the suit for sale by the mortgagee, the mortgaged property was sold in execution of the mortgage decree after the order of discharge. As the net proceeds of the sale were found insufficient to pay the amount due, the mortgagee applied for a decree under Or. 34, R. 6; *held*, (1) that the debt due to a secured creditor is not provable in insolvency and the order of discharge cannot affect his rights, (2) that the order of discharge cannot take away the statutory right of the decree-holder under Or. 34, R. 6, which materialised after the order of discharge. NIAZ AHMAD v. PHUL KUNWAR. 237

———*Or. 34, R. 14—Suit on promissory note—Compromise—Payment by instalments—Property hypothecated—Decree in terms of compromise—Whether hypothecated property could be sold in execution.*

In a suit on foot of a promissory note, a compromise was entered into between the parties which provided that an instalment decree be passed in favour of the respondent and that in default of payment of two consecutive instalments, the decree-holder could obtain execution of his decree in respect of the entire decretal amount remaining unpaid. The appellant further hypothecated certain property which was specified in the compromise; but the compromise was silent as regards the manner in which the sale of such property was to be obtained. A decree was passed on foot of the compromise. Default having been made in payment of all instalments, the decree-holder applied for execution of the decree by sale of the property hypothecated under the compromise. *Held*: (1) that the compromise in which the liability under the promissory note became merged, created a mortgage or charge and the decree which followed it related to the payment of money in satisfaction of the claim arising under the mortgage or charge previously created by the compromise, and Or. 34, R. 14 was applicable even if it be assumed that the mortgage or charge must precede the decree; (2) that the hypothecated property could not be sold in execution of the decree passed on the compromise, and if the decree-holder desired to have the hypothecated property sold, he must institute a suit under Or. 34, R. 4 C. P. C. POSTIMAL THROUGH CHAMPA LAL v. RADHA KISHAN LAL CHAND THROUGH LAL CHAND. 486

———*Or. 38, R. 5—Notice issued under—Defendant shows cause why he should not furnish security—Court's order accepting defendant's contention falls within Or. 38, R. 6(2)—And appeal lies under Or. 43 (1) (q).*

On the application of the plaintiff under Or. 38, R. 5 the court passed the order—'the defendant will be ordered to appear and furnish security for Rs.23,000 or show cause why it should not be furnished. The property in the list (filed with the plaintiff's application) will be conditionally attached pending such showing of cause". The defendant appeared in court and showed cause why he should not furnish security, and the court cancelled the conditional order of attachment; *held*, that the order of the court accepting the contention of the defendant is an order which falls within Or. 38, R. (6)(2), and is appealable under

Or. 43(1) (*q*) C. P. C. CHOKHEY LAL v. SRI KISHAN. 228

———*Or. 38, R. 6(2)—Notice issued under Or. 38, R. 5—Defendant shows cause why he should not furnish security—Court's order accepting defendant's contention falls within Or. 38, R. 6(2)—And appeal lies under Or. 43(1)(q).* CHOKHEY LAL v. SRI KISHAN. 228

———*Or. 40, R. 1—Decree for payment of annuities—Properties charged with payment—Receiver misappropriates money for payment of annuities—Whether annuitants can enforce charge—Or. 21, R. 1—Judgment-debtor makes payment to receiver—No order of court authorising payment—Payment to receiver at judgment-debtor's risk.*

By his will the testator bequeathed the residence of his estate to the respondent, and by his codicil he left annuities to the appellant and other persons, and charged certain properties with the payment of the annuities. All the annuities fell into arrears, and the appellant brought a suit to recover the arrears of the annuity due to her, for the administration of the estate of the testator, and for the appointment of a receiver. The other annuitants were joined as defendants to the suit. A pleader was appointed receiver without security, and ultimately a decree was passed declaring the sums due to the appellant and other annuitants. The decree provided that the said sums were to be paid partly by sale of securities in deposit with a Bank and partly from money to be paid into court by the respondent. The decree also provided that all the annuitants were entitled to recover their annuities from the properties charged, and as regards future payments it was directed that they should be made every six months. Subsequently the receiver obtained possession of the securities from the bank and absconded. Having failed to recover the annuity due to her, the appellant presented an application for execution of the decree by sale of the properties charged. *Held,* (1) that the charge created by the codicil and affirmed by the decree was in no way affected or impaired by the embezzlement of the receiver, and the appellant was entitled to recover the annuity by sale of the properties charged. (2) that in the absence of any order of the court under which the respondent paid or even was authorised to pay the future annuities to the receiver, the respondent paid them to the receiver at his own risk, and the analogy by a judgment-debtor to a bailiff charged with the execution of a warrant of arrest or attachment did not apply. BRIJ INDAR KUAR v. JAI INDAR BAHADUR SINGH. 747

———*Or. 41, R. 5 and Sec. 151—Appeal from an order confirming sale under Or. 21, R. 92—Application by auction-purchaser for delivery of possession under Or. 21, R. 95—Judgment-debtor applies for stay—Whether High Court has power to order stay.*

The judgment-debtor appealed to the High Court from an order confirming the sale of immovable property under Or. 21, R. 92. During the pendency of the appeal the auction-purchaser applied to the court below for delivery of possession under Or. 21, R. 95. The judgment-debtor therefore applied to the High Court for stay of proceedings relating to the delivery of possession. *Held,* (1) that the application for delivery of possession was 'a proceeding under the order' confirming that sale, and the appellate court had therefore power to order stay under Or. 41, R. 5; (2) that assuming that Or. 41, R. 5 did not apply, the appellate court had power under Sec. 151 C. P. C. to stay proceedings in a subordinate court from which an appeal was pending. HIRAMBHO NATH BANERJI v. SAROJINI DEVI. 582

———*Or. 41, R. 6(2)—Interpretation of—Decree—Appeal—Order for sale of immovable property in execution—Whether execution court obliged to stay sale in every case.*

Or. 41, R. 6(2) is not to be interpreted to mean that in *every* case where an order has been made for the sale of immovable property in execution of a decree from which an appeal is pending, the executing court is obliged to stay the sale on the application of the judgment-debtor. HARNARAIN SAHI v. GOVIND RAI. 603

———*Or. 41, R. 11—Order under—Appeal to be admitted on payment of decretal amount within specified period—Whether* ultra vires.

Where an appeal is put up for hearing under Or. 41, R. 11 C. P. C., the admission or rejection of the appeal is to be on the merits. Apart from the discretion to demand security for costs under Or. 41, R. 10(1), there is no power in the appellate court to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. AFZALI BEGAM v. KANHYYA LAL. 722

———*Or. 44, R. 1—Application to file an*

CIVIL PROCEDURE CODE (V of 1908)—Or. 45, R. 7

appeal in forma pauperis—*Whether applicant entitled as of right to be heard.*

On an application to file an appeal in *forma pauperis,* which was laid before the District Judge with a report by the Munsarim drawing his attention to Or. 44, the District Judge passed an order as follows:—"I see no reason to allow this appeal. Application rejected." *Held,* that the applicant is not entitled as of right to be heard, and the order complied with the law. RAM KUMAR v. GIRDHARI LAL. 860

———*Or. 45, R. 7—Counsel files application for leave to appeal to Privy Council—Deposit under Or. 45, R. 7—Appeal succeeds—Whether counsel can claim lien on the deposit for the outstanding fees.* RASHID AHMAD, *In re.* 764

———*Schedule II, Para 20—Agreement to refer to arbitration—Arbitrators to partition entire estate including debts due to the estate—Arbitrators allotted debts* en bloc *to one party and directed heirs to pay in cash half the value of the debts to the other party—Award invalid.*

A dispute having arisen between two brothers as regards their share in the property left by their father, the matter was referred to arbitration. The governing idea in the agreement of reference was that the arbitrators were appointed to partition the entire property. The estate consisted *inter alia* of certain amounts due to the father on bonds, promissory notes, money lending business and *bahi khata* accounts, the total of which amounted to Rs.14,000. The arbitrators treated the entire debts as realisable assets and allotted them *en bloc* to one brother and directed him to pay in cash Rs.7,000 to the other brother as being the cash equivalent of his share in these assets; *held,* that the arbitrators travelled outside the scope of the reference and the award was not valid, and the court was not competent to enforce it. SHEO NARAIN v. BALA RAO. 331

———*Schedule II, Para 20—Agreement to refer to arbitration—Revocation of arbitrator's authority.*

Where a matter is referred to arbitration by an agreement between the parties *without the intervention of a court of justice,* the agreement to refer to arbitration cannot be revoked without good cause and a mere arbitrary revocation will not be permitted by the court. SHEO NARAIN v. BALA RAO. 331

COMPANY—*Shares—Agreement to pay commission or discount for subscription of—Illegal*

COMPANIES ACT (VII of 1913)—Sec. 104

—Agreement to underwrite—Payment of commission or discount—Illegal.

An agreement by a company to pay commission to a person in consideration of his subscribing *in praesenti* for a definite number of shares in the company's capital would be *ultra vires* the company. The law enacts that every member who takes shares in the company in return for cash shall either pay or become liable to contribute their full nominal value and an arrangement whereby he is allowed a rebate or discount on the amount payable by him for the shares for which he agreed to subscribe is illegal. An agreement to underwrite under which a party agrees to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public, stands on the same footing and a payment of any commission or discount as a consideration for an agreement to underwrite is illegal and not binding on the company. THE AUSTRALIAN INVESTMENT TRUST, LIMITED v. THE STRAND AND PITT STREET PROPERTIES, LIMITED. 963

———*Winding up Order—Appeal—Heard after seven years—Appellate court of opinion that order wrongly made—Whether order to be maintained.*

A winding-up order having been made in 1924 by the High Court on appeal, with effect from 1922, the Judicial Committee upon an appeal heard in 1931, although of opinion that the order was not justified when made, did not set aside the order except as to costs, having regard to the lapse of time and intervening events—the business of the company had ceased for years and its undertaking had been broken up, and the task of adjusting liability for the mischief which had resulted from that liquidation presented a prospect of far-reaching and ruinous litigation. RIPON PRESS AND SUGAR MILL CO. v. GOPAL CHETTI. 825

———*Winding-up order on petition of share-holders—Appeal—Form of.*

Where a winding-up order is made upon the petition of share-holders an appeal at the instance of other share-holders is properly brought in the name of the company. RIPON PRESS AND SUGAR MILL CO. v. GOPAL CHETTI. 825

COMPANIES ACT (VII of 1913), *Sec. 104 and Stamp Act, Sec. 2(10)—Deed of conveyance—Test of—Agreement to transfer business, good will, etc.—Agreement for allotment of shares in future—Duty to be paid.* SWA-

DESHI COTTON MILLS CO.—*In the matter of.* 394

———*Sec. 162—Company—Winding-up order on petition of share-holders—Appeal by other share-holders—Duty of Liquidator.*

Where a winding-up order is made upon the petition of share-holders, an appeal at the instance of other share-holders is properly brought in the name of the company. In such an appeal the only duty of the liquidator is from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the court of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the court ought to know, and it is no part of his duty actively to oppose the appeal at the expense of the company. RIPON PRESS AND SUGAR MILL CO. v. GOPAL CHETTI. 825

———*Sec. 162(vi)—Company—Preponderating influence of one share-holder—Of itself no reason for winding-up.*

Under Section 162(*vi*) of the Companies Act, 1913, which empowers the court to wind up a company if it is of opinion that such a course is just and equitable, the fact that one of the share-holders has a preponderating voice in the company by reason of his owning or controlling a large number of shares is of itself no reason for winding up the company. RIPON PRESS AND SUGAR MILL CO., LTD., BELLARY v. GOPAL CHETTI. 825

———*Secs. 174 and 183(2)—Solvent company—Court should have regard to wishes of contributories ascertained by meetings.*

Where a company ordered to be wound up has no creditors, so that the contributories only are interested in the result of the liquidation, the court, under Section 174 of the Companies Act, should have regard to their wishes, ascertained by meetings convened under Section 183(2). RIPON PRESS AND SUGAR MILL CO., LTD., BELLARY v. GOPAL CHETTY. 825

———*Schedule I, Table A, Art. 14—Company—Share—Unpaid calls—Forfeiture—Company entitled to interest on unpaid calls up to date of forfeiture—But no interest claimable from date of forfeiture to date of suit.* BISHAMBHAR NATH v. THE AGRA ELECTRIC STORES, LTD. THROUGH LIQUIDATOR. 354

———*Schedule I, Table A, Art. 28, and Limitation Act, Art. 115—Company—Share—Unpaid calls—Forfeiture—Art. 28 of Table A creates special contract on forfeiture—Limitation—Three years from date of forfeiture.*

On failure of a shareholder to pay the calls due on his share, the company forfeited the share. Subsequently the Company went into liquidation, and within three years from the date of forfeiture, the liquidator instituted the present suit for recovery of money in respect of unpaid calls with interest up to the date of the institution of the suit. *Held,* (1) that under Art. 28 of Table A of the Companies Act the cause of action for the present suit arose when the share was forfeited, and Art. 115 of the Limitation Act applied to the present suit, which was within time. (2) that under Art. 14 of Table A of the Companies Act the liquidator was entitled to interest at 5 per cent per annum on the unpaid calls up to the date of forfeiture but no interest was claimable from the date of forfeiture to the date of suit, in the absence of any provision of law or contract. BISHAMBHAR NATH v. THE AGRA ELECTRIC STORES, LIMITED THROUGH LIQUIDATOR. 354

CONTRACT—*Written contract—Meaning doubtful—Surrounding circumstances at creation of contract—Conduct of parties—Whether can be looked into—To arrive at true meaning.*

Where a written contract was doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subject-matter to which it was designed and intended to apply, as also the conduct of the parties might be looked into to help the court to arrive at the true meaning of the contract. NAND KISHORE v. BEHARI LAL. 329

CONTRACT ACT (IX of 1872), *Sec. 25—"Express promise to pay"—Meaning of.*

It is necessary to show an express promise to pay (i.e., some such words as "I promise to pay") for Sec. 25 of the Contract Act to be applicable, and a mere acknowledgment of liability will not be sufficient. GIRDHARI LAL v. BISHUN CHAND. 279

———*Section 69—'Person interested in payment'—Meaning of—Whether charge created by payment.*

A creditor instituted a suit for a declaration of his right to attach and sell a house, which he alleged belonged to the judgment-debtor, in execution of his decree. He joined as defendants the present appellant to whom the house passed if the title was with the judgment-debtor, and one *K*, who claimed to be the owner

of the house—the present first three respondents being the descendants of *K*. *K* died shortly afterwards. Thereupon *K's* son paid off the decree and retained possession of the house. The present appellant instituted a suit for possession within limitation. The High Court dismissed the suit and held that the previous judgment did not operate as *res judicata.* On appeal the Privy Council took a contrary view on the question of *res judicata* and decreed the suit. The respondents however contended that they were entitled to get the money paid by *K's* son as a condition precedent to the plaintiff getting possession. The Privy Council remanded the case to the High Court for decision on this point. *Held,* that the question whether the previous decision operated as *res judicata* was a difficult question of law, and *K's* son had occasion to believe and did believe that the judgment in the creditor's suit was not conclusive as between the defendants, and that an earlier judgment in which *K's* title to the house was upheld yet stood in his favour, and therefore *K's* son acted as a person interested in payment within the meaning of Section 69 of the Contract Act. (2) that Sec. 69 gave only a personal remedy to *K's* son and there was no charge in favour of *K's* son on the particular property now in suit. Accordingly the present plaintiffs were entitled to a decree for possession without any condition sought to be attached by the defendants. Munni Bibi *alias* Ambika Dei v. Tirloki Nath. 63

———*Sec. 73, and Interest Act—Scope of—Suit by a co-sharer—For his share of profits—Whether plaintiff can be compensated for delay in payment by allowing an equitable rate of interest.*

The observations of the Privy Council do not give rise to the conclusion that interest can be allowed only under the provisions of the Interest Act or of Sec. 73, Illustration (*n*), of the Contract Act. There are circumstances in which interest can be allowed on general grounds of equity and Illustration (*n*) does not cover the whole of Sec. 73 of the Contract Act.

In a suit for his share of rent of certain property against the defendant, who was a co-sharer with the plaintiff and collected rent on behalf of himself and the plaintiff, the plaintiff claimed an additional payment of interest as compensation for delay in making the payment of rent but there was no express contract to that effect; *held,* that the case

fell under the third paragraph of Sec. 73, Contract Act, and the plaintiff was entitled to compensation on the basis of an equitable rate of interest. Abdul Jalil Khan v. Mohammad Abdul Salam Khan. 733

———*Sec. 130 and Succession Act, Sec. 291—Administration Bond under Sec. 291 Succession Act—Surety to—Whether can claim as of right to be released from future liability.* Avinas Chandra Banerji—*In the matter of.* 140

———*Sec. 134—"Act or omission of the creditor"—Meaning of—Failure of creditor to bring suit within limitation against principal debtor—Whether amounts to 'omission'.*

Sec. 134 of the Contract Act intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part. The failure of the creditor to bring a suit within the period of limitation against the principal debtor is not an omission on the part of the creditor which would bring the matter within the provisions of Sec. 134 of the Contract Act. Anand Singh v. The Collector of Bijnor and Udai Raj Singh. 868

———*Sec. 145—Liability of principal debtor to indemnify surety—Limited to amount surety bound to pay at date of suit by creditor against surety.*

The liability of the principal debtor to indemnify the surety is limited to the amount which the surety was bound to pay at the date of the suit instituted by the creditor against the surety. The liability of the principal debtor is not effected by a compromise under which the surety undertook to pay the creditor after a specified period with contractual interest including compound interest up to the date of payment. Anand Singh v. The Collector of Bijnor. 868

———*Sec. 239—Firm—Whether can be partner in another firm—Income-Tax—Firm owned by two partners—Partners interested in other firms also—Income from other firms credited into the books of the firm—Whether partners individually or firm liable to tax.*

Under Sec. 239 of the Contract Act a firm cannot be a partner in another firm.

Where two partners with equal shares, besides owning a registered firm in Benares, were interested in several other unregistered firms bearing the same name, and it was found that although the Benares firm had made no profits in the year of assessment, the other firms had

made considerable profits, and the income received from these firms was credited into the books of the Benares firm, *held*, that subject to the limitation that it does not necessarily follow that the income received by the Benares firm is no part of its own income, the Benares firm cannot legally be a partner in the other firms.

Per SULAIMAN, C. J.—If money had been taken by the partners out of the Benares firm and reinvested by them in other firms, then it is their money and the profits earned on it belonged to them in their individual capacities. If, on the other hand, the money belonged to the Benares firm and was invested by the Benares firm as such and profits on the amount had been received back by the Benares firm, the capital continues to belong to the Benares firm and the income earned thereon is the property of the Benares firm, although the Benares firm cannot in the eye of the law have the status of a partner in the other firms. JAI DAYAL MADAN GOPAL OF BENARES—*In the matter of.* 999

CO-SHARER—*Position of—In relation to other co-sharers.*

A co-sharer is not an agent for the other co-sharers and holds no fiduciary position as regards the other co-sharers of the village. If a co-sharer is not entitled to make any collections under any village custom he may be sued in the civil court for usurping the shares of other co-sharers. If a co-sharer has been, by custom, allowed to make collections for other co-sharers, he may be treated as the *de facto* lambardar, and may be sued under Sec. 164 of the Tenancy Act of 1901 (=Sec. 226 of Act III of 1926). The mere fact that a man who is not an agent has acted contrary to his rights, will not make him an agent for other co-sharers. KANHAIYA LAL v. R. H. SKINNER. 129

———*Co-sharers—Mortgage by one, of his undivided share—Subsequent partition between—Mortgage applies only to property allotted to mortgagor—Civil Procedure Code, Sec. 64—Partition of undivided property made through award—Subsequently filed in court—Not a private transfer.*

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a definite portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. Such partition effected by an award made out of court which was subsequently filed in court and a decree passed thereon, does not amount to a private transfer within the meaning of Section 64 of the Code of Civil Procedure. MOHAMMAD AFZAL KHAN v. ABDUL RAHMAN. 909

COSTS—*Suit decreed against three defendants—Interest of each defendant separately valued—Liability to costs—Proportionate.*

Where a suit was decreed against three defendants, and the interest of each defendant was separately valued, each defendant should contribute to the costs in proportion to the property held by him out of the estate in suit. CHANDI RAM v. KUNJ BEHARI LAL. 411

COURT-FEES—*Court parts with seisin of case—Whether has power to direct recovery of court-fees by attachment of property.*

There is no provision in the Court-Fees Act which justifies a process of attachment for recovery of court-fee after the court finally parts with the seisin of a case, even if the court-fee is payable in law. MOHAMMAD ISMAIL v. LIYAQAT HUSAIN. 165

———*To be determined with reference to plaint as it is, and not as it ought to have been.*

The question of court-fees must be determined with reference to the plaint as it is and not as it ought to have been. If, having regard to the nature of his claim, plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to Sec. 42, Specific Relief Act; but the court cannot say that the plaintiff should have claimed consequential relief and not having done so, he should be deemed to have claimed the consequential relief and was therefore liable to pay an *ad valorem* court-fee on the consequential relief. MOHAMMAD ISMAIL v. LIYAQAT HUSAIN. 165

COURT-FEES ACT (VII of 1870), *Sec. 5—Chief Inspector of Stamps—Whether an officer whose duty it is to see that the fee is paid under Chapter II.*

The Chief Inspector of Stamps is an officer

whose duty it is to see that the fee is paid under Chapter II Court Fees Act, and the decision of the Taxing Officer on a difference of opinion between the Chief Inspector of Stamps and the suitor is final decision. Bhagwanti v. Dhanwani. 244

———*Sec. 7 (iv), Suits Valuation Act, Sec. 8 and Civil Procedure Code, Sec. 15—Valuation of suit—Contested—Court must determine value—Plaintiff cannot be allowed to over-value or under-value his claim with a view to choose his forum.*

Where the valuation of the suit for purpose of jurisdiction is contested, the value must be determined by the court; and where the valuation can be ascertained correctly, the plaintiff cannot be allowed to put an arbitrary value upon his claim, nor can he be allowed to over-value or under-value his claim with a view to choose his forum.

The Suits Valuation Act and the Court Fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper court for the institution of the suit having regard to the value of the property. Inayat Husain v. Bashir Ahmad. 416

———*Sec. 7, Cl. (v)—Suit for possession as Mahanth of properties attached to math—*Ad valorem *court-fee payable—"Possession"—Interpretation of.*

Sec. 7(*v*) of Court Fees Act is applicable to suits for possession of immovable property and no distinction is made between a suit for possession as a beneficial owner, and a suit for possession as a trustee or as the manager of a religious endowment.

Where the plaintiff alleged that the defendant who was a mahant of a *math* had lost his title to mahantship owing to his marriage, illegal transfers of properties and other wrongful acts, and that the plaintiff had been duly elected as mahant in his place, and the plaintiff sued for possession as mahant of the properties attached to the *math*, including the properties which had been unlawfully transferred; *held*, that the court-fee was payable *ad valorem* under Sec. 7(*v*) upon the value of the properties of the *math* and in calculating the value of such properties the temple itself should be left out of consideration as having no market value. Parsottamanand Giri v. Mayanand Giri. 777

———*Sec. 13—High Court remands case to lower appellate court under Or. 41, R. 23 C. P. C.—Whether appellant entitled to a refund of court-fee paid.*

Where a court of second appeal remands a case to the lower appellate court under Or. 41, R. 23 C. P. C., the appellant is entitled under Sec. 13 of the Court Fees Act to a refund of the court-fee paid on the memorandum of appeal. Shantilal v. Agha Dost Mohammad. 745

———*Sec. 13—'Lower Court'—Meaning of—Second Appeal—High Court remands suit to court to first instance—Whether fee paid on memorandum of appeal refundable.*

Where on second appeal to the High Court, the following order was passed:—"We modify the decree of the court below and remand the suit to the court of first instance for trial in its entirety", *held*, that the expression 'lower court' in Section 13, Court Fees Act, includes the court of first instance where the appellate court is the High Court, and the fee paid on the memorandum of appeal was refundable. Kanhaiya Lal v. Mahadei. 320

———*Sec. 19, Cl. XX—Applicability of—Application under Sec. 13 for refund of court-fees—Not chargeable with court-fees.*

No court-fee is chargeable on an application, under Sec. 13 of the Court-fees Act, for refund of court-fees. Jag Narain Pandey v. Mata Badal. 601

———*Schedule I, Art. 1—Appeal—Valuation of—Dispute about liability of certain properties for the decretal amount—Value of such properties or decretal amount, whichever is less, is the proper valuation.*

Where the trial court entirely excluded the assets of one S in the hands of defendants 2 to 5 from liability for the decretal amount, and in the appeal from the decree of the trial court the plaintiffs asked that the suit may be decreed against the assets of S in the hands of defendants 2 to 5, *held*, that *ad valorem* court-fee was payable on the liability sought to be imposed or the value of the assets of S in the hands of defendants 2 to 5, upon which the liability was to be imposed, whichever was less. Sabir Husain v. Farzand Hasan. 387

———*Schedule I, Art. 1—Appellants seek to establish priority of their debentures over plaintiff's claim—*Ad valorem *court-fee payable on value of debentures or decretal debt, whichever is less.*

Plaintiff's suit for recovery of a certain amount from a company and from certain debenture-holders of that company, and for a declaration that the amount was recoverable in priority over the debentures, having been decreed, the debenture-holders appealed to the High Court for modification of the decree by refusing the declaration that plaintiff's claim had priority over the debentures. *Held*: that the appellants sought to establish the priority of their debentures—in other words, they sought to exonerate the property which was security for their debentures from liability to satisfy the decretal debt—and the court-fee was payable *ad valorem* on the decretal debt, or on the value of the debentures whichever was less. A. U. John v. Suraj Bhan. 385

———*Schedule I, Art. 1, Sec. 7 (iv) (c) and Schedule II, Art. 17 (iii)—Suit for cancellation of an instrument (e.g., mortgage deed or compromise) under Sec. 39, Specific Relief Act—Suit for 'cancellation of a decree'—Whether relief declaratory—'Consequential relief'—Meaning of.*

Where a suit is for the cancellation of an instrument under Section 39 of the Specific Relief Act, the relief is not a declaratory one. It falls neither under Sec. 7 (*iv*) (*c*) nor under Schedule II, Art. 17 (*iii*), but under the residuary Article, Schedule I, Art. 1.

The expression 'consequential relief' in Sec. 7 (*iv*) (*c*) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.

Where the plaintiffs claim the following reliefs, viz., (1) that a certain registered mortgage deed may be adjudged void and ineffectual as against the plaintiffs, and that it may be cancelled; (2) that the compromise, the preliminary decree and the final decree in a certain suit may be cancelled. *Held,* (1) that relief No. 1 is governed by Schedule I, Article 1; (2) that relief No. 2 is one consolidated relief (and not distinct reliefs) and it also falls under Schedule I, Article 1 and the court-fee is payable on the value of the final decree

only. Kalu Ram v. Babu Lal. 684

———*Schedule I, Art. 5—Court-fee on application for review—Calculation—Basis of—Effect of U. P. Stamp Act, 1932.*

The court-fee on the application for review must be calculated on the basis of the fee leviable on the memorandum of appeal according to the law in force when the memorandum was filed. Parmeshar Kurmi v. Bakhtawar Pande. 908

———*Schedule II, Art. 1 (d)—Memorandum of objections filed under Or. 41, R. 26 C. P. C. —Not liable to court-fee—Memorandum neither an "application" nor a "petition".*

No court-fee is chargeable upon a memorandum of objections filed under Or. 41, R. 26 C. P. C.

Such a memorandum cannot properly be held to be either an "application" or a "petition" presented to the High Court. Mohammad Salim-ullah Khan v. Khalil-ur-Rahman Khan. 149

———*Schedule II, Art. 17 (iii) and Sec. 7 (iv) (c)—Suit for declaration—'Family property belonged equally to plaintiff and defendant and certain documents did not affect jointness of family'—Court-fee payable—Actual relief asked for should be looked into.*

For the purpose of determination of the court-fee the actual relief asked for should be looked into and it is entirely beside the consideration of the court whether the suit is likely or not to fail, because the plaint did not ask for a consequential relief.

In his suit for a declaration that the entire family property in the hands of the plaintiff, as the head of a joint family, belonged equally to the plaintiff and the male defendant, and that certain documents executed by certain deceased members of the family did not affect the jointness of the family, plaintiff paid a court-fee of Rs.10 only. *Held,* that the plaint was sufficiently stamped. Brij Gopal v. Suraj Karan (*minor*) through Dhapi Kunwar. 466

———*Schedule II, Art. 17 (iii) and Sec. 7 (iv) (c)—When inapplicable—Suit for sale on mortgage—Appeal—Relief—Declaration that appellants were prior mortgagees*—Ad valorem *court-fee payable on value of subject-matter in dispute.*

The appellants were impleaded as defendants in a suit for sale on a mortgage upon the allegation that they were subsequent mortgagees. They claimed to be prior mortgagees but the trial court found against them and decreed the plaintiff's suit. The appellants appealed to the High Court and sought for a declaration that they were prior mortgagees. The appeal was valued at Rs.1,600, but a court-fee of Rs.10 only was paid. *Held,* that Art. 17 (*iii*) of Sch. II of the Court-Fees Act had no direct application to this case and that an *ad valorem* court-fee was payable on the value of the subject-matter in dispute in the appeal. KUNDAN LAL v. DULI CHAND. 45

COURT OF WARDS ACT (Local Act IV of 1912), *Secs. 3(3), 10, 12, 15, 55 and 37—Joint Hindu family—Of father and sons—Application by father under Sec. 10—Declaration—Notification—Entire joint property under management of Court of Wards—Whether sons, major or minor, deemed to be 'wards' and subject to disabilities under Secs. 37 and 55.*

The plaintiffs sued to recover the money due to them under an agreement executed by the defendants. The defendants took the plea that they were 'wards' and no suit could be maintained against them in their names under Section 55 of the Court of Wards Act, 1912, and the contract made by them was void in law under Sec. 37 of the said Act. It appeared that the defendants and their father formed a joint Hindu family. The father made an application under Sec. 10, Court of Wards Act, for the ancestral property being placed under the superintendence of the Court of Wards. The Court of Wards made the declaration required by Sec. 10, and the order of assumption of superintendence was notified in the gazette. The names of the defendants did not appear in the notification. The entire property belonging to the joint family came under the actual management of the Court of Wards. The defendants remained in possession of the estate which they inherited from their maternal grandfather.

Held (1) that the sons having made no application under Sec. 10 and their names not appearing in the declaration and the notification, they did not come within the second portion of the definition of 'ward' in Sec. 3(3); (2) that even if some of the sons were minors on the date of assumption of superintendence, they were never treated as minors whose property the Court of Wards in the exercise of its discretion under Sec. 12, decided to place under its own management, and they cannot therefore come under the first portion of the definition of 'ward' in Sec. 3(3). The mere accident that their property is physically under the superintendence of the Court of Wards will not make them 'wards'; (3) that the defendants not being 'wards' did not suffer the disabilities enumerated for a ward in Sec. 37 and Sec. 55 of the Court of Wards Act. KAULPATI KUNWAR v. RAM BARAN SINGH. 677

CRIMINAL PROCEDURE CODE (V of 1898), *Secs. 15, 16 and 350A—Bench of Magistrates—Whether presence of all magistrates on all hearings indispensable—Part of evidence recorded in absence of one magistrate—Conviction based on such evidence—Whether sustainable.*

The presence of all the magistrates constituting the bench, under Secs. 15 and 16 of the Criminal Procedure Code, on all hearings is indispensable for a valid trial of a case pending before it. Individual magistrates constituting a bench have no jurisdiction to hear a case cognizable by the whole bench. If witnesses are examined by one or more magistrates in the absence of one or more of those constituting the bench, a conviction based on such evidence is unsustainable. CHITESHWAR DUBE v. KING-EMPEROR THROUGH NARSINGH DUBE. 42

———*Sec. 103—Search witnesses—To be invariably produced by prosecution—But conviction may be based on other evidence.*

The search lists and the search witnesses should invariably be produced by the prosecution, and they will be guilty of suppression of material evidence if they did not produce the same. But the prosecution can prove the recovery of the incriminating article by other evidence as well. MOHAMMAD BASHIR v. KING-EMPEROR. 104

———*Secs. 107, 202 and 203—Magistrate requested to take action under Sec. 107—Whether magistrate can refer matter to police for enquiry and report independently of Sec. 202.*

A magistrate is not competent to proceed under Secs. 202 and 203 of the Cr. P. C. when dealing with a petition requesting him to take action under Sec. 107, but he can, independently of those sections, refer the matter to the police for enquiry and report before issuing a notice under Sec. 112 in the exercise of his absolute discretion. In acting under Secs. 107, 108, 109 or Sec. 110 of the Cr. P. C. the magistrate does not, so long as he does not record an order in writing in accordance with Sec. 112 calling upon any person to show cause, act judicially. Laxmi Narain v. King-Emperor. 880

———*Sec. 107(2)—Interpretation of—Person informed against not within local limits of Magistrate's jurisdiction—When proceedings initiated—Whether Magistrate has jurisdiction—Issuing a summons under Sec. 114—Part of such proceedings.*

An application was presented before the Joint Magistrate of Ghazipur for action being taken against the present applicants under Sec. 107 Cr. P. C., who were in Jaunpur when the application was filed and process issued under Sec. 114. They appeared in obedience to the summons served upon them, when an order under Sec. 112 was read over to them. They took objection to the jurisdiction of the Magistrate to take proceedings under Sec. 107 Cr. P. C. against them; *held*, that the objection was well-founded, as the present applicants were not within the local limits of the magistrate's jurisdiction when proceedings under Sec. 107 were initiated, and issuing a summons under Sec. 114 was part of such proceedings. Hamid Hasan v. King-Emperor *through* Syed Husain, Mukhtar. 211

———*Sec. 112—Notice issued under—Right of Crown to conduct case.*

The moment a notice is issued under Sec. 112, Cr. P. C., the Crown has the right to conduct the case against the person called upon to show cause and Sec. 495 of the Cr. P. C. gives discretion to the magistrate to permit the prosecution to be conducted by any person mentioned in that section. Laxmi Narain v. King-Emperor. 880

———*Secs. 117(3) and 118—Order under—Text of—Bond with sureties—To be in form given in Sch. V—Magistrate to satisfy himself that sureties would be able to make good the amount—Hypothecation bond may be taken in addition by way of precaution.*

Where the magistrate issued an order under Sec. 117(3) Cr. P. C. against a person to execute a personal bond, with "two reliable sureties *in movable properties*", *held*, that in the order the magistrate should follow the words of Sec. 117 and not introduce the restrictive words "in movable property".

When sureties are produced, the magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. The primary consideration is whether the surety is likely to fulfil the undertaking given by him. When they have been accepted, the bond executed by them should be in the form given in Sch. V. A registered security bond is not necessary under the Code, nor is a magistrate bound to accept such security if offered, but if the magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may by way of precaution accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties. King-Emperor v. Harihar Kalwar. 157

———*Section 121—Bond executed under Sec. 109 Cr. P. C.—Accused again found in suspicious circumstances and unable to give satisfactory explanation—No forfeiture of bond—Liability of sureties.*

The accused was proceeded against under Sec. 109 Cr. P. C. Two persons stood sureties for him for his good behaviour. Shortly before expiry of the period for which the sureties had bound themselves, he was again found concealing himself under suspicious circumstances without any means of livelihood and unable to give a satisfactory account of himself, *held*, (1) that in view of the provisions of Sec. 121 Cr. P. C. there had been no forfeiture of the bond because the action of the accused did not amount to an attempt to commit an offence punishable with imprisonment, (2) that if the bond had been forfeited the sureties would have been liable whether proceedings were started against them or after the expiry of the period for which they had bound themselves. King-Emperor v. Bahadur Singh. 112

———*Section 133—Licensed lime kiln—Magistrate empowered to take action in interests of public health—But it is expedient that matter should be left to the control of Municipal Boards.*

A magistrate is empowered under Sec. 133 Cr. P. C. to order a licensed burner of lime to regulate his business in a manner that it may not be injurious to the health or physical comfort of the community.

Where the applicant had been working a lime kiln for the last 45 years, and had a municipal license, and there was no adequate evidence of any evil effects on the public health from the neighbourhood of the kiln; and on a complaint made, under Sec. 113 Cr. P. C., by a person who had recently deliberately occupied a house in a position where he was liable to be inconvenienced by the smoke and smell of the kiln, the magistrate ordered that the kiln should be stopped, *held,* that the High Court, in such cases, can look to the propriety of the order, which, under the circumstances, was unjustified.

It is generally inexpedient that a magistrate should take action in such cases, for these matters are left by the Legislature to the control of the Municipal Boards. LALMAN v. BISHAMBHAR NATH. 49

———*Sections 137 and 139A—Order under Sec. 133—Existence of public right of way denied—Magistrate must first proceed under Sec. 139A.*

Where a person against whom an order is made under Sec. 133 Cr. P. Code, appears before the magistrate and denies the existence of the public right of way, *the magistrate must first proceed under Sec. 139A,* and if there is *reliable* evidence in support of the opposite party's denial, the magistrate should stay proceedings (under Sec. 139A(2)) until the matter of the existence of the public right of way has been decided by a competent civil court. The enquiry under Sec. 137 should not take place until after the decision required by Sec. 139A that the opposite party produced no reliable evidence. RAGHUNANDAN v. SHEW NANDAN. 339

———*Sec. 145(1)—Not mandatory—Order under Sec. 145—Not to be set aside unless one of the parties prejudiced by absence of formal order—No question of jurisdiction arises—Court of competent jurisdiction—Characteristics of.*

Sec. 145(1) Cr. P. C. is not mandatory except in this sense that the court will set aside an order passed under the latter clauses of Sec. 145, if there is any reason to believe that the omission of an order or the passing of an order not strictly in the terms of Sec. 145(1) led to some prejudice to one or other of the parties.

It would be quite unjustifiable and unreasonable to set aside lengthy proceedings under Sec. 145, when the facts indicate that the parties could not conceivably have been prejudiced by the absence of a formal order, where it is manifest that they knew well all the facts and contested the matter with the advantage of the knowledge of the whole of the facts.

The omission to draw up an order under Sec. 145(1) has nothing to do with the question of jurisdiction.

The characteristic of a court of competent jurisdiction are:

(*a*) power conferred to deal with offences or matters of the class in question.

(*b*) power conferred to deal with the offences or persons of the class in question. MADAN MOHAN LAL v. SHEORAJ KUNWAR. 503

———*Section 145 (1)—Provisions of—Mandatory—Magistrate fails either in his order or notice to say that there is danger of breach of peace—Whether proceedings liable to be set aside.*

The provisions of Sec. 145(1) of the Criminal Procedure Code requiring a Magistrate to make an order in writing stating the grounds for his being satisfied that a dispute likely to cause a breach of the peace exists are mandatory.

Section 145 Criminal Procedure Code is enacted in order that a Magistrate may prevent a breach of the peace from a dispute as to immovable property. He has no jurisdiction in a matter primarily appertaining to civil court, unless he is fully satisfied that there is a danger of a breach of the peace and this must, therefore, be put in the forefront of his proceedings and he must give the parties notice that it is to prevent a breach of the peace that he is taking action under the section. If he fails to do so, the proceedings are vitiated, and the order passed under Sec. 145 must be set aside. HIRA LAL v. KING-EMPEROR. 1087

———*Sections 145(1) and 537—Order under Sec. 145—Omission or irregularity in the proceedings—When High Court can set aside order.*

A court of revision is absolutely prohibited from setting aside an order under Sec. 145 Cr. P. C. on account of any omission or irregularity in the proceedings (e.g., the omission of the magistrate to record his order strictly in accordance with the provisions of Sub-section (1) of Sec. 145), unless such omission or irregularity has in fact occasioned a failure of justice. BARMHA SINGH v. EMPEROR THROUGH MADHO SINGH. 865

———*Section 146(1)—Two joint owners both in joint possession fighting—Likelihood of breach of peace—Whether magistrate entitled to pass order under Sec. 146 and direct parties to file a partition suit in civil court.*

The case of two joint owners both in possession is covered by the words "unable to satisfy himself as to which of them was in possession" in Section 146 Cr. P. C. as it is a case where the magistrate cannot decide which of them was in exclusive possession.

When two joint owners of barren land in an urban area are fighting and there is a likelihood of a breach of the peace between them, a magistrate is entitled to pass an order under Sec. 146 Cr. P. C. directing that the land should be kept in attachment pending the decision of the partition suit to be filed in the civil court within three months. CHIRANJI LAL v. MAHADEO PRASAD.

———*Section 162 and Evidence Act, Sec. 32 (2)—Statement made to police officer (investigating a dacoity) by M—That A and B took part in dacoity—Police officer made entries in the diary—M was later murdered—A, B and others charged under Sec. 302—Whether entries in police diary inadmissible under Sec. 162.*

A police officer in the course of investigations in connection with a dacoity made entries in the diary to the effect that a statement had been made to him by a person who attended the meeting of the villagers called by him, that two of the present appellants had certainly taken part in the dacoity along with some others. Three days after this information was given to the police the person who gave the information was beaten and killed. Six persons (including the two whose names were mentioned to the police officer as having taken part in the dacoity) were charged before the Sessions Judge under Sec. 302 I. P. C., who found them guilty of murder. On appeal to the High Court it was objected that the evidence of the police diary was inadmissible in evidence under Sec. 162 Cr. P. Code; *held*, that this enquiry or trial, in which it is sought to use these records in the police diary as evidence, could not even have been thought of, and was not under investigation at the time that the statements were made, and Sec. 162 did not apply; and these statements were admissible in evidence under Sec. 32(2) Evidence Act. KING-EMPEROR v. ABDUL AZIZ. 301

———*Section 164—Confession—Magistrate to record questions and answers by means of which he has satisfied himself that confession is voluntary—Accused implicating co-accused in his statement—When statement admissible.*

Where there is nothing in the statement to show that besides the usual and stereotyped questions any serious attempt has been made by the magistrate recording the confession to find whether the statement was voluntary or otherwise, the court should hesitate to accept his certificate at its face value. It is the imperative duty of the magistrate to record those questions and answers by means of which he has satisfied himself that the confession is, in fact, voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the magistrate recording the confession furnishes data which enable the court of Sessions and the High Court to form an independent estimate as to the voluntary nature of the confession.

When an accused person in his statement or confession imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused. KING-EMPEROR v. SHAMBHU. 162

———*Section 164—Confession—Retracted—Evidentiary value of.*

The evidentiary value of a retracted confession is very little and it is not safe to act on such a confession unless it is corroborated in material particulars. KING-EMPEROR v. SHAMBHU. 162

———*Section 164 and Evidence Act, Sec. 24—Confessions—When inadmissible—Duty of Magistrates and Sessions Judges—Whether evidence of approver coupled with retracted confession sufficient for conviction.*

The judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every judge is: "Why the accused made the confession?" It is very important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction.

The evidence of the approver, coupled with the retracted confession of a co-accused but uncorroborated by other evidence, is not sufficient for conviction. NASIR v. KING-EMPEROR. 1125

———*Section 179—Offence under Sec. 409 I. P. C.—Complainant in Cawnpore—Goods sent to agent in Bengal for sale there—Money to be remitted to Cawnpore—Agent only accounted for part of price—Whether Cawnpore courts had jurisdiction.*

Where a complainant in Cawnpore employed a commission agent in Bengal and sent goods to the agent for sale in Bengal, and the agent promised to send the money on receipt of the goods but only accounted for part of the price, *held*, that on the allegations jurisdiction lay in the criminal courts at Cawnpore to try the agent for an offence under Sec. 409 Penal Code. BRIJ LAL v. EMPEROR. 269

———*Sections 181(2) and 222(2)—Misappropriation of gross sum made up of five items received in places where magistrate had no territorial jurisdiction—Whether magistrate had jurisdiction in respect of all items.*

Where on the complaint of a zamindar his agent was charged under Sec. 222(2) Cr. P. C. with misappropriation of a gross sum made up of five items, some of which were received by him in villages situate in Tahsils over which the trying magistrate had no territorial jurisdiction, *held*, that under Sec. 181(2) the magistrate had jurisdiction in respect of all the sums alleged to have been misappropriated by the accused. SUNDER LAL v. EMPEROR THROUGH RADHEY SHIAM. 160

———*Section 195(1) (a) (as amended in 1923)—District Magistrate granted 'sanction'—Believing that Superintendent of Police would thereby be enabled to prosecute accused—Whether a proper complaint.*

An information lodged by accused having been found to be false, the investigating officer moved the Superintendent of Police for the prosecution of accused under Sec. 182 Penal Code, whereupon the Superintendent enquired of the District Magistrate whether he had any objection to the prosecution of accused who was the reader of the Tahsildar of Konch, and the District Magistrate merely granted "sanction" for accused's prosecution believing that the Superintendent would thereby be enabled to prosecute accused, *held*, that there was no complaint either by the Superintendent or by the District Magistrate for the prosecution of accused, and therefore the conviction under Sec. 182 Penal Code was unsustainable for want of a proper complaint as required by Sec. 195 (1) (a) Cr. P. Code (as amended in 1923). ABDUL RAHMAN v. KING-EMPEROR. 155

———*Sections 235 and 236—Conjoint application—Whether permissible—Several charges rightly framed under Sec. 235—Whether one of such charges can be framed in the alternative under Sec. 236.*

Several charges being rightly joined against the same accused under Sec. 235 Criminal Procedure Code, there can be no objection to one of such charges being in the alternative as provided by Sec. 236; nor can there be any objection to another accused being joined under Sec. 239 as regards one of those charges. KASHINATH v. EMPEROR. 113

———*Section 236, and Penal Code, Secs. 302 and 201—Persons charged with offence of murder—Evidence insufficient to prove participation in murder—Whether can be charged and convicted of an offence under Sec. 201.*

Where a number of people are charged with carrying out a massacre in the course of a riot, and not with any individual act, or with throwing live persons into a river in the course of a transaction which otherwise amounted to an offence under Sec. 201 I. P. C., and the evidence was insufficient to prove their participation in the murder, they could be charged and convicted of the offence under Sec. 201 I. P. C. KING-EMPEROR v. SOHAN. 801

———*Sections 236 and 237 and Penal Code, Secs. 302 and 194—Accused acquitted of an offence under Sec. 302—But convicted of an offence under Sec. 194 (with which he was never charged)—Whether conviction under Sec. 194 should have been passed.*

Where the Sessions Judge acquitted a person of an offence under Sec. 302 I. P. C. and convicted him of an offence under Sec. 194 I. P. C., with which he was never charged and to which no reference was made either in the charge-sheet or in his examination, *held*, that the conviction was not illegal but this was a case in which such a conviction should not have been passed. QABUL v. KING-EMPEROR. 1079

———*Section 252—Interpretation of—Trial of warrant case—Accused cannot, as a matter of right, cross-examine prosecution witnesses before framing of charge—But as a matter of practice some cross-examination should be permitted.*

An accused has no absolute right of cross-examination of prosecution witnesses, in the trial of a warrant-case, before the framing of the charge; but as a matter of practice or discretion the magistrates would be well-advised to permit some cross-examination at least at that stage, otherwise, Sec. 253 would practically become a dead letter. LACHMI NARAIN v. KING-EMPEROR. 5

———*Sec. 257—Scope of—Magistrate cannot arbitrarily limit number of witnesses.*

Outside the provisions of Sec. 257 Cr. P. C.

it is not open to a magistrate to limit the number of witnesses which the defence or prosecution should be allowed to produce. Where the Magistrate does not consider that the application has been made for the purpose of vexation or delay or for defeating the ends of justice, he has no option but to issue process under Sec. 257(1) Cr. P. C. BALKRISHNA SHARMA v. KING-EMPEROR. 39

———*Sec. 307—Offence under Sec. 395 Penal Code—Accused found guilty by jury on admissible evidence—Jury's refusal to accept judge's view as to requisite amount of evidence necessary to corroborate approver's statement—Whether reference to High Court necessary.*

The appellant was charged with an offence under Section 395 I. P. C. In his charge to the jury the Sessions Judge pointed out that it would be improper to convict on the uncorroborated evidence of the approver and expressed his personal view that they should not hold any accused guilty unless they find that besides being named or identified by the approver, he was also identified by at least two other witnesses. The jury did not accept the judge's view, for the appellant was named by the approver and identified in jail by one witness only, and returned a verdict of guilty. The judge accepted the verdict and convicted the appellant under Sec. 395 I. P. C. *Held,* that the verdict of the jury was in accordance with law and it was not the duty of the judge to refer the case to the High Court. HARISH CHANDRA v. KING-EMPEROR. 1089

———*Sec. 337, Sub-sec. (2A)—Interpretation of—Whether approver must be committed to session.*

Sec. 337, Sub-sec. (2A) of the Criminal Procedure Code means that where a pardon has been granted to one accused who has been examined as a witness, then the case against the other accused must be committed to session if a *prima facie* case against the latter is established and not tried by the magistrate himself. The Sub-section cannot be reasonably interpreted to mean that the approver must be committed for trial to the court of session. KING-EMPEROR v. RAJA RAM. 754

———*Sec. 350A—Bench of Magistrates—One member not present during examination-in-chief of witnesses for complainant—Whether order invalid.*

Where one of the magistrates constituting the bench, which ultimately decided the case, was not present during the examination-in-chief of the witnesses for the complainant, *held,* that the order was invalid under Sec. 350A Cr. P. Code and inasmuch as the complainant had not had a fair hearing, the order of acquittal should be set aside and the case retried. RAM KHELAWAN v. SHEO NANDAN. 166

———*Sec. 366—Judgment—Delivered after vacating office of Sessions Judge—Conviction bad.*

Where the Sessions Judge, delivered judgment in a criminal case a few hours after he had made over charge of his office to his successor, *held,* that he had no jurisdiction to deliver judgment and therefore the conviction was bad, and the case should be re-tried. RAM RATAN AND NANHWAN v. KING-EMPEROR. 753

———*Section 418(1)—'Trial was by jury'—Meaning of—Offence triable with aid of assessors—In fact tried by jury—Appeal on matter of law only.*

The words, "when the trial was by jury", in Sec. 418, Criminal Procedure Code, mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

Under Sec. 418, Criminal Procedure Code, where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors, an appeal lies on matters of law only and not on matters of fact.

Where appellants were charged under Sec. 325|149 and Sec. 148 Penal Code and the Sessions Judge believing that this was a case which under Sec. 269 Cr. P. C. should be tried by a jury for one of the offences committed, and with the aid of the jurors as assessors for another impanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under Sec. 325|149 Penal Code and took their opinion as assessors on the charge under Sec. 148 Penal Code, *held,* that the charge was not under Sec. 325 (which is triable by a jury) but Sec. 325|149 and the wording of the charge showed that the essential part of the offence was rioting, and the case was not therefore triable by a jury but by a judge with the aid of assessors and the opinion given by the jury was a verdict which could only be challenged on questions of law. DAKHANI v. KING-EMPEROR. 1103

———*Secs. 426(1), 107 and 423(1) (d)—'Convicted person' in Sec. 426(1)—Meaning of —Appeal from an order under Sec. 107—Whether appellate court empowered to suspend exe-*

cution of order relating to security.

The words "convicted person", in Sec. 426(1) of the Criminal Procedure Code, include persons against whom an order has been passed by a criminal court from which there is an appeal allowed.

The applicants, who were bound over under Sec. 107 Cr. P. Code to keep the peace and were ordered to find security, appealed to the sessions court, *held,* that the words 'convicted person' in Sec. 426(1) applied to a person against whom an order was made under Sec. 107 and the appellate court was therefore empowered to suspend the order relating to furnishing of security. Even supposing Sec. 426(1) did not apply, the appellate court could pass such order under Sec. 423(1)(*d*). KATWAROO RAI v. KING-EMPEROR. 624

———*Sec. 435—Applies exclusively to proceedings before inferior courts.* KING-EMPEROR v. PATRAKHAN. 67

———*Sec. 435—Case under Sec. 124A Penal Code—Magistrate's order—Limiting number of witnesses defence should produce—Whether revision lies to High Court.*

An appeal, in a case under Sec. 124A Penal Code, lies from the order of the District Magistrate direct to the High Court, and the High Court is not precluded from entertaining an application for revision of the District Magistrate's order limiting the number of witnesses which the defence should produce, simply because the Sessions Judge had not been approached first.

Even a settled practice not to entertain a revision when the applicant could have gone to the Sessions Court, does not oust the jurisdiction of the High Court. BALKRISHNA SHARMA v. KING-EMPEROR. 39

———*Secs. 438 and 435—Sec. 435 applies exclusively to proceedings before inferior courts—Case decided by Sessions Judge—District Magistrate makes reference to High Court—Reference improper—Duty of District Magistrate.*

Where the District Magistrate examined the record of a case decided by the Sessions Judge, and made a reference to the High Court recommending that the sentence of transportation for life should be altered to one of death, *held,* that Sec. 435 Cr. P. C. applies exclusively to the proceedings before an inferior court, and the District Magistrate acted with impropriety.

A District Magistrate is inferior as a court to the Sessions Judge. It is no business of a District Magistrate, on the judicial side, to criticize the propriety of the view taken by the superior court. It is his imperative duty to abide by the conclusion of the sessions court loyally and faithfully. If however he considers that there is room for reconsideration, he may on the administrative side approach the local Government or the Government Advocate with the request that the High Court should be moved by means of a revision to consider the propriety of the sentence. He cannot sit in judgment over the Sessions Judge and bring his own views to the notice of the High Court. KING-EMPEROR v. PATRAKHAN. 67

———*Secs. 488 and 489(2)—Civil suit for restitution of conjugal rights—Within a month wife takes proceedings under Sec. 488 Cr. P. C.—Civil suit decreed* ex parte*—Proceedings under Sec. 488 not* bona fide*—Whether criminal court should pass orders under Sec. 488 ignoring civil court decree.*

A civil suit was instituted by the husband against his wife for restitution of conjugal rights. Within a month of the filing of the civil suit the wife took proceedings under Chapter XXXVI Criminal Procedure Code (Of the Maintenance of Wives) and the husband denied that he had ever ill-treated her and no specific questions were put to him to prove ill-treatment. The civil suit was decreed *ex parte. Held,* that the proceedings under Chapter XXXVI were not *bona fide* and were taken for the purpose of ignoring any decree that the civil court may pass, and the fact that the civil court decree was passed *ex parte* or after contest was immaterial, and this was not a case in which any order under Sec. 488 Cr. P. C. should be passed. SHARDA PRASAD v. KING-EMPEROR THROUGH PIARI. 766

———*Secs. 498 and 561A—Bail granted by High Court—Conditions on which bail granted not violated—Whether it can cancel the order.*

The High Court is not specifically empowered by Sec. 498, Criminal Procedure Code, to cancel bail granted by itself; but it can hardly be argued that it will be exercising the wide powers with which it is endowed by Sec. 561A improperly, if it follows the procedure that would be observed by a Sessions Judge or Magistrate, and directs the arrest of a person who has been released on bail under its orders, for the reason that there do now appear to be reasonable grounds for believing that he has committed a non-bailable offence. KING-

EMPEROR v. MIRZA MOHAMMAD IBRAHIM. 701

———*Sec. 539A—Accused person making false allegations in application for transfer—Whether liable to prosecution.*

Section 539A, Criminal Procedure Code, applies to an accused person and he is liable to prosecution in respect of any false statement which he may make in an affidavit supporting his application for transfer. BADRI PRASAD v. JHAMMAN. 1076

———*Secs. 539B and 537—Accused alleged to have cut and stolen gram crop—Magistrate visits the field—But omits to make a memorandum of what he observed on the spot—Whether omission amounts to irregularity.*

The accused who were alleged to have cut and stolen gram crop, were charged under Section 379 I. P. C. They examined the village patwari in defence to establish that there had been no gram crop in the field in question in that year and that wheat had been sown. This surprise was sprung on the prosecution at a late stage of the case. No suggestion of the kind was made when the complainant was examined, nor did the accused state in their defence that the field had not been sown with gram at all. The Magistrate made an inspection of the field and discovered stumps of dried gram plants. He however did not give any previous intimation of his intention to visit the field and he did not record the result of his inspection in a note which, as required by Section 539B Cr. P. C., should have been made part of the record. *Held,* that the 'omission' of the Magistrate to act in accordance with Section 539B Cr. P. C. was an irregularity, and did not in fact occasion a failure of justice. SARJU v. EMPEROR. 523

CRIMINAL TRIBES ACT (VI of 1924)—*Sec. 23—Applicable only to convictions for offences specified in Sch. I—'Any other such offence'—Meaning of.*

Section 23 of the Criminal Tribes Act refers only to convictions for offences specified in Sch. I and has no application to a conviction for an offence which is not contained in Sch. I. The words "any other such offence" used in the section mean one of those offences mentioned in the schedule.

Where a person was convicted under Section 454 Penal Code read with Section 23 of the Criminal Tribes Act and his previous convictions were one under Section 454 and two under Section 457, *held,* that Section 23 of the Criminal Tribes Act did not apply and the accused could only be punished as an old offender. KING-EMPEROR v. CHITTIRA. 1070

CUSTOM—*Ancient—How to be proved—Whether proof of instances essential—Whether prevailing practice in* maths *of the same order relevant.*

Evidence afforded by instances is more satisfactory than evidence afforded by tradition but an ancient custom can be established by evidence of persons who heard it mentioned by persons deceased who had special means of knowledge.

While it is true that questions relating to succession to the office of a *mahant* had to be decided on proof of custom applicable to each particular *math,* the prevailing practice in a large number of 'maths' of the same order (that installation by *mahants* belonging to the same order is considered necessary) cannot be ignored.

Where the plaintiff alleged that the 'math' in question had existed for several centuries, and this fact was admitted in the written statement without any qualification or reservation, *held,* that the District Judge was not justified in holding contrary to the case of both parties that the 'math' in question was of recent growth. RAGHUNATH DAS v. GANESH DAS. 615

DAMAGES—*Defendant digs trench near foundation of* kutcha *house of plaintiff—Rain water accumulates in trench and percolates into plaintiff's ground—Damage caused to plaintiff's wall—Whether plaintiff entitled to recover damages.*

Where the defendant digs a trench on his own land but adjoining the wall of the plaintiff's *kutcha* house, and by failing properly to cover it, permits rain water to accumulate in the trench in such quantities that it naturally percolates through the soil into the plaintiff's ground, so that damage is caused to the plaintiff's wall, the plaintiff is entitled to recover damages from the defendant. MAHADEO PRASAD v. SARJU PRASAD. 758

DISTRICT BOARDS ACT (Local, X of 1922), *Sec. 192—Interpretation of—Protection intended for defendant—Status of plaintiff immaterial.*

Section 192 of the District Boards Act is intended for the protection not only of the Board and its officers and servants, but also of the members of the Board. So long as the defendant is a member of the Board and the suit against him is instituted in respect of an

DISTRICT BOARDS ACT (Local, X of of 1922)—Sec. 192

act done or purporting to have been done by him in his official capacity, the section is applicable, no matter whether the plaintiff is a stranger or the Board or any other officer or servant. The protection is for a defendant and does not take into account the status of the plaintiff in the suit. RAZA HUSAIN v. THE DISTRICT BOARD, BANDA THROUGH CHAIRMAN. 1081

———*Sec. 192, Sub-sec. 3—Advance given to member of District Board for supply of lime —Failure to render proper accounts—Suit for recovery of balance—Filed more than 6 months after accrual of cause of action—Suit time-barred.*

Where advance money had been given to defendant by the District Board for supply of lime in his capacity as member of the Board and on his failure to supply the full quantity of lime and to submit correct accounts, the Board, after obtaining the Commissioner's sanction but more than 6 months after the accrual of the cause of action, sued the defendant for the balance, *held,* that Sec. 192, Sub-section 3 applied and the suit was time-barred.

Held, further, that the action of the Board in giving such a contract to the defendant, while he was a member of the Board, was highly objectionable, was contrary to the express provisions of Sec. 34 of the District Boards Act and to the principle underlying Section 31(*c*) of the rules contained in the District Board manual. RAZA HUSAIN v. THE DISTRICT BOARD, BANDA THROUGH CHAIRMAN. 1081

ESTOPPEL—

See Evidence Act, Sec. 115.

EVIDENCE ACT (I of 1872), *Sec. 24—Confessions—When inadmissible—Whether evidence of approver coupled with retracted confession sufficient for conviction.* NASIR v. KING-EMPEROR. 1125

———*Sec. 32(2) and Criminal Procedure Code, Sec. 162—Statement made to police officer (investigating a dacoity) by* M*—That* A *and* B *took part in dacoity—Police officer made entries in the diary—*M *was later murdered—*A, B *and others charged under Sec. 302—Admissibility of entries in police diary.* KING-EMPEROR v. ABDUL AZIZ. 301

———*Sec. 35—Income from chari—Calculation of—Settlement officer's report—Whether admissible.* GANPATJI v. HANUMAN SINGH. 1

———*Secs. 44 and 2—Whether bar evidence*

EVIDENCE ACT (I of 1872)—Sec. 115

of negligence in a suit by minor to avoid a decree or order against him.

Per SULAIMAN and SEN, JJ. (BOYS, J. *dissenting*)—The Evidence Act does not purport to destroy any substantive right that may exist independently of that Act. Sec. 44 of the Act is merely permissive and not prohibitive. There is nothing in Sec. 44 or Sec. 2 of the Act which precludes the plaintiff from proving that a judgment previously obtained had been obtained by the negligence of his guardian, and was not binding on him. SIRAJ FATIMA v. MAHMOOD ALI. 437

———*Sec. 68, Proviso to—Interpretation of —Suit for sale on a mortgage—A defendant denies that an alleged executant executed the mortgage—One marginal witness to be produced.*

If any of the defendants to a suit denies that any of the alleged executants executed the mortgage deed, the plaintiff must produce one of the marginal witnesses to prove the document. RADHA BALLAB v. DEOKI NANDAN. 207

———*Sec. 108—Person not heard of for several years—Presumption as to death—But no presumption that he was dead at a particular time.*

Under Sec. 108 of the Evidence Act, where a person has not been heard of for more than 7 years by those who are likely to hear of him, a presumption arises as to the death of the said person, but there can be no presumption that he was dead at a particular time.

Where in order to succeed in a suit it is necessary for a person to establish that a particular person who had not been heard of for a number of years, was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence either direct or circumstantial. JANGI SINGH v. GUDRI SINGH. 175

———*Sec. 115—Principle of—Person entering into possession under an invalid instrument—When estopped—Whether his son not claiming through him also estopped.*

By a deed, Government made a grant of property to *A* for his life. On *A's* death the deed laid down the mode of selection of his successor. *A* by his will bequeathed life-interests in the property to *B* and *C* in succession, and this portion of the will was invalid at any rate as against the Government as it was inconsistent with the terms of the grant. *B* went into possession of the property under the will. On *B's* death his son entered into

possession of the property. On a suit for possession by *C*, who maintained that *B's* son was estopped from disputing the title of the remainderman under the will, *B's* son relied on his possession as a squatter. *Held*, that although *B*, as he went into possession under the will, might be estopped from denying the remainderman's title, his son entering into possession after his father's death without any title at all and not through his father, because his father had nothing to pass to him, cannot be affected by any such estoppel. Nisar Ali Khan v. Mohammad Ali Khan. 691

———*Sec. 115—Estoppel—Assignment—Assignor acknowledging receipt of consideration—Deed registered—Assignor estopped from setting up fictitious nature of transaction.*

If a grantor conveys in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but that the grantees take on a secret trust not disclosed in the conveyance.

If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of encumbrance or adverse equity, and he cannot be heard to say that he has not received such purchase money.

Where words of any written instrument are free from ambiguity and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible.

Where a father executed an assignment in the shape of a sale-deed in favour of himself (in an assumed name) and his son jointly for a stated consideration and the deed recited that the consideration had been received and the document was registered under the law of Registration, *held;* that the son was competent to convey a good title to his mortgagee and the father was estopped from setting up the fictitious nature of the transaction. Tsang Chuen v. Li Po Kwai *alias* Li Kan. 971

———*Sec. 115—Estoppel—Conditions to be fulfilled.* Sri Ram Singh v. Baldeo Prasad. 605

EXCISE ACT (Local Act IV of 1910). *Secs. 3 (2), 70 and 60—Sub-Inspector of police—Whether an 'Excise officer'—Whether empowered to file complaint under* Sec. *60.*

A Sub-Inspector of police, who is invested with certain powers in connection with seizure of excisable articles and the arrest of suspected persons under Sec. 10 of the Excise Act, is an 'Excise Officer' within the meaning of Sec. 3 (2); and is therefore empowered by Sec. 70 to file a complaint under Sec. 60. Chedi v. King-Emperor. 107

———*Sec. 60 (a)—Conviction under—Irregularity in search—Search without warrant—Effect of.*

Irregularity in a search and the failure to obtain warrant would always afford ground for scrutiny, but if after close scrutiny the court comes to the conclusion that an excisable article was recovered from the possession of the accused, then a conviction under Sec. 60 (*a*) of the Excise Act (Local Act IV of 1910) would be sound. Mohammad Bashir v. King-Emperor. 104

———*Sec. 64 (c)—License for selling liquor—Condition of—Hours for sale fixed—Shop closed temporarily by licensee—Whether amounts to breach of condition of license.*

Where one of the conditions in the license for selling liquor was that "the hours for the opening and closing of the shop have been fixed as follows It is necessary that shops should not be kept open at any other hour", and the licensee was convicted under Sec. 64 (*c*) of the Excise Act (IV of 1910) for having broken the condition as the Excise Inspector had found it closed temporarily, *held*, (1) that the condition cannot be interpreted as meaning that at no time between the two limits the shop should be closed even temporarily. The object of the condition is to prevent the sale of liquor outside the fixed hours; (2) that there was no breach of condition and the conviction should be quashed. Puttu Lal v. King-Emperor. 32

———*Secs. 70, 3 (2) and 60—Sub-Inspector of police—Whether an 'Excise officer'—Whether empowered to file complaint under Sec. 60.* Chedi v. King-Emperor. 107

EXECUTANT—*Of document—To understand nature of transaction—Details may be*

left to his lawyer.

It is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer. RAJKUMAR SEN CHOWDHURY v. RAM SUNDAR SHAHA. 198

FAMILY SETTLEMENT—*Wife not living with husband—Father-in-law executes document—Agrees to pay allowance called Kharch-i-pandan—Allowance unconditional—Agreement amounts to family settlement—Consideration—Promotion of family peace.*

Where the father-in-law of a Mohammedan lady, who had left her husband and was living with her parents, executed a document in her favour under which he agreed to pay her a monthly allowance called *kharch-i-pandan* and expressed his desire of bringing his daughter-in-law to his house so that she may live with her husband, but the document did not reserve to the executant any power of revocation either upon the happening of a future contingency or at his own sweet will and pleasure, *held,* (1) that the daughter-in-law was entitled to recover the arrears of the allowance which was not dependent upon the fulfilment of a condition precedent that she should return to her husband; (2) that the transaction partook of the nature of a family settlement the object of which was to promote good will between the daughter-in-law and her husband. LATIF JAHAN BEGAM *alias* SAKKAN BIBI v. MOHAMMAD NABI KHAN *alias* UMRAO DULAH KHAN. 9

GENERAL CLAUSES ACT (X of 1897), *Sec. 27—Presumption as to service of notice—Rebuttable.*

On a true construction of Sec. 27 of the General Clauses Act the presumption as to service raised by "properly addressing, prepaying and posting by registered post" a notice (which an Act authorises to be served by post), is a rebuttable presumption. L. C. DESOUZA, CAWNPORE—*In the matter of.* 409

GRANT—*By Hindu in favour of Christian woman—Whom he married according to* Arya Samaj *rites—Deed described her as 'my wife'—Whether grant dependent upon validity of marriage—Whether a* dum casta *condition implied—Contract Act, Sec. 25(1)—Whether applicable to such grant.*

A Hindu executed a deed in favour of an Australian woman, whom he had married according to the rites of the *Arya Samaj* sect after she became a convert to Hinduism. By this deed he purported to grant to her, "her heirs, executors, administrators and assigns," a perpetual annuity charged upon specified immovable properties. In the deed he described her as "my wife", and the grant was expressed to be made out of "love and affection". *Held,* (1) that the deed was not a contract and was in form and substance a gift; (2) that the grant was not intended to be in any way dependent upon the validity of the marriage, and there was no room for the implication of a *dum casta* condition. GOPAL SARAN NARAIN SINGH v. SITA DEVI. 703

GUARDIANS AND WARDS ACT (VIII of 1890), *Sec. 4(2)—Guardian—Definition of—Not limited to guardian appointed by court.*

The definition of the word 'guardian' in Sec. 4(2), Guardians and Wards Act does not necessarily mean a guardian duly appointed or declared by the court, and includes any person having the care of the person of a minor. SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Sec. 4(2)—Guardian—Minor Mohammedan girl in custody of her maternal grandmother—By virtue of right of hizrat—Whether her 'guardian'.* SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Sec. 17—Appointment of guardian—Personal law of minor—Not binding upon court.*

In cases where Sec. 17, Guardians and Wards Act, applies the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Sec. 19—Where contingencies mentioned in sub-clauses exist—Court has no power to appoint guardian—Personal law governing minor not touched.*

The language of Sec. 19 Guardians and Wards Act implies that when any of the three contingencies mentioned in the Sub-clauses exists, there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19 of the Guardians and Wards Act. The legislature apparently did not intend to settle the competition that

may arise under the personal law governing the minor between the husband and the father of the minor. SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Sec. 25—'Custody'—Meaning of—Includes constructive custody.*

There is no reason to restrict the meaning of the word 'custody' in Sec. 25, Guardians and Wards Act, to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody. SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Secs. 25 and 4(2)—Minor Mohammedan girl in custody of her maternal grandmother—By virtue of right of hizrat—Whether girl can be said to have been removed from the custody of her legal guardian.*

If a female relation is under the Mohammedan Law entitled to the custody of the minor and is not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having care of the person of the minor. SIDDIQ-UN-NISSA BIBI v. NIZAMUDDIN KHAN. 21

———*Sec. 34—Scope of—Guardian to pay balance due on accounts submitted by himself.*

Under Sec. 34 of the Guardians and Wards Act the court directs the guardian to pay such amount as may be due on the accounts submitted by the guardian himself. KANHAIYA LAL v. MAHDEI. 47

———*Sec. 35—District Judge assigns bond to minor—Whether order fixing surety's liability essential before assignment.*

An order by the District Judge fixing the liability of the surety is not called for, before he can assign the bond to the minor (or any guardian of his appointed by the District Judge) under Sec. 35 of the Guardians and Wards Act.

There is no provision in the Act for the surety being a party to any proceeding in which accounts may be taken, nor can the surety appeal against the District Judge's order fixing his liability. KANHAIYA LAL v. MAHDEI. 47

HINDU LAW—

Adoption.
Alienation.
Impartible estate.
Inheritance.
Joint family.
Joint family business.
Joint family property.
Maintenance.
Partition.
Reversioner.
Succession.
Widow.
Widow remarriage.

Adoption

———*Adoption—Widow—Power to adopt—Whether exercisable after remarriage.*

A Hindu widow cannot, after remarriage, make a valid adoption to her former husband. ABDUL HALIM KHAN v. SAADAT ALI KHAN. 593

Alienation

———*Alienation—Deed of Exchange—Executed by manager—When binding on family.*

A deed of exchange executed by a father or manager of a joint Hindu family is an alienation and is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the estate. BALZOR SINGH v. RAGHUNANDAN SINGH. 33

Impartible estate

———*Impartible estate—Ancestral—Junior members of family—Right of survivorship for purposes of succession—Separation from, how effected—Incorporation of other acquired with impartible estate—Possible and how effected—Incorporation of movables.*

In the case of ordinary joint family property the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility and so also the third. To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility and still remains. To this extent therefore the estate still retains its character of joint family property and its devolution is governed by the general Mitakshara law applicable to such property. Though

the other rights which a co-parcener acquires by birth in joint family property no longer exist, the birth-right of the senior members to take by survivorship still remains. This right is not mere *spes successionis* but a right which is capable of being renounced and surrendered. In order to establish that a family governed by Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied on the part of the junior members of the family to renounce their right of succession to the estate. Such a renunciation is not to be presumed from mere separation in food and worship.

On a question whether a member of a joint family has incorporated his self-acquired property with the joint family property, the crucial test is intention and the intention may be expressed by the blending of income or in some other way. It may be done by declaring expressly or impliedly his intention to do so. On the same principle a member of a joint family who is the holder of an impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate. By so doing he expresses his intention to alter the course of devolution of the self-acquired property. Such incorporation of the self-acquired property will follow the impartible property under the law and be heritable by the rule of primogeniture. The power to incorporate being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom; but where a Raj is an estate granted by the Crown, its boundaries cannot be enlarged by any additions being made to it so as to make it descend under the law by the rule of primogeniture. Movable property cannot however form accretion to an ancestral impartible Raj, nor can even the income of such an estate be an accretion to the estate. The income when received is the absolute property of the owner of the impartible estate. It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate. SHIBA PRASAD SINGH v. PRAYAG KUMARI DEBI. 919

Inheritance

———*Inheritance* — Mitakshara — '*Heritable* bandhus'—*Rules for determining—Last male owner's father's father's daughter's son's daughter's son—Whether his heritable* bandhu.

The last owner's father's father's daughter's son's daughter's sons are not his heritable *bandhus.*

Per SULAIMAN, J.—Rules laid down by Sarvadhikari in his Tagore Law Lectures for determining heritable bandhus re-stated as follows:—

(I) Heritable bandhus can belong only to three classes mentioned in the *Mitakshara* (and cannot be added to). The *Atma bandhus* are now well known to be included (1) within the circle of grand-parents in the ascending line, and their descendants under certain limitations including certain descendants of the owner himself. For *Pitri* or *Matri bandhus* we go outside the circle and higher, but in accordance with the ordinary conception we must travel upwards along agnatic lines, that is (2) the father's father's agnatic ascendants (*Pitri, ex parte paterna*), (3) the father's mother's agnatic ascendants (*Pitri, ex parte materna*), (4) mother's father's agnatic ascendants (*Matri, ex parte paterna*) and (5) mother's mother's agnatic ascendants (*Matri, ex parte materna*), and not in the agnatic ascendants of the mothers of these ancestors.

(II) There must be at least one female between the given person and the deceased, and there cannot be more than two females between the propositus and the common ancestors on the one side, and not more than two females between the common ancestor and the claimant on the other side, and if two females exist on either side they must be related as mother and daughter to each other. This holds good in the case of *Pitri* and *Matri bandhus*, whether *ex parte paterna* or *ex parte materna* and also in the case of *Atma bandhus* whether in the ascending line or in the descending line.

Per MUKERJI, J.—A *bandhu* who has a right to inherit to a propositus, otherwise known as heritable bandhu, must possess the following qualifications:—

(I) He may be one (1) in the propositus's father's line which would include his own line, either ascending or descending because descending line also would be his father's line through the propositus himself, (2) in the propositus's maternal grandfather's line, (3) in the propositus's father's maternal grandfather's line, (4) in the propositus's mother's maternal grandfather's line.

(II) Both the claimant and the deceased must be related to each other as *sapindas*. GAJADHAR PRASAD v. GAURI SHANKAR. 533

Joint family

———*Joint family—Adults and minors—*

Appointment of certified guardian for minor members—Whether effects their separation.

It is well established that if a Hindu family consisting of adults and minors remains joint, it is not open to the District Judge to appoint a certified guardian for the minor members for their share of joint family property, and it must therefore be assumed that the appointment of a certified guardian implies that *ipso facto* the minor members are being separated from the adult members. JAGANNATH PRASAD v. CHUNNI LAL. 1110

———*Joint family—All minors—Guardian of property appointed—Guardianship ceases on one of the minors attaining majority.*

Where in a joint Hindu family all the coparceners are minors and a guardian of the property is appointed for them by the District Judge, the guardianship *ipso facto* terminates on the attainment of adult status by one of the minors. It is contrary to the Hindu Law that there should be a guardian certified by the Judge for a joint Hindu family where there is an adult member. JAGANNATH PRASAD v CHUNNI LAL. 1110

Joint family business

———*Non-ancestral business—Joint family* —Mitakshara—*Father borrows money for business of mortgaging family property—Whether minor members bound.*

Money borrowed by the father as manager of a joint Hindu family governed by the *Mitakshara* for the purpose of a business which is not ancestral, is not borrowed for legal necessity and a mortgage granted as security for such a loan is not binding on the minor members of the joint family, and the mortgage being wholly invalid does not pass the shares even of the alienating co-parceners. THE BENARES BANK, LIMITED v. HARI NARAIN. 714

Joint family property

———*Joint family property—Mortgaged for satisfying pre-emption decree—Neither "benefit of the estate" nor "legal necessity" proved —Mortgage unenforceable against family property mortgaged—Alienation by father—When unjustified.*

Where two brothers mortgaged ancestral property for the sake of raising a loan for satisfying a pre-emption decree but it was not proved that the loan was raised for legal necessity or for discharging an antecedent debt or for the benefit of the estate, *held,* that the mortgage was not within the authority of the executants and that therefore it was unenforceable against the family property mortgaged.

Per SULAIMAN, C. J.—The money required for a new business started even by the father as the manager of the family, involving as it does a risk and liability on the minor members of the family, cannot justify an alienation.

Case-law discussed at length. AMRAJ SINGH v. SHAMBHU SINGH. 895

Maintenance

———*Maintenance—Widow—In possession of a portion of joint family estate in lieu of maintenance—Whether can be dispossessed by decree-holder holding decree against rights of the family.* RAM KUNWAR v. AMAR NATH. 267

Partition

———*Partition—Joint family—Separation of one member—No presumption of jointness or separation of other members—Question to be proved as one of fact.*

When one co-parcener separates, then there is no presumption that the remaining co-parceners remain joint and there is also no presumption that the remaining co-parceners have separated. The question whether the remaining co-parceners remained joint or whether they separated has to be proved as a question of fact in each case. PIYARE LAL v. CHUNNI LAL. 1018

Reversioner

———*Reversioner—Acts of waste by life-tenant—Remote reversioner not entitled to challenge—Act II of 1929—Effect of—Sisters and sisters' sons of last male-holder—Precedence in order of succession over distant collaterals.*

Under the Hindu Law the person entitled to challenge any acts of waste or alienation by a life-tenant like a Hindu mother is the next presumptive reversioner on the date of the suit. By operation of Act II of 1929, sisters and sisters' son obtained a precedence in the order of succession over distant collaterals and therefore a remote reversioner is not entitled to sue for an injunction restraining the mother of the last male-holder and her transferee from committing acts of waste unless he satisfies the court that the nearest reversioner has colluded with the life-tenant or has otherwise done acts precluding him from maintaining an action. BANDHAN SINGH v. DAULATA KUAR. 384

———*Widow—Gift by—Suit for declaration by reversioner—That gift void after widow's lifetime—Whether court should grant declaration.* RAGHUNATH BARAIE v. JAINARAIN BARAIE. 99

Succession

———*Succession—Male agnate—Same as* gotraja-sapinda—*Necessity of proving necessity of* gotra.

In order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, viz., (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males. In the absence of challenge, it might well be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but on his being challenged by defendant, it is for the plaintiff to satisfy the court that he complies with this condition also, before he can succeed in his claim to the succession. DULAHIN JADUNATH KUAR v. BISHESHAR BAKHSH SINGH. 632

Widow

———*Widow—Decree against assets of deceased husband—Decree-holder can sell estate, though that would have the effect of depriving the widow of future profits.*

A creditor who has got a decree against the assets of a Hindu who died sonless leaving a widow, can attach and sell the estate in execution of the decree though that would have the effect of depriving the Hindu widow of future profits. MAJHLI DULAIYA v. MUNNA LAL. 562

———*Widow—Gift by—Suit for declaration by reversioner—That gift void after widow's lifetime—Whether court should grant declaration—Specific Relief Act, Sec. 42—Declaration to be refused at a preliminary stage—And not by court of appeal.*

A deed of gift by a Hindu widow could not possibly be held to be evidence of alienation for value for purposes of necessity, and taken by itself the document could not stand as a deed of title; and if the next reversioner files a suit for a declaration that the deed of gift was void after the lifetime of the widow, the court should refuse the declaration. RAGHUNATH BARAIE (*and after his death*) RAM RAJI v. JAINARAIN BARAIE. 99

———*Widow—Maintenance—In possession of a portion of joint family estate in lieu of maintenance—Whether can be dispossessed by decree-holder holding decree against rights of the family.*

A widow has a right to hold that portion of the joint family estate of which she is in possession in lieu of maintenance as long as she is entitled to maintenance as a Hindu widow. On her death or if she ceases to be entitled to maintenance as a Hindu widow, the right to hold the estate would terminate. Subject to her right to hold the estate, it is open to a decree-holder of a simple money decree against the rights of the joint Hindu family to bring the property to sale. RAM KUNWAR v. AMAR NATH. 267

———*Widow—Property acquired by her out of the savings of her husband's estate—When to be regarded as "accretion to her husband's estate"—Test for determination.*

Where a Hindu widow acquired by pre-emption an undivided share in the same property in which she had already acquired the undivided share of her husband, out of the savings of her husband's estate, and treated the two properties as one, and seven years after her purchase by pre-emption she gifted the property to her brother's son, *held*, on a suit by the reversioner, that the widow intended that the property acquired by pre-emption should be treated as an accretion to her husband's estate, and her subsequent transfer to one who was no heir of her husband does not disprove the widow's intention at the time of the purchase. BHAROSA SHUKUL v. MANBASI KUER. 875

———*Widow—Right of maintenance—Unchastity of widow—Instrument executed by two brothers (members of a joint family)—On the death of either, widow of deceased to have profits of half the property for her life—Right to profits not liable to forfeiture—On subsequent unchastity.*

The right to maintenance of a Hindu widow, belonging to a joint family, is conditional upon continued chastity, and this right is not affected by the fact that the widow has obtained a decree declaring her right to maintenance or that there has been an agreement between the widow and the male co-parceners to pay her a certain amount by way of maintenance.

The plaintiff respondent and *B* (the husband of the defendant) were brothers and were members of a joint Hindu family. They had no male issue. Shortly before the death of *B*, they jointly executed a document, whereby they declared that they were the members of a joint Hindu family, but agreed that on the death of either of them without leaving male issue, the widow of the deceased should have

the full share of the profits of half the property upon the same footing as that of a widow of a separated Hindu, *held,* that the defendant derived under the document a special estate equivalent to the estate of a Hindu widow and it was not liable to forfeiture upon the ground of subsequent unchastity, because under the document the widow's right to profits was to continue for her whole lifetime, unhampered by any restrictions. ANANDI v. LAKHMI CHAND. 208

———*Widow—Right of residence in husband's house—Ancestral house mortgaged by son—Suit for sale on mortgage—Widow entitled to claim, as against auction-purchaser, a right to reside in a suitable portion of house.*

A Hindu after mortgaging the ancestral house, made a gift of the house in favour of his mother. Later he along with his mother executed a second mortgage over the property. On a suit for sale of the house on the basis of the mortgages, the lower court made a decree jointly on the two mortgages and stated that the question of the right of residence of the mother did not arise at that stage of the proceedings. *Held,* that the mortgage decree as given by the court below should be split up and the two amounts separately payable under each decree should be shown. It would be open to the parties to the second mortgage to pay it off; and leave the plaintiff to bring the property to sale on the first mortgage. If this happens the mother would be entitled to claim, as against the auction-purchaser, a right to reside in a suitable portion of the house, having regard to the nature of the property and her requirements. The question as to what portion of the house, the right of residence of the mother should be confined, will be determined by the court executing the decree, after the sale has taken place. KISHUN PIYARI v. GOPAL NARAIN. 795

Widow Remarriage

———*Widow remarriage—Mere proof of custom—Insufficient to involve forfeiture—Proof of custom of such forfeiture necessary.*

The proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu Law. It would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency. BHOLA UMAR v. KAUSILLA. 941

HINDU WIDOW'S REMARRIAGE ACT (XV of 1856), *Sec. 2—Meaning and scope of —Widow remarrying in accordance with custom of her caste—No forfeiture of her rights in the estate of her first husband.*

Section 2 of the Hindu Widows' Remarriage Act (XV of 1856) does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture of the Hindu widow's estate on remarriage under the Act in such a case. BHOLA UMAR v. KAUSILLA. 941

HIRE-PURCHASE—*Contract of hire with option of purchase on payment of instalments in full—Hirer has no option to terminate contract—Whether agreement amounts to 'hire-purchase'—Test.*

An agreement whereby the plaintiff agrees to hire to the defendant certain goods at a certain rate with a condition that if so many months instalments are paid the property in the goods passes to the hirer and nowhere in the agreement is the defendant given the option to terminate the hiring, and the agreement further provides that if the defendant fails to pay hire in any one month in advance the whole transaction will be treated purely on the 'hire system'. *Held,* that the whole tenor of the agreement is that of a 'purchase' and not 'hire-purchase' and the plaintiff is entitled only to that part of the purchase price which has not been paid.

The distinguishing mark of a true hire-purchase agreement, as distinguished from a sale, is that the hirer should have a right to terminate the agreement at his pleasure; and the distinguishing mark of an agreement which is a sale and not a hire-purchase agreement, is that the 'hirer' should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement. In each case, the substance of the transaction or agreement must be looked at and not mere words. MAHABALI PRASAD v. H. N. PALMER. 761

INCOME-TAX—*Firm owned by two partners—Partners interested in other firms also —Income from other firms credited into the books of the firm—Whether partners individually or firm liable to tax.* JAI DAYAL MADAN GOPAL OF BENARES—*In the matter of.* 999

INCOME-TAX ACT (XI of 1922), *Sec. 4(3)(vii)—"Receipts arising from business"*

—*Meaning of.*

The expression "receipts arising from business" in Sec. 4(3) (*vii*) must mean receipts arising from the carrying on of business. The Commissioner of Income Tax, Bengal v. Shaw, Wallace & Co. 588

———*Secs. 6(iv), 2(4), 10, 6(vi) and 12—"Income, profits and gains"—Meaning of—Sum received by agent from his principal as compensation for cessation of agency—Whether taxable.*

The object of the Indian Income-tax Act is to tax "income" which connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is loosely spoken of as "capital".

A sum received by an agent from his principal as compensation for the compulsory cessation of his agency cannot be regarded as profit or gain from carrying on the business or as income from "other sources" as mentioned in Sec. 6(*vi*) of the Income-tax Act and therefore such a sum is not taxable under the Act. The Commissioner of Income-tax, Bengal v. Shaw, Wallace and Company. 588

———*Sec. 10—Business profits—Ascertainment of—Bad debts of the year to be deducted—What debts bad—Question of fact—To be decided by appropriate tribunal—Statute-barred debts not necessarily bad.*

In assessing the amount of profits and gains of a year chargeable to income-tax account must be taken of all losses incurred during the year and for this purpose each year is a separate and self-contained period of time in regard to which profits earned or losses sustained before its commencement are irrelevant. Consequently a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining profits of that year because loss had not been sustained in that year.

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions of fact to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The assessee has no option of declaring debts bad in any particular year. A statute-barred debt is not necessarily bad; neither is a debt which is not statute-barred necessarily good. The Commissioner of Income-tax, Central Provinces and Berar v. Sir S. M. Chitnavis, since deceased (now represented by Krishna Rao, minor, through his guardian Parwati Bai Lady Chitnavis. 647

———*Sec. 22(2)—Notice sent to assessee by registered post, acknowledgment due—Delivery taken by minor son of assessee—Whether service good.*

Where a notice, issued by the Income-tax Officer, by registered post, acknowledgment due, under Sec. 22(2) of the Income-tax Act, was taken delivery of by his son without stating the name of the addressee for whom he purported to sign the receipt, and the son, though a minor, was possessed of ordinary intelligence and was living with his father and had on previous occasions received such notices on his father's behalf, *held,* that the service of the notice was a good service. L. C. DeSouza, Cawnpore—*In the matter of.* 409

———*Secs. 30 and 23(4)—Assessment under Sec. 23(4)—Appeal by assessee—On the ground that case did not fall within Sec. 23(4)—Appeal not admitted without hearing assessee or his counsel.*

An assessment under Sec. 23(4) of the Income-tax Act of 1922 having been made against the assessee, he filed an appeal before the Assistant Commissioner contending that the Income-tax Officer was not justified in treating the case under Sec. 23, Sub-sec. 4. The Assistant Commissioner, after scrutinizing the order and the memorandum of appeal behind the back of the assessee or his counsel. came to the conclusion that the order had been rightly made and refused to admit the appeal. *Held,* that the Assistant Commissioner must satisfy himself on hearing the assessee or his counsel and not by an *ex parte* examination of the record in his chambers, that the case fell within the purview of Sec. 23(4), and was, therefore, not open to appeal. Bhagwati Prasad, Rais, Alinagar, Gorakhpur—*In the matter of.* 389

———*Secs. 66(2), 23(4), 30 and 31—Assessment by Income-tax Officer under Sec.*

23 (4)—Assistant Commissioner considers assessment properly made—No order under Sec. 31—No reference lies to High Court.

Where the Assistant Commissioner of Income-tax considers that the assessment by the Income-tax Officer is *properly* made under Sec. 23(4), no appeal lies to him under Sec. 31 (in accordance with the proviso to Sec. 30) and there is no order under Sec. 31, and no reference therefore lies to the High Court in accordance with the provisions of Sec. 66(2). SURAJ BHAN UGARSEN—*In the matter of.* 576

———*Sec. 66(5)—High Court judgment—Reassessment—Question to be considered by Income Tax department in the light of High Court's judgment and in the presence of the assessee.*

It is the duty of the Income Tax department to take up the question of reassessment, after a reference by the Commissioner of Income-tax has been answered by the High Court, and to see, in the presence of the assessee, whether in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say that material alteration in the figure of assessment is not expected, and therefore reassessment is not necessary. SECRETARY OF STATE FOR INDIA v. BASANT RAI. 174

INSOLVENCY—*Receiver—Decree directing receiver to pay costs—Executable personally against him—Receiver's right to be re-imbursed from insolvent's estate.*

Where the decree dismissing the receiver's appeal directed him to pay the costs of the respondent, without stating that the costs should be paid out of the insolvent's estate, the costs were executable personally against the receiver, though he had ceased to hold the office at the time of execution. If he wanted to safeguard his personal interest he should have obtained an indemnity from the creditor or other person in whose interest he was litigating. It was however open to the receiver or his heirs to apply to the insolvency court for an order that he may be reimbursed out of the insolvent's estate. LACHMAN DAS v. LAKSHMI NARAIN. 226

LAND ACQUISITION ACT (I of 1894), *Secs. 11 and 21—One piece of land (forming part of whole to be acquired)—More than one person interested—To be dealt with in one award—Award apportions compensation between owner and tenants—Tenants had by agreement accepted a lower sum—Wehther owner entitled to the extra amount.*

Sec. 11 of the Land Acquisition Act does not contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto. This does not mean that the whole of the land at any time to be acquired under the Act must necessarily be dealt with in one award; but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land.

Where the compensation for one piece of land (forming part of the whole to be acquired) which was "spotted over with the houses of permanent tenure-holders", was apportioned in the award in the proportion of one-fourth to the owner and three-fourths to the tenants, and the tenants had by agreement accepted a lower sum; *held*, that no objection ever having been made to the award as to apportionment, there was no foundation for the owner's claim to be entitled to the extra amount which the tenants might have received if they had not by agreement accepted three-quarters of a lower valuation. All that the owner could claim was his awarded proportion. The gain was a gain of the municipality which acquired the land. PRAG NARAIN v. THE COLLECTOR OF AGRA. 741

———*Sec. 18 and Civil Procedure Code, Sec. 115—Order passed by Collector under Sec. 18 refusing to make reference to the District Judge—Whether High Court has jurisdiction to revise the order.*

The Collector, when acting under Sec. 18 of the Land Acquisition Act, is acting administratively and not judicially, and not as a 'court', and he could not in any case be acting as a court "subordinate to the High Court", and no revision therefore lies to the High Court under Sec. 115 C. P. C. from an order passed by the Collector under Sec. 18 refusing to make a reference to the Court of the District Judge.

Case-law discussed. BHAJANI LAL v. THE SECRETARY OF STATE. 769

———*Secs. 19 and 18—Application under*

Sec. 18 barred by time—Collector makes reference to civil court—Whether civil court can entertain plea of limitation—Board Circulars I—VIII, Para 28, Note 2.

Where a 'person interested' who has not accepted the award, makes a time-barred application to the Collector under Sec. 18, Land Acquisition Act, that the matter be referred to the civil court, and the Collector makes the reference; *held*, on objection by the Secretary of State, that the civil court had no power to entertain the plea of limitation. The principle laid down by Board Circulars I—VIII, Para 28, Note 2, that the collector cannot refuse to make a reference, even if it is time-barred and that his duty is to bring the matter to the notice of the civil court is founded on a misconception of law. Secretary of State for India in Council v. Bhagwan Prasad. 752

LANDLORD AND TENANT—*Occupancy holding—House built with zemindar's permission—Site not a holding within meaning of Kumaun Rules—Suit for possession of the house—Cognizable by civil court—Kumaun Tenancy Rules of 1918—Rules 3 and 9, read with Schedule (1) Serial No. 15.*

Where plaintiff sued for possession of a house and a court-yard attached thereto standing on a plot of land alleged to be plaintiff's holding, and under the Kumaun Tenancy Rules of 1928 suits in respect of any matter relating to a holding were cognizable by a revenue court only; *held*, that the land-holder having allowed a building to be put upon the land, the nature and character of the holding was changed and it ceased to be land used or held for agricultural purposes; and in these circumstances the site was not a holding within the meaning of the Kumaun Rules, and the suit was cognizable by the civil court. Jathali Bhul v. Nadia. 468

LAND REVENUE ACT (Local Act III of 1901), *Sec. 233 (k)—Joint co-sharers in a suit formed by partition—Civil suit raising a question of title between them—Whether barred.*

There is no authority for the proposition that Sec. 233 (*k*), Land Revenue Act, bars a civil suit raising a question of title between joint co-sharers in a unit formed by partition because such questions might have been raised in the partition proceedings. Supposing *A*, *B* and *C* are recorded co-sharers in a *mahal*, their respective shares being recorded as 8 annas, 5 annas and 3 annas. Supposing *A* applies for separation of his share into a separate *mahal*. *B* and *C* do not wish for any partition *inter se* and prefer to remain joint in one *mahal*, and the revenue court therefore would only be concerned in dividing the original mahal into two shares of equal value. If after partition *C* claims as against *B* a declaration that his share in the new mahal which has been allotted to them jointly is not 3|5ths but ½, then his suit would not be barred, because the question of title, though it might have been raised under Sec. 111 during the partition proceedings, would not have affected the partition. Halima Begam v. Mohit Ullah Khan. 621

LEGAL PRACTITIONER—*Advocate made deliberately false imputations upon fairness of judicial officers—In proceedings connected with a case to which he was himself a party—Whether advocate can be punished by suspension or removal from practice.*

Where an advocate deliberately made false allegations involving imputations upon the fairness and impartiality of two judicial officers in proceedings connected with an execution case *to which he was himself a party; held,* that it was not competent for the High Court to punish the advocate on the disciplinary side under the Indian Bar Council Act and to suspend or remove him from practice. All that the court could do was to punish him for contempt of court. An Advocate of Benares—*In the matter of.* 773

———*Counsel files application for leave to appeal to Privy Council—Deposit under Or. 45, R. 7 C. P. C.—Appeal succeeds—Whether counsel can claim lien on the deposit for the outstanding fees.*

A counsel, who files an application for leave to appeal to Privy Council, is not entitled to claim a lien for the outstanding fees on the amount deposited by the appellant under Or. 45, R. 7 C. P. C. as security, in the event of the appeal succeeding, as this deposit was never the subject-matter of dispute and was not the fruit of the action. Rashid Ahmad—*In the matter of.* 764

———*Payment of fees—By execution of promissory note—Whether can be taxed as costs—General Rules, Chapter XXI, Rule 1—Actual payment necessary.*

Where the certificate filed by a legal practitioner showed that cash had not been paid, but that a promissory note had been executed in his favour in lieu of the unpaid part of his fees, *held*, that payment of fees to a legal practitioner must be made in the manner laid

down by General Rules, Chapter XXI, Rule 1 (applicable to subordinate courts) which contemplates *actual payment* and if payment is not actually made but is only promised it cannot be taxed as costs recoverable from the opposite party. BHAGWANT SINGH v. BHAO SINGH. 272

———*Professional misconduct—Unnecessarily protracted examination and cross-examination of witnesses—Gross abuse of process of court.*

Unnecessarily protracted examination and cross-examination of witnesses on commission is a gross abuse of the process of the court and it would be within the powers of the High Court to direct an enquiry with a view to disciplinary action in flagrant cases of this description. RAJKUMAR SEN CHOWDHURY v. RAM SUNDAR SHAHA. 198

———*Threatened zemindar that tenants would stop rendering 'begar' and payment of rent—Convicted under Sec. 506 Penal Code —Appeal—Released by Local Government— In accordance with Government of India Notification dated March 5, 1931—Proceedings before High Court relating to suspension dropped—Threat did not imply violence either to person or to property.*

The High Court issued a notice to a mukhtar to show cause why he should not be suspended or dismissed inasmuch as he was convicted under Sec. 506 of the Penal Code on the ground that he had threatened a zemindar with this consequence that his tenants would stop rendering "begar" and payment of rent. His appeal was not heard as he was released by the Local Government in accordance with the Government of India Notification dated March 5, 1931 granting general amnesty to political prisoners who had been convicted in connection with the civil disobedience movement for offences not involving violence or incitement to violence. *Held,* (1) that the release of the mukhtar amounted to an expression of opinion on the part of the Local Government that he was convicted of an offence which did not imply "violence or incitement to violence"; (2) that the threat to the zemindar, although it came within the definition of criminal intimidation, did not imply any violence either to person or to property and therefore the proceedings before the High Court should be dropped. A MUKHTAR OF GORAKHPUR—*In the matter of.* 116

———*When cannot appear for the other party—Definite retainer with a fee paid or relevant confidential information conveyed.*

In order to prevent counsel from appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party.

Where in a suit by the wife for dissolution of marriage on the ground of adultery, the husband put in a petition praying that an order should be made prohibiting one C, a Barrister-at-Law, from appearing for the wife on the ground that he had conveyed confidential information to him in a letter; and the letter merely referred to complaints that he had against his wife and he desired to take action so that he might obtain custody of the children but he did not definitely engage counsel's services, *held,* that there was nothing in the letter which would prejudice the husband if counsel appeared for the wife. EDNA MAY OLIVIA HARDLESS v. HAROLD RICHARD HARDLESS. 755

LEGAL PRACTITIONERS ACT (XVIII of 1879), *Sec. 36(1), Explanation to—Resolution of Bar Association—Person declared tout on basis of general repute—Legally admissible in evidence.*

A resolution of a Bar Association passed by a majority of the members present at a meeting specially convened, declaring a certain person to be a tout by general repute is legally admissible in evidence under the Explanation to Sec. 36 of the Legal Practitioners Act and can be taken into consideration by the court. There is nothing in the language of the Explanation which would make a resolution based on general repute or hearsay evidence effective. RAM PHAL v. KING-EMPEROR. 176

LIMITATION ACT (IX of 1908), *Sec. 5 —Application under* Or. 22, R. 9 C. P. C.*— Ignorance of death of a respondent—No negligence or omission on the part of appellant —Whether amounts to 'sufficient cause'.* LAKSHMI CHAND v. BEHARI LAL. 18

———*Secs. 6, 9 and 19—Suit on mortgage by mortgagee's son after attaining majority—* Prima facie *time-barred—Acknowledgment— Made when plaintiff a minor—Whether a new period runs from date of acknowledgment— Whether plaintiff entitled to benefit of Sec. 6.*

The plaintiff sued within three years of his attaining majority on a mortgage executed in favour of his late father. In order to bring his suit within limitation he relied on

an acknowledgment of liability made by the mortgagor in a second mortgage which was executed at a time when the plaintiff's father was dead and he himself was a minor, and the plaintiff claimed the benefit of Sec. 6 Limitation Act. *Held,* that first period ceased to run entirely and a new period came into existence from the date of the acknowledgment, and the plaintiff was, therefore, a minor 'at the time from which the period of limitation is to be reckoned' and was entitled to institute the suit within the period of three years after his disability ceased; and Sec. 9 was no bar to the plaintiff's suit. Chandrabhan v. Rajkumar and Sri Parasnathji. 1012

———*Sec. 14—Applicability of—Plaintiff admits—That suit, as framed, not cognizable by civil court as pleaded by defendant—Plaint returned for presentation to proper court—Whether plaintiff entitled to benefit of Sec. 14.*

A party may be in doubt as to whether a suit should be instituted in a civil or a revenue court. If a suit is honestly and with due care and caution instituted in one of such courts but at a subsequent stage it is found that a wrong forum had been chosen, it cannot be doubted that if an admission to that effect be made and the court which has no jurisdiction returns the plaint for presentation to the proper court, Sec. 14 of the Limitation Act, which is couched in comprehensive terms, will be applicable.

It was possible to construe the plaint filed in a civil court as one for avoidance of a lease and for compensation for use and occupation of land. Both the parties and the Subordinate Judge, however, put the construction which was equally plausible, viz., that it was a simple suit for arrears of rent by a landholder against the thekadar and as such it was cognizable by a revenue court. Accordingly, the plaint was returned to the plaintiff for presentation to the propert court; *held,* that there was no want of good faith and the plaintiff was entitled to the benefit of Sec. 14 Limitation Act. Ram Pati Kunwar v. Phool Singh. •421

———*Sec. 19—Document containing acknowledgment of title to immovable property—Whether compulsorily registrable under Sec. 17 Registration Act.* Bageshwari Charan Singh v. Jagannath Kuari. 186

———*Sec. 19—Mortgage—Acknowledgment of—Contained in a* dakhalnama *filed in an execution proceeding—When valid.*

In a suit for redemption of a mortgage which was *prima facie* time-barred, the plaintiffs relied on an acknowledgment contained in a *dakhalnama,* which was filed in court in an execution proceeding—after describing what property the auction-purchasers had purchased, they expressly stated that that property did not include an 8 bigha area which was in their possession as mortgagees and which belonged to the mortgagor's representatives, *held,* that the necessary implication was that the mortgage was subsisting and that they were in possession as mortgagees, and there was therefore a valid acknowledgment within the meaning of Section 19 of the Limitation Act. Mohammad Rafi v. Kripa Ramji. 1010

———*Sec. 19—Unconditional acknowledgment of indebtedness—Whether constitutes a new cause of action—Inclusion of time-barred debts in acknowledgment—Burden of proof.* Abdul Rafiq v. Bhajan. 77

———*Sec. 19 and Pre-emption Act, Sec. 4(9)—Whether pre-emptor is a person deriving his title through the vendee within the meaning of Sec. 19.*

A pre-emptor is not a person deriving his title through the vendee within the meaning of Sec. 19 of the Limitation Act so as to make an acknowledgment of the vendee made in his written statement filed after the claim for pre-emption has been brought, an acknowledgment of his predecessor in title binding upon the pre-emptor. Shankar Lal v. Hashmi Begam. 878

———*Sec. 20, Proviso to (added by Act I of 1927)—Applicability of.*

A money decree was passed on June 10, 1927. On December 9, 1929 Rs.85 were paid by the judgment-debtor out of Court to the decree-holder. The decree-holder applied to certify it on March 16, 1931. The application for execution was made on June 24, 1931. *Held,* that the proviso added to Sec. 20 Limitation Act by Act I of 1927, which came into force on January 1, 1928, applied and the payment of December 9, 1929 did not help to keep alive the decree; and the application certifying payment having been made more than three years after the decree cannot help the decree-holder. Jai Karan v. Panchaiti Akhara Chota Naya Udasi Nanak Shahi. 1035

———*Sec. 123—Applicability of—Suit against an executor or administrator or some person* *legally charged with duty of distributing the estate.*

Article 123 of the Indian Limitation Act only applies to a suit brought against an executor or administrator or some person legally charged with the duty of distributing the estate. Ghulam Mohammad v. Ghulam Husain. 245

———*Sec. 144—Religious Endowment—Transfer by manager without necessity—Adverse possession against idol—Time from which period begins to run.*

When property does not vest in the Mahant, but vests in the idol and the Mahant purports to transfer it in his capacity as the manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale deed, and it cannot be deemed to have been postponed until the Mahant is dead. Sarabdeo Bharthi v. Ram Bali. 836

———*Art. 36—Applicability of—Suit for compensation—By attaching creditor—Against person who misappropriates attached goods.*

A suit for compensation by an attaching creditor against a person who dishonestly removes the attached goods, sells the same and misappropriates the sale proceeds, is governed by Art. 36 of the Limitation Act, and not by Arts. 48 and 49, which apply to cases where the plaintiff has a right to possession of the goods. Kripa Ram v. Kunwar Bahadur. 241

———*Art. 48—Applicability of—Plaintiff must have a right to possession of the goods.* Kripa Ram v. Kunwar Bahadur. 241

———*Arts. 48 and 49—Inapplicability of—Suit for compensation—By attaching creditor—Against person who misappropriates attached goods.* Kripa Ram v. Kunwar Bahadur. 241

———*Art. 49—Applicability of—Plaintiff must have a right to possession of the goods.* Kripa Ram v. Kunwar Bahadur. 241

———*Arts. 60 and 59—Suit for recovery of money—Loan or deposit—Distinction between.*

Where plaintiffs sued to recover a sum of money alleged to have been deposited by their mother with the defendant in the year 1921, *held*, that the Article applicable was Art. 60 of the Limitation Act and not Article 59, and the transaction was a deposit and not a loan in the ordinary sense of that term. Sohan Pal (*Minor*) through Radha Ballabh v. Mustafa Husain. 261

———*Art. 64—'Account stated'—Meaning of—Bilateral account essential—Account must be stated within limitation—Burden of proof.*

The expression "accounts stated" in Art. 64, Limitation Act, implies that there must be mutual demands on each side and the account must not be a unilateral but a bilateral account. In other words the Article contemplates an account stated by one party and an account stated by the other party, that is, two accounts and not merely an account stated by a single party.

Where the plaintiffs lent money to the defendants and the defendants merely made repayments of money which had been lent and had all along been debtors of the plaintiffs, and on a certain date the accounts were gone into and a sum of money found due to the plaintiffs, and the defendants acknowledged the said sum in the books of the plaintiffs, and within three years of the acknowledgment the plaintiffs sued the defendants for a certain sum of money as due on the acknowledgment, *held*, that the transactions were entirely unilateral, and there was no statement of a mutual account, and the case, therefore, did not come under Art. 64 Limitation Act.

For an account stated under Art. 64, Limitation Act, account must be stated within the period of limitation, and it is necessary for the plaintiff to show that the acknowledgment is within the period of limitation. Girdhari Lal v. Bishun Chand through Sri Ram. 279

———*Art. 115 and Companies Act, Schedule I, Table A, Art. 28—Company—Shares—Unpaid calls—Forfeiture—Art. 28 creates special contract on forfeiture—Limitation.* Bishambhar Nath v. Agra Electric Stores. 354

———*Art. 116—Mortgage deed—Covenant—Mortgagee entitled to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third party—Suit to enforce covenant—Limitation—Starting point.*

In the proceedings in execution of a mortgage decree, a certain person objected that the property sought to be sold belonged to him. His objection was disallowed, but in the declaratory suit brought by him it was declared that the property could not be sold in execution of the mortgage decree. A suit for a simple money decree was barred on that date. Thereupon the mortgagee brought a suit for compensation against the mortgagor for breach of the covenant contained in the mortgage deed, which entitled the mortgagee to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third party; *held*, that the plaintiff's suit was for compensation for breach of a covenant of indemnity, and was therefore governed by Art. 116; and was within limitation, whether it was reckoned from the date of objection in execution proceedings or the date of the decree nullifying the decree in favour of the plaintiff. ZIA UDDIN AHMAD KHAN v. AKBAR ALI. 317

———*Art. 120—Applicability of—Family settlement—Person having the right to have and enjoy the profits of the property but cannot possess, partition or transfer—Suit for recovery of arrears of profits.* LAKHMI CHAND v. ANANDI. 177

———*Art. 120—Vendee agreed to pay balance of consideration to mortgagees—Delay in payment—Vendor had to pay interest—Suit for recovery of sum so paid—Limitation.* MAHTAB SINGH v. COLLECTOR OF SAHARANPUR. 556

———*Art. 132—Mortgage deed—Stipulated period—Money becomes due after expiry of.*

A mortgage deed provided that the principal sum would be paid within 6 years and the stipulated interest every year and further that in case of default in punctual payment of interest the mortgagee shall, within the expiry of the stipulated period of 6 years, have power to realise the entire mortgage money and the remaining interest and compound interest due to him in a lump sum through court by sale of the mortgage property. There was default in payment of interest, but the mortgagee did not avail himself of the option given to him. He sued upon the mortgage after 12 years from the date of such default but within 12 years from the date of the expiry of the stipulated period of six years. *Held*, that the suit was within time. Money became due within the meaning of Art. 132 only after the expiry of six years. LASA DIN v. GULAB KUNWAR. 913

———*Art. 144—Co-owners—Transferee from co-owner takes transfer of whole property—Other co-owner has no knowledge of extent of share transferred—Whether adverse possession commences as against other co-owner.*

Where a transferee from a co-owner takes a transfer of the whole property, the other co-owner, *if he has actually no knowledge of the extent of the share transferred*, is entitled to presume that the co-owner has transferred his own interest only and that the transferee by virtue of his right to that share is enjoying possession of the whole property. Of course, if the assertion of title to the whole is brought to his knowledge, and it is accompanied by his ouster and exclusion, adverse possession would then commence as against him.

If a co-owner is in possession of the whole of the joint property and asserting his exclusive title makes a possessory mortgage of the whole and knowledge of the fact is communicated to his co-owners, he can treat his mortgagee's possession as his own constructive possession and count the period of occupation by his mortgagee as a part of the period of his own adverse possession. But where the possession of the co-owner himself was not adverse to his co-owners, and it is not he, but his mortgagee who, having become his subsequent vendee, is setting up adverse possession, then the mortgagee vendee cannot join the two periods together in order to complete his period of prescription for acquiring full title.

Two persons jointly owned a shop in equal shares. A lease was granted to the defendant by the managing co-owner, who remained in possession as a lessee for some time. In 1910 the managing co-owner made a usufructuary mortgage of this very shop to the defendant, and in 1913 the managing co-owner sold the shop to the defendant, who continued in possession all this time. The other co-owner had no reason to suspect the conduct of the managing co-owner, and no evidence was led to prove that the other co-owner had knowledge of the mortgage. On a suit for joint possession by the other co-owner instituted in 1924, the defendant pleaded adverse possession. *Held*, (1) that in the absence of proof that knowledge of the extent of the property mortgaged was communicated to the other co-owner the defendant's possession did not become adverse as against him; (2) that assuming that possession became adverse after the execution of the sale deed of 1913, it was not open to the defendant to tack on the period of his possession as usufructuary mortgagee to the period of his possession as vendee so as to acquire full title by prescription. SUBAH LAL v. FATEH MOHAMMAD. 425

———*Arts. 144 and 106—Suit for joint possession by heirs of deceased member of Mohammedan joint family constituting a partnership—Whether maintainable—Limitation.*

The heirs of a deceased member of a Mohammedan joint family constituting a partnership can maintain a suit for joint possession of the assets in the hands of the surviving members and Art. 144 of the Limitation Act applies to such a suit. SHUKRULLAH v. ZUHRA BIBI. 1039

———*Art. 181 and Civil Procedure Code, Sec. 144—Application for restitution—Limitation—Whether to be counted from the decree of the lower appellate court or from the decree of the High Court confirming that decree.*

In an application for restitution under Sec. 144 C. P. C., the time to be reckoned under Art. 181, Limitation Act, should be counted from the decree of the lower appellate court and the applicant is not entitled to get deduction of the period occupied by the appeal to the High Court. DHAPO v. BAKRIDI. 724

———*Art. 182—Construction of—Decree —Appeal—Appeal irregular or incompetent—Whether time runs from date of appellate decree.*

Time under Article 182 of the Limitation Act in a case where there has been an appeal runs from the date of the decree of the appellate court. There is no qualification either as to the character of the appeal or as to the parties to it and the appeal would be no less an appeal even though it be irregular or incompetent; nor is it necessary that all the persons affected should be parties to the appeal or it should be one in which the whole decree was imperilled.

In construing provisions relating to statutes of limitations equitable considerations are out of place and strict grammatical meaning of the words is the only safe guide.

In a mortgage suit some of the mortgagees were plaintiffs while others were impleaded as defendants. The other defendants were the mortgagors or their representatives. A decree having been passed partly in favour of the plaintiffs and partly in favour of the defendants mortgagees, the plaintiffs appealed against the decree in so far as it related to the defendants mortgagees and to the appeal the defendants representing the mortgagors' interests were not impleaded. *Held*, nevertheless, that time for execution under Art. 182 ran from the date of the decree of the appellate court.

Any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the term and it is no less an appeal because it is irregular or incompetent. NAGENDRA NATH DEY v. SURESH CHANDRA DEY. 643

———*Art. 182—Step-in-aid of execution—Meaning of—Payment by judgment-debtor out of court—Whether amounts to.*

A step-in-aid of execution is an act done by the decree-holder in Court and therefore a payment of money made by the judgment-debtor out of Court cannot be treated in any sense as a step-in-aid of execution. JAI KARAN v. PANCHAITI AKHARA CHOTA NAYA UDASI NANAK SHAHI. 1035

———*Art. 182—"Where there has been an appeal"—Meaning of—Whether include an appeal from an order dismissing an application to set aside an* ex parte *decree.*

The words "Where there has been an 'appeal'," used in Art. 182 of the Limitation Act, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree passed *ex parte*. SUKHNANDAN SINGH v. RAMDEYI KUNWAR. 731

———*Art. 182 and Civil Procedure Code, Sec. 48—Final decree—Amendment of—Application for execution of amended decree—Made more than 12 years after date of final decree—Whether time-barred.* FAQIR CHAND v. KUNDAN SINGH. 471

———*Art. 182, Cl. (5)—Application for execution filed after expiry of prescribed period—Previous application made under Or. 21, R. 11 —Not accompanied by affidavit required by Or. 21, R. 66(3)—Rules 11 to 14 complied with—Whether application "in accordance with law" so as to save limitation.*

An application for execution of a final decree for sale in a suit on a mortgage was made by the decree-holder, who claimed that limitation was saved under Art. 182(5), Limitation Act, by a previous application under Or. 21, R. 11. On behalf of the judgment-debtor it was alleged that the previous application was not 'in accordance with law' because it was not accompanied by the affidavit required by Or. 21, R. 66(3) and the certificate of the Sub-registrar as regards prior encumbrances. *Held*, (1) that it was not shown that any of the rules 11 to 14 of Or. 21 were not complied with and therefore the application under Rule 11 was an application according to law; (2) that the affidavit and the certificate should be filed at a subsequent stage. DAMBAR LAL v. CHAND MAL. 578

MADRAS IRRIGATION CESS ACT (VII of 1865)—*Section 1, proviso—Interpretation of.*

Where riparian property passes, the property, being riparian, has inherent in it, without special mention in the conveyance, the riparian rights, and the riparian owner is entitled to the protection of the proviso to Sec. 1 of the Madras Irrigation Cess Act. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SANNIDHIRAJU SUBBARAYUDU. 348

MAJORITY ACT (IX of 1875)—*Sec. 2(a)—'To act in the matter of dower'—Meaning of—Mohammedan woman—Major by her personal law but minor under Majority Act—Whether capable of relinquishing her dower.*

A Mohammedan woman who is a major by her personal law but a minor under the Indian Majority Act is capable of relinquishing her dower as consideration for obtaining *Khula*—a form of divorce recognised by the Mohammedan Law, inasmuch as to relinquish dower is 'to act in the matter of dower' within the meaning of Sec. 2(*a*) of the Indian Majority Act. QASIM HUSAIN BEG v. KANIZ SAKINA. 781

MINOR—*Right of—To institute a suit to avoid a decree or order against him—On the ground of negligence of his guardian.*

A minor has a right to institute a suit in the civil court to avoid a decree or order passed by a competent court against him on the ground of the negligence of his guardian. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented.

The plaintiffs were clearly the righful owners of the entire zamindari property in suit but in the revenue papers their names were recorded jointly with the defendants. On the strength of these entries in the revenue papers the defendants applied in the revenue court for partition of their shares. The plaintiffs being minors were represented by their certificated guardian, who objected that the defendants had no right in the property. A question of proprietary title having been raised the revenue court directed the guardian to file a civil suit within three months. The guardian failed to file any suit, and as a result the revenue court decided the question against the present plaintiffs and ordered partition. One of the plaintiffs on attaining majority instituted the present suit for a declaration

of title to the property and for possession in his own right and acting as the next friend of his minor brothers and sisters, against the defendants who were applicants for partition. *Held,* (1) that the legal rights of the plaintiffs being absolutely clear, the failure of the guardian to file a civil suit as ordered by the revenue court prejudiced the interests of the minors, and the guardian ceased to represent the minors properly and effectively, and the inaction of the guardian amounted to negligence, and the minors were entitled to treat the partition order as not binding on them; (2) that when the partition order under the Land Revenue Act itself fell to the ground, Sec. 233 (*k*) would have no application, and the present suit was maintainable. SIRAJ FATMA v. MAHMOOD ALI. 437

MOHAMMEDAN LAW—*Deceased debtor—Suit by creditor against his legal representatives—One defendant exempted—Liability of remaining defendants—Civil Procedure Code, Sec. 2(11).*

Where in a suit, based on a bond executed by a Mohammedan debtor who died before the institution of the suit, the plaintiff originally impleaded the debtor's widow, father and minor daughter who were in possession of his property as his heirs and legal representatives, but subsequently the plaintiff discharged the daughter from the array of defendants, *held,* that the plaintiff was only entitled to a decree against the two remaining defendants (i.e., father and widow) for sums proportionate to the shares of the deceased debtor's estate which devolved upon them, and a decree should not be passed for the whole debt against these two legal representatives. RAM CHARAN LAL v. HANIFA KHATUN. 727

———De facto *guardian—Powers of—Mother of minor sons—No authority to enter into an agreement of reference to arbitration so as to make award binding upon minors as to their share in immovable property—No power to enter into an arrangement whereby minors' share in property is affected.*

Under the Mohammedan Law, the mother, as a *de facto* guardian of her minor sons, has no authority to enter into an agreement of reference to arbitration on behalf of her minor sons so as to make the award binding upon them as to their share in the immovable property of their father, nor has she power or authority to enter into an arrangement whereby the minors' share in the immovable property of their father would be affected and she cannot be clothed with the necessary authority by calling the transaction a family arrangement. MOHAMMAD EJAZ HUSAIN v. MOHAMMAD IFTIKHAR HUSAIN. 199

———*Dower—Relinquishment as consideration for obtaining khula—Right to reclaim dower cannot be exercised after expiry of period of* iddat.

Where a Mohammedan woman relinquishes her dower as consideration for obtaining *Khula,* it is open to her to reclaim her dower at any time during the *'iddat'* and she cannot exercise the option after the expiry of the period of *'iddat',* when the husband's right to revoke the divorce is automatically put an end to. QASIM HUSAIN BEG v. KANIZ SAKINA. 781

———*Dower—Widow in possession of husband's property in lieu of dower debt—Right to receive dower* and *the right to remain in possession vest in the same person by inheritance or transfer—Whether husband's heir can dispossess widow's heirs of transferees from her or her heirs, without payment of dower debt.*

If the right to receive dower *and* the right to remain in possession of certain property in lieu of such dower are vested in the same person, by inheritance or transfer, he cannot be dispossessed by the heirs of the husband until the dower debt is satisfied. AMIR HASAN KHAN v. MOHD. NAZIR HASAN. 275

———*Dower—Widow in possession of husband's property in lieu of dower debt—Whether can sue for her dower and obtain a decree against the assets of her husband.*

A Mohammedan widow in possession of her husband's property in lieu of dower, can sue for her dower and obtain a decree against the assets of her husband if her claim is not barred by limitation. AMIR HASAN KHAN v. MOHD. NAZIR HASAN. 275

———*Gift of immovable property to wife—Deed stating possession delivered—Actual vacation by husband not necessary.*

A Mohammedan executed in favour of his wife a deed of gift of immovable property which declared that he delivered possession over it to her as absolute owner. The deed was handed over to the donee and remained in her possession, but there was no mutation of names. She did not take actual possession until after her husband's death, but during his life she frequently resided with him on the premises. *Held,* that the declaration made by the husband in the deed, followed by the handing over of the deed, were amply sufficient to establish a transfer of possession, and the gift was valid. In the case of an intended gift by a husband to his wife, Mohammedan Law does not require an actual vacation by the husband and an actual taking of separate possession by the wife. MOHAMMAD SADIQ ALI KHAN v. FAKR JAHAN BEGAM. 663

———*Gift to infant, daughter*—Bona fide *intention to give—Valid gift.*

A Mohammedan purchased immovable property, taking the conveyance in the name of his five years old daughter. The income was credited to a separate account, but it was in part applied to purposes with which she had no concern. On the occasion of her marriage the deed was placed upon a tray and sent for the inspection of her father-in-law. After the death of the donor it was contended that the purchase was *benami. Held,* that in the case of a gift by a Mohammedan father to his infant child, no transfer of possession is required, it is only necessary to establish a *bona fide* intention to give, which was established, and there was therefore a valid gift to the daughter. Though there may be no presumption of advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. MOHAMMAD SADIQ ALI KHAN v. FAKR JAHAN BEGAM. 663

———*Hanafi school—Sunnis*—Talak *addressed to absent wife by name, and repeated three times—Whether constitutes an immediately effective divorce*—Talak *pronounced under compulsion or in jest—Whether valid and effective.*

Among Sunni Mohammedans governed by the Hanafi law, words of divorce addressed to the wife by name, though she is not present, and repeated three times by the husband, constitute an immediately effective divorce, and the validity and effectiveness of the divorce is not affected by the husband's mental intention that it should not be a genuine divorce. A *talak* actually pronounced under compulsion or in jest is valid and effective.

Once a divorce is proved, the fact that for fifteen years after the divorce the husband treated the woman as his wife and his children born after the divorce as legitimate, could not undo its effect or confer legitimacy on the children. RASHID AHMAD v. ANIS KHATUN *alias* ANIS FATIMA. 344

———*Inheritance—Surrender of their rights in exchange for annuities—By widow and daughters of deceased Mohammedan—Their in-*

terests enure for benefit of other heirs irrespective of their rights inter se.

The widow and daughters of a deceased Mohammedan having surrendered their rights in exchange for annuities which were charged upon the whole estate, their interests in the entire property enured for the benefit of the other heirs irrespective of their rights *inter se,* and the whole estate, subject to the annuities so charged and the debts, became divisible between the remaining heirs, the sons of the deceased. GHULAM MOHAMMAD v. GHULAM HUSAIN. 245

———*Kharch-i-pandan—Wife not living with husband—Father-in-law executes document—Agrees to pay allowance for kharch-i-pandan—Allowance unconditional—Whether agreement binding.*

See Family Settlement. 9

———*Mohammedan joint family—Meaning of—Whether a legal entity—Rights of members and their heirs—How determined.*

A so-called Mohammedan joint family implies nothing more than a group of individuals living and messing in commensality, owning property as tenants in common, carrying on business jointly and making fresh acquisitions. The law does not recognise a Mohammedan joint family as a legal unit having a corporate existence and as such owning property. In the generality of such cases their rights and those of their heirs can be determined with reference to express or implied agreement, relation of principal and agent, partnership, constructive trust or the like. In support of each claim it must be shown that it is justified by some known principle of law. Mere *a priori* conclusions based on the analogy derived from the law applicable to joint Hindu families, if they cannot be shown to be in conformity with a definite rule applicable to Mohammedans, cannot be accepted. SHUKRULLAH v. ZUHRA BIBI. 1039

———*Waqf—Provision for salary and pension of servants—A valid object—Whether mutwalli can reduce amount—Waqif can reserve to himself the power of naming beneficiaries subsequent to the execution of deed.*

A provision for the salary and pension of servants is a valid object of waqf.

On general grounds there is nothing to prevent a waqif from reserving to himself the power of naming beneficiaries subsequent to the execution of the deed of waqf, provided charitable intention is clearly indicated in the deed.

If the pay or pension of servants is made a valid object of the waqf, it is not open to any mutwalli to interfere with it. ABDUL WAHAB v. SUGHRA BEGUM. 171

———*Waqf—Waqif reserved right to transfer property to pay off previous debts—Subsequent mortgage of part of waqf property—Mortgage valid.*

Where the waqif expressly reserved to himself the right to transfer a part of the dedicated property in order to pay off the previous debts, and it was merely in exercise of that power that he subsequently mortgaged a part of the waqf property with a view to satisfy those debts, *held,* that the mortgage was valid. MOHAMMAD AHMAD SAEED KHAN v. KISHORI LAL. 414

———*Waqf by Shia—Waqif reserving to himself as mutwalli a larger sum for collections and mutwalli's dues than for succeeding mutwallis—Whether waqf valid.*

Where the waqif, who was an old man when he dedicated the property and had retained only a very small property for himself, assigned to himself as mutwalli a larger sum for collections and mutwalli's dues than he assigned to those who were to come after him and for whom collection would be a matter of no difficulty and little expense; *held,* that in making this distinction between himself and the succeeding mutwallis, the waqif was not reserving to himself any portion of the profits, but was merely making allowance for additional expense which would be incurred during his life-time in carrying out the purposes of the waqf, and the waqf was therefore valid under the Shia Law. SALONA BIBI (and after her death) ZUBAIDA BIBI v. BU ALI KHAN. 855

———*Will—In favour of one of heirs of testator—Invalid—Unless consented to by other heirs after death of testator—Consent of minor heirs to be given after attaining majority—Consent by guardian not valid.*

Under the Mohammedan Law a will made in favour of one of the heirs of the testator, is invalid unless consented to by the other heirs after the death of the testator. If the other heirs are at the time of the death of the testator minors, consent must be given by them after their attaining majority. A consent by their guardian on their behalf during their minority is invalid. GHULAM MOHAMMAD v. GHULAM HUSAIN. 245

MORTGAGE—*'Clog on equity of redemption'—What amounts to—Mortgagee given* *right to recover with interest at 2% p.m. money spent on rebuilding house—Whether stipulation enforceable.*

A stipulation in the mortgage deed gave the mortgagee a right to build or rebuild the house mortgaged, and in case he did so, the mortgagor would on redemption pay the amount of the money spent over the building or rebuilding with interest at 2 per cent per mensem, *held,* that the stipulation did not amount to a 'clog on the equity of redemption' under the Indian law and the contract was enforceable in a court of law. SABRATAN v. DHANPAT GADARIYA. 1021

———*Part-owner of property (subject to a simple mortgage) sells entire property and vendee enters into possession—Vendee discharges mortgage debt—Suit by another part-owner for possession of his share—Whether vendee liable to be dispossessed unconditionally.*

A part-owner of certain property, which was subject to a single mortgage executed by all the owners, purported to transfer the entire property to the defendant, who entered into posesssion and paid off a part of the mortgage debt with a portion of the sale proceeds left with him. About a year before the expiry of the limitation on the mortgage the present suit was instituted by another part owner for possession of his share. The defendant contended that the plaintiff should not be allowed possession without payment of a proportionate amount of the sum the defendant had paid towards the discharge of the mortgage debt. *Held,* that the defendant could not set up the private payment of the simple mortgage as a shield against the plaintiff's claim for possession inasmuch as the defendant had become entitled to possession of the property as purchaser of the equity of redemption and not by virtue of the payment of the previous simple mortgage. MUFTI MOHAMMAD HASNAIN v. RUSTAM ALI. 1116

———*Plaint framed as in a redemption suit—Relief—Possession—Mortgage deed unregistered—Plaintiff's title proved independently—Defendants claimed possession as mortgagees for more than 12 years—Plaintiff entitled to possession on paying amount due to defendants.*

The plaint was framed as if it were one in a suit for redemption, and the substantive relief claimed was one for possession. The mortgage deed being unregistered was invalid and no suit for redemption could lie. The defendants had never set up adverse possession and had claimed possession as mortgagees for more than 12 years. The plaintiff succeeded in proving his title independently of the mortgage; *held,* that the defendants must be deemed to have acquired at least the mortgagee's rights, and the plaintiff was entitled to recover possession on payment of the mortgage money admitted by him in the plaint. HALKA *alias* DARIYAO v. NANNHON. 101

———*Possessory mortgage—Simple mortgage—Covenant—Mortgagor could not redeem first mortgage without payment of sum due under second mortgage—Suit for redemption of possessory mortgage—At a time when suit on second mortgage barred by limitation.*

Besides the possessory mortgage of 1868, the mortgagor had executed in 1874 another bond in favour of the same mortgagee and the sum advanced under the bond was charged on the same property as was in possession of the mortgagee under the deed of 1868, and there was a clear stipulation that the mortgagor should not redeem the mortgage of 1868 without payment of the principal and interest due under the bond of 1874. The present suit was brought to redeem the possessory mortgage at a time when if the defendant had to sue on the bond of 1874 it would have been barred by limitation. *Held,* that limitation can be pleaded as against a plaintiff's claim but no defence can be barred by any Article of the first Schedule of the Limitation Act, and the mortgagor was not entitled to redeem the possessory mortgage without payment of the sum due under the second bond. PARAS RAM CHAUBEY v. SHEO DHAN PANDEY. 595

———*Prior and subsequent mortgages—Prior mortgagee takes another mortgage—Part of mortgage consideration left with him to pay up his own mortgage and the subsequent mortgage—Subsequent mortgage not paid up—Suit for sale on subsequent mortgage—Whether prior mortgagee can use his paid up mortgage as a shield.*

Where a mortgagee having a prior lien upon the property, takes another's mortgage of the property with a distinct stipulation with his mortgagor to discharge with the mortgage money left in deposit with him his own lien and that of another mortgagee(of a date subsequent to his own), and the mortgagee satisfies his own incumbrance but fails to discharge the other incumbrance, he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the suit of the subsequent mortgagee for sale. BALBHADDAR UPADHYA v. SHEO MANGAL. 413

———*Several mortgagors—A co-mortgagor redeems property from the mortgagee—Another co-mortgagor redeems property from the co-mortgagor who has already redeemed it—Whether right of subrogation arises—Transfer of Property Act, Section 92 (as amended in 1929).*

One of several co-mortgagors having redeemed the mortgaged property, the appellants, who had purchased the share of one of the co-mortgagors, redeemed the property from the co-mortgagor who had already redeemed it on payment of the mortgage money. The plaintiffs, who were the other co-mortgagors, then brought a suit to recover possession of their shares without paying their proportionate shares of the mortgage debt. *Held*:

Per SULAIMAN, C. J.—That although the appellants had no right to redeem more than their own shares against the will of the mortgagee, nevertheless they were entitled to redeem the whole property *with the mortgagee's consent*. Having redeemed the whole property with the mortgagee's consent they cannot be dispossessed unless the plaintiffs pay their proportionate shares of the mortgage debt. As defendants in possession they can set up their payment as a shield. At the very least they are licensees of the mortgagee and not mere trespassers.

Per MUKERJI, J.—That the appellants were only entitled to redeem their own shares and had no right to redeem the shares of the plaintiffs also. When they paid the mortgage debt due upon the plaintiffs' shares they did so as volunteers, and have no right to retain the property or to be reimbursed. For these reasons the appellants are nothing but trespassers and are bound to hand over the property to the plaintiffs without receiving any payment.

Per KING, J. (on reference)—That the principle of Section 95 Transfer of Property Act (IV of 1882) was applicable to cases where a co-mortgagor redeems the whole property, with the mortgagee's consent, although he might have compelled the mortgagee to permit redemption of his own share only, and the appellants are therefore in possession of the plaintiffs' shares as mortgagees and not as trespassers, and the plaintiffs cannot recover possession without paying their proportionate shares of the mortgage debt. JAUHARI v. TUNDAY. 986

———*Usufructuary—"If possession of mortgagees interfered with, mortgagees entitled to sue for money due by sale of property"—Possession over some properties not given—Whether mortgagees entitled to institute suit for sale.*

A usufructuary mortgage deed provided as follows:—"If the possession of the mortgagees be interfered with in any way, the mortgagees shall have power to bring a claim for delivery of possession, damages and costs, or to realise the entire amount of the mortgage due under the mortgage with interest from my person, mortgaged property and other movable and immovable properties". Out of the properties mortgaged the mortgagees were not put in possession over some and they sued to recover the mortgage money with interest by sale of the mortgaged property. *Held*, that the clause pre-supposes the possession of the mortgagees and was inapplicable to the present suit in which the only relief the mortgagees can have is for possession and mesne profits. GAURI SINGH v. BECHU SINGH. 1092

MUNICIPALITIES ACT (Local Act II of 1916), *Sec. 298, List I, Group H, Cl. (e)—Bye-law under—Prohibiting public prostitutes from residing within specified areas and streets.*

A minor girl, whose mother and other relations were prostitutes, and who lived in the city with her mother, was served with a notice by the municipality forbidding her to carry on her occupation as prostitute in her house, in pursuance of a bye-law framed under Sec. 298 of the Municipalities Act prohibiting prostitutes from residing within specified areas and streets. It was found that the girl carried on the occupation of singing and dancing and lived for about two months as a concubine of a certain man and there was nothing to show that their intimacy was not of an exclusive character. *Held*, that the plaintiff was not a public prostitute and the bye-law could not apply to her case. MUNICIPAL BOARD, ETAH *through* THE CHAIRMAN v. ASGHARI JAN *alias* LAPPO (*minor*) THROUGH BISMILLA. 117

———*Sec. 298H(e)—Bye-law under—Prohibits prostitutes from residing within the municipal limits except certain streets—Whether bye-law* ultra vires.

Where a municipality frames a bye-law under Sec. 298H(*e*) of the U. P. Municipalities Act prohibiting public prostitutes from residing 'within the municipal limits' except certain streets, *held*, that having regard to the definition of 'municipality' in Sec. 2(9) of the

Act, the municipality is itself an area the limits of which are defined and specified, and the bye-laws themselves show what the municipal limits are, and therefore the mention of such limits with the exception of certain parts of it, does amount to specifying a particular area within the meaning of Sec. 298H(*e*), and the bye-law is not *ultra vires.*

Where a municipality framed a bye-law prohibiting public prostitutes from residing 'within the municipal limits' except certain streets, but the exception permitted those who owned houses within the area other than the streets excepted, to continue to reside in such houses, *held,* that reading the whole bye-law together with the exception in it, there was no absolute prohibition against prostitutes residing within the specified area, and the bye-law was *ultra vires.* NAZIRAN v. KING-EMPEROR THROUGH MUNICIPAL BOARD, AGRA. 399

———*Sec. 298, List I, Group H, Cl.* (*e*)—*Bye-law under—Prohibiting prostitutes from residing within specified areas and streets—But permitting those who owned and resided in houses in March 1925 to continue to live—Whether bye-law* ultra vires.

The object of the Legislature in enacting Sec. 298, List I, Group *H,* Cl. (*e*) of the U. P. Municipalities Act is that the prohibition must be general and of universal application within a specified street or area, and must not hit particular prostitutes, while leaving other prostitutes free to ply their trade.

Where a municipality framed a bye-law prohibiting public prostitutes from residing within specified areas and streets but permitted those who owned and resided in houses in March 1925 to continue to live there as before, *held,* that such a bye-law was not in accordance with the provisions of Sec. 298 because it did not amount to a prohibition of the residence of public prostitutes but merely to a prohibition against a particular class of prostitutes. CHANCHAL v. KING-EMPEROR THROUGH THE SECRETARY, MUNICIPAL BOARD, ALIGARH. 28

———*Sec. 298, List I, Group H, Cl.* (*e*)—*Interpretation—To be one which encroaches less on rights of citizens—Whether Board has power to make bye-law prohibiting prostitutes from residing in the whole of the municipal area with the exception of a specified part.*

The interpretation which must be placed on Sec. 298, List I, Group *H,* Cl. (*e*) of the U. P. Municipalities Act is the one which is not only the more reasonable one but also the one that encroaches less on the rights of individual citizens, viz., that a Municipal Board has power to make a bye-law prohibiting prostitutes from residing in a specified street or area, but not to make a bye-law prohibiting them from residing in the whole of the municipal area with the exception of a certain specified part. MUHAMMADI v. KING-EMPEROR THROUGH MUNICIPAL BOARD, AGRA. 15

———*Sec. 307—Recurring fine—Cannot be imposed on first conviction.*

Under Sec. 307 of the Municipalities Act (II of 1916) a recurring fine cannot be imposed at the time of the first conviction but on the second conviction when it is proved that the offender has persisted in the offence for which he was first convicted. HURMAT v. KING-EMPEROR. 154

———*Secs. 307, 318 and 321(1)—Prosecution under Sec. 307—Accused's failure to comply with notices ordering him to remove certain construction—Remedy under Sec. 318 not availed of—Whether trying magistrate precluded from questioning legality or validity of notices.*

The accused was prosecuted under Sec. 307 of the Municipalities Act of 1916 for failure to comply with two notices issued by the Municipal Board under Secs. 186 and 211 ordering him to remove a certain construction which was encroaching upon a public drain, and it was proved that the notices had been served and not complied with. The accused maintained that he had not made any encroachment on the public drain and therefore the Municipal Board had no jurisdiction to issue the notices. *Held,* that Sec. 318 gave to the accused a remedy by way of appeal to the District Magistrate to challenge the legality or validity of the notices under Secs. 186 and 211 of the Act and as he failed to avail himself of that remedy, the criminal court was, under Sec. 321, precluded from questioning the legality or validity of the notices.

There is nothing in the language of Sec. 307 of the Municipalities Act of 1916 which indicates that it is the duty of the court to satisfy itself that the notice was "lawfully" issued by the Municipal Board. HAR PRASAD v. KING-EMPEROR. 579

———*Sec. 318 and Civil Procedure Code, Sec. 115—Order of District Magistrate—Passed in exercise of appellate jurisdiction conferred by*

Sec. 318—Whether revision lies to High Court.

The Court of the District Magistrate while deciding an appeal under Sec. 318 of the Municipalities Act is not subordinate to the High Court and accordingly no revision lies to the High Court. BISHAMBHAR NATH v. ACHAL SINGH. 816

———*Sec. 319—Reference by District Magistrate—High Court's duty—Merely to express opinion on a point of law formulated by the District Magistrate and not to investigate facts.*

Under Sec. 319 of the Municipalities Act (II of 1916) all that the High Court is required to do is to see a statement of facts made by the District Magistrate himself and to express its opinion on a point of law arising out of the statement. This point of law should also be formulated by the District Magistrate. It is no part of the duty of the High Court to investigate the facts. SHEIKH MOHAMMAD v. SAGAR MAL. 470

MUSSALMAN WAQF ACT (XLII of 1923), *Secs. 10 and 3—Failure to comply with Sec. 3—Necessary to decide whether person in default is 'mutawalli' of a 'waqf'—Sec. 10 applicable if position as 'mutawalli' established by evidence.*

Before a person described as 'mutawalli' can be fined for failure to comply with the provisions of Sec. 3, Mussalman Waqf Act, it is necessary for the District Judge to decide whether the person who is alleged to be in default is or is not the 'mutawalli' of a waqf within the meaning of Sec. 2(*e*) of the Act. All that is needed to bring home an offence under Sec. 10 read with Sec. 3 to a defaulting 'mutawalli' is to establish by evidence that he is a 'mutawalli' in respect of property which is waqf within the meaning of Act XLII of 1923. Whether the character of the property is 'waqf' and his own position as 'mutawalli' are admitted or are established by evidence, if denied, Sec. 10 is equally applicable, if a 'mutawalli' has failed to comply with Sec. 3. AFZAL HUSAIN v. MOHAMMAD AHSAN. 266

———*Secs. 10, 3 and 5—'Mutawalli' furnishes particulars under Sec. 3—Deemed to have admitted 'waqf'—Failure to file statement of account under Sec. 5—Liable to be punished under Sec. 10—District Judge's jurisdiction to impose fine.*

Where a "Mutawalli" complies with the provisions of Sec. 3 Mussalman Waqf Act (XLII of 1923), no question as to whether he desires the waqf or admits it can arise, because by his conduct in furnishing particulars of the waqf he must be deemed to have admitted the 'waqf' and his own position as a 'mutawalli', and having furnished particulars required by Sec. 3, he is also under an obligation to file a statement of account in terms of Sec. 5, and if omits to do so, he can be punished under Sec. 10.

The whole scheme of Act XLII of 1923 suggests that the District Judge (and not the criminal court) is the proper authority to fine a 'mutawalli', who is in default in respect of certain duties enjoined by the Act, under Sec. 10. NASARULLAH v. WAJID ALI. 262

NEGOTIABLE INSTRUMENTS ACT (XXVI of 1881) *and Arbitration Act, Sec. 19—C. I. F. Contract—Bank endorses bills of exchange in favour of sellers—Suit based on accepted bills—When can be stayed—Legal position after acceptance.* DHIRAJ LAL RAM PRASHAD v. JACOB BEHRENS & SONS. 1055

N. W. TENANCY ACT (XII of 1881), *Sec. 9—Grove land—Mortgage by sub-tenant—Not illegal.* ARJUN SINGH v. MAHESHA NAND. 474

OATHS ACT (X of 1873), *Sec. 9—Application for an oath—To be without any condition.*

An application for an oath under the Oaths Act must be an application without any condition. It is not open to a party to ask the court to adjudicate, and if the court adjudicates against them to then ask the court to start a separate proceeding under the Oaths Act.

Where plaintiff's application stated that "*if the court does not hold the evidence to be sufficient,* defendant should swear by the Ganges water in hand before the court and say "I may be ruined if I speak lie or falsely swear by the Ganges", *held,* that the offer did not conform to Sec. 9 of the Oaths Act. CHAND REKHA v. JANKI PRASAD. 481

OUDH ESTATES ACT of 1862, *Sec. 19—Applicability of—To wills made after inclusion of* talukdar's *name in the prescribed lists made up for approval, but before such approval.*

Sec. 19 of the Oudh Estates Act of 1862 applied to wills made after the passing of the Act by *talukdars* of the statutory class prescribed by Sec. 10, and it applied to a will, at the time of making of which the *talukdar's* name was included in the lists made up under

Sec. 8 for the purpose of subsequent approval and publication, so that, if unattested as required by Sec. 50 of the Succession Act, 1865, it was invalid as a will. Dulahin Jadunath Kuar v. Bisheshar Bakhsh Singh. 632

———**(I of 1869),** *Sec. 29—Widow of Mohammedan taluqdar—Power to adopt—Forfeited upon re-marriage.*

The widow of a Mohammedan taluqdar has, under the terms of Sec. 29 of the Oudh Estates Act (I of 1869), no power to adopt a son after her re-marriage. Abdul Halim Khan v. Saadat Ali Khan. 593

———*Sec. 32A—Alleged accretions to taluqa—Absence of statutory declaration.*

Apart from the provisions of Sec. 32A of the Oudh Estates Act of 1869 as amended in 1910 there cannot be incorporation of acquisitions in the *taluqdari* estate. Mohammad Sadiq Ali Khan v. Fakr Jahan Begam. 663

OUDH TALUQDARI ESTATE—*Non-talukdari properties—Presumption as to custom of descent—Rebuttal of presumption.*

Where a family custom which governs the succession to the *taluqdari* estate is of comparatively recent origin, two well-established instances of division of *non-taluqdari* property according to Mohammedan Law are sufficient to rebut the presumption that the family custom of primogenitary succession being established in respect of the *taluqdari* property, it must be held to govern also what is *non-taluqdari.* Mohammad Sadiq Ali Khan v. Fakr Jahan Begam. 663

PARTITION—*Co-sharers—Mortgage by one, of his undivided share—Subsequent partition between—Mortgage applies only to property allotted to mortgagor.* Mohammad Afzal Khan v. Abdul Rahman. 909

PARTITION ACT (IV of 1893), *Sec. 4—"Transferred"—Meaning of—"Undivided family"—Owns dwelling house—Share of one member sold in execution of a decree against him—Whether "transferred" to auction-purchaser.*

Where the undivided share of one of the members of an undivided family, in a dwelling house belonging to the family, is sold in execution of a decree against him, it is 'transferred' to the auction-purchaser within the meaning of Sec. 4 of the Partition Act. The word 'transfer' in Sec. 4 of the Partition Act is used in its ordinary sense, namely, change of ownership from one to another; and the words "transfer of property," as used in Sec. 5 of the Transfer of Property Act, cannot be imported in Sec. 4 of the Partition Act. Sohni v. Raj Kumar Singh Jain. 809

PENAL CODE (XXVII of 1870), *Sec. 215—Offence under—Necessary to prove—That property lost by commission of an offence—And accused was screening offender.*

Where the accused merely undertook to endeavour to trace out and restore the lost property on payment of some remuneration, he could not be convicted of an offence under Sec. 215 Penal Code, unless over and above that the prosecution proved that the property had been lost by the commission of an offence and that the accused was endeavouring to screen the offender from justice and was not using all means in his power to cause the offender to be apprehended and convicted of the offence. Ram Naresh Rai v. King-Emperor. 103

———*Section 225B—"Lawful apprehension"—Meaning of—Warrant of arrest defective—No "lawful apprehension".*

A warrant was issued by the court for arrest of a judgment-debtor in the name of the central nazir of Banda, and his office sent it to the registration clerk at Karwi (a sub-division in Banda Judgeship) *without having the nazir's endorsement on it,* and the clerk directed his peons to make the arrest, and after he had been arrested the judgment-debtor assaulted the peons and entered his house. He was prosecuted and convicted under Sec. 225B I. P. C.; *held,* that there was no proper delegation of authority which empowered the clerk to get the warrant executed by the peons under him, and consequently there was no 'lawful apprehension' within the meaning of Sec. 225B and the conviction could not be upheld. Jagannath v. King-Emperor. 179

———*Section 279 and Motor Vehicles Act, Section 16—Accused's negligence and failure to observe the rule of the road—Collision—Conviction under Section 279 I. P. C.—When conviction under special Act more appropriate.*

Where the offence falls *strictly* within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. In such a case it may be assumed that the legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course.

Where the fault of the accused did not lie merely in not observing the rule of the road by driving the lorry on the right side of it but he was negligent in continuing to drive on the wrong side of the road in spite of due warning and in going fast, *held,* that when the ingredient of negligence entered into the offence, the conviction under Section 279 I. P. C. was not only proper but more appropriate. Rule 27 of the Motor Vehicles Act Rules merely lays down the rule of the road, and a breach of it need not necessarily involve rashness or negligence. Jiwa Ram v. King-Emperor through Lt.-Col. Pengelley. 519

———*Section 332, and Criminal Procedure Code, Section 103—Search of applicant's house—Police constables prevented applicants from entering into house at the time of search—Scuffle—Constables hurt—Whether Section 332 applicable.*

On receiving information that the applicants were in possession of illicit liquor, the Excise Inspector with the assistance of the police, searched the house of the applicants. Two constables who had been posted near the house prevented the applicants from entering into the house saying that they should enter it after the search was over. On a scuffle which ensued there was an exchange of blows between the applicants and the constables, with the result that the applicants and the constables received injuries. The applicants were subsequently convicted under Section 332 I. P. C. *Held,* that the constables acted not in the discharge of their duty, which was to allow the applicants to enter into the house and be present at the time of the search, but in contravention of the mandatory provisions of Section 103 Cr. P. C., and were not justified in offering physical resistance when the applicants attempted to go into their house and therefore Section 332 I. P. C. did not apply. Bhikugir v. King-Emperor. 530

———*Section 336—Conviction under—Throwing bricks into another's house from enmity—"Any act"—Meaning of.*

Where it was found that the accused had thrown bricks into the house of the complainant from enmity, *held,* that the act was one which would endanger the personal safety of the complainant when he was inside the house and of any other person who might be inside, and the accused committed an offence under Sec. 336 I. P. C. The accused could also be convicted of the offence of assault under Sec. 351 Penal Code, as the throwing of brickbats by the accused would be a gesture which would cause the complainant to apprehend that criminal force was about to be used against him. Mahadeo Pandey v. King-Emperor through Joganand Pande. 224

———*Section 351—Conviction under—Throwing bricks into another's house from enmity.* Mahadeo Pandey v. King-Emperor. 224

———*Section 351—Internal examination of a lady—If not voluntarily submitted to by her—Amounts to assault.* Padarath Tiwari v. Dulhin Tapesha Kueri. 221

———*Section 353—Warrant of arrest illegal—Whether officer executing warrant acting in discharge of duty as public servant.*

Where the warrant issued was illegal, the officer executing that warrant could not be considered to be acting in the discharge of his duty as public servant, and the conviction of the accused under Sec. 353 I. P. C. could not be upheld. Jagannath v. King-Emperor. 179

———*Section 366—Offence under—When made out—Kidnapping or abduction from lawful guardianship—Necessary ingredient.*

In order to prove an offence under Sec. 366 Penal Code, it is necessary to show that the girl or woman had been kidnapped or abducted from lawful guardianship.

A man who commits sexual intercourse with a girl in a field near her own home without having any intention of taking her away with him is not guilty of an offence under Sec. 366 Penal Code; but a man who has intercourse with a minor girl even with her consent is guilty of the offence of rape. King-Emperor v. Abdul *alias* Abdul Karim and Abdul Hasan. 776

———*Section 366—'Seduced to illicit intercourse'—Meaning of—Accused carrying on intrigue with a girl under sixteen (in the custody of her guardian)—He goes away with her—With intention of continuing illicit intercourse—Whether offence under Sec. 366 made out.*

The phrase 'seduced to illicit intercourse' in Sec. 366 I. P. C. implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse. These must be two distinct acts, though they may follow in immediate sequence. The words or actions of the accused which induced the girl to submit to the illicit intercourse must precede the actual act.

PENAL CODE (XXVII of 1870)—Sec. 395

The term 'seduction' can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man.

The act of seduction alleged must be subsequent to the kidnapping in order to make Sec. 366 Penal Code applicable.

Section 366 Penal Code cannot apply to a case where the accused is said to have been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian, and goes away with her because obstacles are thrown in the way of that intrigue, even though when he so goes away with her it is with the intention of carrying on that intrigue or in other words, with the intention of continuing illicit intercourse. KING-EMPEROR v BAIJNATH. 483

————*Secs. 395 and 380—Dacoity—No use of force or show of force as inmates did not resist dacoits—Whether offence committed.*

The accused were charged originally under Section 395 I. P. C. but the Sessions Judge convicted them of an offence under Section 380 I. P. C. as he was of opinion that probably the inmates did not resist the dacoity seeing their large number and so peacefully and calmly without using any force or show of force the dacoits acquired the property, *held,* that the view taken by the Sessions Judge was entirely wrong. According to his view any dacoity in which no resistance is offered and no violence required will cease to be a dacoity and should be treated as a theft. RAM CHAND v. KING-EMPEROR. 1078

————*Sec. 405—Criminal breach of trust—Failure to produce an electric meter on a particular date—Whether amounts to—Evidence of dishonesty necessary.*

A person on whose premises a meter is installed by the electric company is responsible for it, and if at any time he is unable to produce the meter, the price of it could be deducted from his deposit with the company; but the mere failure to produce the meter on any particular date does not of itself constitute criminal breach of trust under Sec. 405 Penal Code. The words of Section 405 do not embrace the case of a man who has taken an article on hire and fails to produce it. There must be some evidence that he acted dishonestly. MANNI LAL v. KING-EMPEROR. 213

————*Sec. 499, Exception 9—Complainant excommunicated by panchayat—Punches informed members of brotherhood—Good faith to be presumed—No direct evidence of malice—Communication privileged.*

A communication by the *punches* to the members of the community, incorporating the resolution of the *panchayat* excommunicating the complainant (who absented himself when summoned to answer a charge), must be presumed to have been made in good faith, and in the absence of direct evidence of malice, the communication must be deemed to be privileged, even though the resolution was not worded in an absolutely regular and formal manner. DASAI v. KING-EMPEROR. 75

PRE-EMPTION—*Customary right of—Suit for pre-emption—Crucial date—Date of decree—Vendee's acquisition by gift of a share in village pending suit—Whether claim defeated—Re-sale by stranger purchaser after suit—Effect of—Transfer of Property Act, Sec. 52.*

In a suit for enforcement of a customary right of pre-emption, not governed by Mohammedan Law or by the Agra Pre-emption Act, the right of a co-sharer seeking pre-emption must be judged on the facts existing on the date when the decree is passed. Therefore, the vendee's acquisition by gift of a share in the village pending suit defeated the claim of the plaintiff-co-sharer to pre-emption. The doctrine of *lis pendens* as embodied in Section 52 of the Transfer of Property Act applies only to dealings with property actually in litigation. A re-sale by the stranger purchaser *after suit* will not defeat the pre-emptor. HANS NATH v. RAGHO PRASAD SINGH. 190

————*In Kumaun—Not governed by Pre-emption Act but custom—Record does not give preference to relatives within third degree* inter se.

Where, in a suit for pre-emption in Kumaun, to which the Pre-emption Act did not apply, the plaintiffs were step-brothers of the vendor, and the vendees were descended from the same grand-father as the vendor, and according to the custom prevailing in Kumaun "a relative of the vendor within the third degree has a right of pre-emption against any purchaser who is an unrelated or a more distantly related co-sharer", *held,* that the record of custom did not mean that if both the plaintiff-pre-emptor and the vendee were within the third degree, the plaintiff would have preference if he was a nearer relation; and therefore the plaintiffs were not entitled to pre-empt. BHIM SHAH v. UDE RAM SHAH. 108

———*Plaintiff's property included in sale deed —Claim for possession as owner joined with alternative claim for pre-emption—Whether pre-emptor to pay proportionate amount of sale consideration for the rest of property.*

Where plaintiff's property has been included in the sale deed, he can combine a claim for recovery of possession and a claim for pre-emption in one and the same suit and base his claim on alternative grounds.

Obiter dicta—Where plaintiff's property has been intentionally included either to defraud him or to embarrass him, the consideration paid may be treated as the consideration for the property which in reality belonged to the vendor, but where the vendee has acted in good faith, it may well be argued that the total consideration paid by him must be paid by the pre-emptor even though a part of his own property was included. HANKAR KUNWARI v. ISHWAR DAYAL SINGH *alias* BABBAN SINGH. 313

PRE-EMPTION ACT (Local Act XI of 1922), *Sec. 4(10)—Vendor sells property not in his possession—Vendee recovers property from third party—Whether transaction amounts to sale and is pre-emptible.*

Where a person, who is not in possession of his property and is unable to raise money to sue for its recovery, sells the same to the defendant for cash consideration, and the defendant recovers the property from the third party by a suit, the transaction falls within the definition of 'sale' under Sec. 54 of the T. P. Act and such sale is pre-emptible on payment of all that the vendee has had to pay. BADRI PRASAD MISIR v. BIJAI NAND TEWARI. 851

———*Sec. 5—Wajib-ul-arz—Language of—"No particular rule based on custom, but there is one according to custom of country and Mohammedan Law"—Whether Sec. 5 (a) complied with.*

Where the extract from the *wajib-ul-arz* prepared before the commencement of the Pre-emption Act (XI of 1922) ran as follows:—"Custom of Pre-emption. There is no particular rule of (based on) custom in this village, but there is one according to the custom of the country and the Mohammedan Law", *held,* that this statement in the *wajib-ul-arz* contains a declaration that there is a custom of pre-emption, though the entry proceeds to limit its significance by saying that pre-emption can be had only according to the custom of the country and the Mohammedan Law, and Sec. 5 (*a*) of the Pre-emption Act has been complied with. ABDUL RAB v. AKBAR HUSAIN. 561

———*Secs. 9 and 20—Sale of* Sir *land—Vendor becomes ex-proprietary tenant—Right of pre-emption accrues in favour of plaintiffs—Before institution of suit for pre-emption vendee sells property back to vendor—Whether Sec. 9 bars suit for pre-emption.*

On a sale of *Sir* lands, the vendor became an ex-proprietary tenant, and a right of pre-emption under Sec. 11 of the Pre-emption Act accrued in favour of the plaintiffs against the vendee. Before the institution of a suit for pre-emption the vendee sold the property back to the vendor. The suit for pre-emption was instituted within one year of the original sale. *Held,* (1) that Sec. 9 did not apply, as it did not say that if property ultimately passed on to an ex-proprietary tenant the right of pre-emption previously acquired was automatically extinguished; (2) that Sec. 20 applied, and the suit was maintainable against the subsequent transferee who, being an ex-proprietary tenant, had no right of pre-emption equal or superior to that of the plaintiffs. MAHABIR PERSHAD v. CHITTOO LAL. 397

———*Sec. 12(2)—Right of pre-emption—Confined to proprietors in same village—Not extended to shares sold in another village—Even though both villages are in the same mahal.*

Sec. 12(2) of the Pre-emption Act contemplates that the right of pre-emption should not be exercised outside the village in which the pre-emptor is a co-sharer, that is to say, there would be no right of pre-emption in favour of a proprietor of one village in respect of a share sold in another village, even though both the villages happen to be within the same mahal. The policy of the legislature appears to be that the right of pre-emption should be confined to proprietors in the same village and not extended to shares sold in other villages. It should make no difference whether one mahal consisted of two or more complete villages or only portions of two or more villages. BASDEO NARAIN SINGH v. BIRJU SINGH. 30

———*Sec. 17—Sale—Price—Included mortgage money, which was in fact due—Whether value of mortgage debt limited to the market value of property—Striking disparity between ostensible price and market value—Whether*

PRE-EMPTION ACT (Local Act XI of 1922)—Sec. 19

burden of proving actual price shifted on vendee.

Per NIAMATULLAH, J.—Where the mortgage money included in the price was *in fact due* and both the vendor and the vendee agreed that that amount be made part of the consideration, (there being no dispute as to the remainder of the consideration which was paid in cash) the ostensible price cannot be considered to be otherwise than the actual price merely because it greatly exceeds what the property can fetch in the open market.

Per SULAIMAN, J.—Where the mortgage money included in the price was in fact due (i.e., the existence of the amount due on an arithmetical calculation of the principal and interest was not disputed), the court is not bound to find that the full amount due under the mortgage was a real part of the sale consideration.

Per NIAMATULLAH, J.—It will be a highly objectionable mode of dealing with the evidence if we seize on only the disparity between the ostensible price and the market value, ignoring other circumstances simultaneously appearing and explaining the disparity, and to reserve consideration of them for the next step in the case, namely, to find whether the vendee has succeeded in discharging the onus laid on him by proof of the market price. The evidence should be taken as a whole, and if it does not suffice to prove, *prima facie,* that the ostensible price is not the actual price, the issue is answered against the pre-emptor. MISRI LAL v. DEBI CHARAN. 321

———*Sec. 19—Pre-emptor—Entitled to maintain suit—If status of co-sharer not lost till passing of first court decree—Not necessary to establish that his status could not have been challenged.*

If the plaintiff-pre-emptor has the status of a co-sharer up to the time the first court passes its decree, he would be entitled to maintain the suit. It is not necessary for him to establish further that no suit to challenge his interest as a co-sharer could have been brought. Where such a suit is brought against him and decreed before the first court passes the decree in the pre-emption suit, the position would of course be different. RAM RAJ PANDEY v. HAR PRASAD. 109

———*Secs. 19, 11, 12 and 4(1)—Suit for pre-emption against a stranger—By a co-sharer —Of less than 12 months' standing—Whether maintainable.*

A person, who has purchased a share in a village can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although twelve months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers. NARSINGH NARAIN v. RAM CHANDER PANDEY. 719

———*Sec. 20—'Indefeasible'—Deeds of exchange from individual members of joint Hindu family—Transferee does not acquire indefeasible title—Unless deeds are for 'benefit of the estate'.*

Where the vendee, who was a stranger at first, obtained, during the pendency of a co-sharer's suit for pre-emption, deeds of exchange from individual members of a joint Hindu family, and the exchanges were not for the benefit of the estate, *held,* that the vendee had not acquired an indefeasible interest in the property taken in exchange and therefore could not defeat the pre-emptor. BALZOR SINGH v. RAGHUNANDAN SINGH. 33

———*Sec. 22—Property jointly purchased by two defendants—Right of pre-emption against one only—Pre-emption suit—Defendants cannot go behind sale-deed and set up a secret arrangement defining their shares—Suit to be decreed as against both.*

Where property is jointly purchased by two persons against one of whom only there is a right of pre-emption and the sale deed does not specify their shares, they cannot go behind the sale deed and set up a secret arrangement defining their shares, and the right of pre-emption can be claimed as against both. SAGHIR FATMA BIBI v. BRIJ RAJ SINGH. 757

PROBATE AND ADMINISTRATION ACT (V of 1881), *Secs. 4 and 90 (=Succession Act (XXXIX of 1925), Secs. 211 (1) and 307)—Executor—Not clothed with probate—Estate vests from date of testator's death—Vesting under Sec. 4 or power of disposal under Sec. 90—Not dependent upon grant of probate.*

In case of Hindu wills to which the Hindu Wills Act does not apply, the estate vests in the executor (who accepts office) from the date of the testator's death, even though probate has not been obtained, and he is competent to deal with the testator's property. KADIYALA VENKATA SUBAMMA v. KATREDDI RAMAYYA. 293

PROFESSIONAL MISCONDUCT

See Legal Practitioner.

PROSTITUTE

See Public prostitute.

PROVINCIAL INSOLVENCY ACT (V of 1920), *Sec. 5 and Civil Procedure Code, Sec. 144—Payment made under an order of insolvency court—Order set aside on appeal—Whether insolvency court has jurisdiction to order refund.*

The insolvency court ordered the receiver after annulling the adjudication to distribute the assets of the debtor among the scheduled creditors. Before the High Court set aside this order as *ultra vires,* the receiver had made payments in pursuance of the order. *Held,* that Sec. 144 C. P. C. applied and the insolvency court had jurisdiction to order that the person who had received payment should be called upon to refund the amount to the receiver. PANNA LAL SHAM LAL (THROUGH PANNA LAL) v. ABDULLAH USMAN. 1095

———*Sec. 28—Liability arising out of a covenant in a sale deed of a house in favour of insolvent—Vendee undertook to remove certain constructions at vendor's pleasure—Whether receiver bound—Specific Relief Act, Sec. 27(b)—Transfer of Property Act, Sec. 11.*

Plaintiff-respondent owned two houses with a lane running between them. The house to the south was sold by him to *F*. The sale deed contained a covenant that, if and when, the vendor wanted the vendee to remove the *chhatta*—a two-storeyed building constructed over the lane—which opened into the vendee's house, it would be removed by the vendee at his own cost. Further, it was agreed that each of the parties would be entitled to open sky-lights or clear-storey windows in their respective walls. After the sale, *F* was declared insolvent and the house was purchased by the defendants from the receiver. The plaintiff, therefore, instituted the present suit for compelling the defendants to remove the *chhatta* built over the lane. *Held,* (1) that the house vested in the receiver with the liability arising out of the covenant in the sale deed to remove the *chhatta* at the vendor's pleasure.

(2) that the covenant could be enforced against the receiver under Sec. 27(*b*) of the Specific Relief Act.

(3) that, as the *chhatta* rested partly on the plaintiff's wall, it imposed a burden on that wall, and unless the *chhatta* was removed the sky-lights, etc., could not be opened, and it was therefore for the beneficial enjoyment of the plaintiff's property that the defendants should be compelled to enjoy their property in a particular manner, viz., that agreed upon, and the case was covered by the proviso to Sec. 11, Transfer of Property Act. NAND GOPAL DAS v. BATUK PRASAD GUPTA. 36

———*Sec. 28, and Tenancy Act (III of 1926), Sec. 264—Whether insolvency law applicable to suits and proceedings under the Tenancy Act.*

Before the coming into force of the Tenancy Act of 1926 the law was that provisions of the insolvency law did not apply to proceedings in the revenue court. But that portion of Sec. 193 of the old Tenancy Act (II of 1901) which had the effect of making the insolvency law inapplicable to cases under the Tenancy Act has been deleted from the corresponding Sec. 264 of the new Act (III of 1926), and the bar has been automatically removed. *The Provincial Insolvency Act must now be held to be applicable to suits and proceedings under the Tenancy Act.* THE OFFICIAL RECEIVER OF MORADABAD v. MURTAZA ALI. 402

———*Sec. 28(2)—"Commence any suit or other legal proceeding"—Meaning of—Appeal—Relief—Declaratory decree that certain property was not attachable be set aside—Whether Sec. 28 barred appeal.*

The sons of a judgment-debtor sued for and obtained a declaration that certain property was not saleable or attachable under a decree against their father. Prior to the passing of the decree the father was adjudged an insolvent. The decree-holder appealed to the High Court (and although he did not in the first instance implead the official receiver, he was given time to do so when the appeal came on for hearing) without obtaining permission of the insolvency court; *held,* that all that the appellant asks is that the declaratory decree should be set aside, so that the property be attachable under the decree of the appellant, and that would not be a remedy against the property of the insolvent within the meaning of Sec. 28 and that section did not bar the present appeal. HARNAM CHANDAR v. RUP CHAND. 361

———*Sec. 28(2)—Hindu father declared insolvent—Untainted debts—Whether receiver can dispossess sons from property available for payment of father's debts—Rights of receiver.*

Where property in the hands of Hindu sons can be made available for payment of the father's debts, the receiver of the father is entitled to *attach and sell* the property, but he has no right to dispossess the son of the insolvent from the property in their possession. In the reported cases, sometime the word 'seize' has been used and sometime the word 'attach' but they have been indifferently used to express the same idea. Sita Ram v. Receiver of the Estate of Ram Prasad, Insolvent. 285

———*Secs. 28(2) and 31—Judgment-debtor adjudicated insolvent—No protection from arrest in execution of decree—Until protection order made under Sec. 31.*

Sec. 28 of the Provincial Insolvency Act (V of 1920) does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent.

Under Sec. 31 of the Provincial Insolvency Act of 1920 a discretion is granted to the court either to make an order for protection of the insolvent from arrest for all debts or make a limited order or not to make a protection order at all; and it is no longer a matter of right for a judgment-debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest.

The words "or person" were deliberately taken out of the present Sec. 28 by the legislature because provision was made in Sec. 31 for dealing with the question as to how far insolvency proceedings bar the arrest of a judgment-debtor. Ali Husain v. Lachhmi Narain Mahajan. 168

———*Secs. 31, 75 and 5(2)—Insolvency court refusing protection as regards all debts due from insolvent—Appeal—Only three creditors who contested application for protection in the first court impleaded—Protection granted —Other creditors entitled to execute decrees against insolvent.*

The insolvency court having refused protection as regards all the debts due from the insolvent, he appealed to the District Judge impleading only the three creditors who had appeared in the first court to contest the insolvent's application for protection and obtained a protection order from the District Judge. Subsequently, the appellant, who was not one of the three creditors, took out execution of his decree praying for the insolvent's arrest. *Held,* that the order of the insolvency court of appeal though general in its terms, must be limited to the debts due to the three creditors, who had been impleaded and as against whom the order of the first court was set aside, but as regards the other creditors, including the appellant, the order of the first court became final, and the appellant was therefore entitled to execute his decree against the insolvent. Jitmal Ram Gopal through Ram Gopal v. Nathu Ram. 407

———*Sec. 53—"Valuable consideration"—Meaning of—Inadequate consideration—When sale can be set aside.*

A consideration would be valuable if it is not so small as to be negligible when the value of the property is to be taken into account. An inadequate consideration may be evidence of want of good faith which may itself be sufficient for the setting aside of a transfer. P. K. Banerji, *Official Liquidator,* Cawnpore v. Mangal Prasad. 53

———*Sec. 57(4)—Government Notification 359|VII-277 dated March 11, 1930—Official Receiver—Remuneration fixed at 5% of "gross assets"—Meaning of "gross assets"—Interest of mortgagee—Not to be taken into account in estimating the assets of insolvent debtor.*

Where the houses owned by insolvents were subject to a mortgage of Rs.2,500, and the insolvents, the creditors and the mortgagee agreed that this property should be sold to the mortgagee for Rs.3,500, and the latter was to keep Rs.3,125 for himself and pay Rs.375 to the unsecured creditors; and by a Government Notification No. 359|VII-277, dated March 11, 1930 the remuneration of the official receiver was fixed at '5% of the gross assets coming into his hands, subject to a minimum commission of Rs.5 in each case', *held,* that the words 'gross assets' in this particular case must mean that portion of the property which was represented by the amount Rs.375. The official receiver therefore should have his remuneration calculated on the sum of Rs.375.

The word 'assets' mean 'effects of an insolvent debtor or bankrupt applicable to the payment of his debts'. This definition implies that the interest of the mortgagee is not to be taken into account in considering what are the assets of an insolvent debtor, because a mortgage is the transfer of an interest in the immovable property and what has already been parted with by the insolvent cannot be considered to be his property available for distribution among his unsecured creditors. *In re* The Official Receiver. 152

———*Sec. 59(c), 57 and 56 and Government of India Act, Sec. 32—Official receiver makes a contract—Liability on contract—Property of insolvent liable if court's sanction obtained, otherwise receiver personally liable—No liability on Secretary of State for acts of receiver.*

The proprietor of a printing press was adjudicated insolvent and the official receiver of the time, who was appointed receiver of the insolvent's estate, arranged with the plaintiff that the press should remain for a period in the house of the plaintiff where the press was, at the rent which was paid by the insolvent. The official receiver failed to pay the sum due to the plaintiff, and the plaintiff thereupon brought the present suit to recover the sum due, making the Secretary of State party to the suit.

Held: that all that the official receiver can do by making a contract is in the first place to render the property of the insolvent liable for the performance of the contract, if the receiver has obtained the sanction of the insolvency court to the making of the contract, and if he has not obtained that sanction, then he is personally liable on the contract. Under no circumstances there is any liability imposed on the Secretary of State in Council by an official receiver making a contract. Even if it were shown that he is in any sense an agent of the Secretary of State or the Government, the official receiver has no authority to make contracts on behalf of the Secretary of State or the Government.

Where the official receiver was appointed by the Government to perform certain duties under the Provincial Insolvency Act, the duties being imposed by statute, the Government has no liability for whatever the official receiver has done in the discharge or supposed discharge of his duty or supposed duty.

The Regulations of the East India Company, which govern the liability of the Secretary of State in virtue of Sec. 32 of the Government of India Act, drew a distinction between the acts of executive officers for which a certain liability might be assumed under Regulation III of 1793, Chapter XI, and the acts of courts for which Regulation I of 1823, Sec. 38, disclaimed all responsibility. RAM SHANKER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 842

———*Secs. 68 and 4—Attachment by official receiver in pursuance of court's order—Application challenging attachment made more than 21 days after attachment—Sec. 68 inapplicable —Court entitled to decide question of title under Sec. 4.*

The official receiver attached certain property alleged to belong to the insolvent *under an order of the insolvency court.* Later on the objection of the son of the insolvent the insolvency court decided that the house belonged to the son, and released it from attachment. The objection was made more than twenty-one days after the attachment by the receiver. *Held*, that Sec. 68 did not apply and the objection was not barred by time. The objector was not challenging the act of the receiver, but the order of attachment passed by the court *ex parte*, and it was open to the court, acting under Section 4, to enquire into the question of title and adjudicate upon the rights of the objector. NATHU RAM v. MADAN GOPAL. 391

PROVINCIAL SMALL CAUSES COURTS ACT (IX of 1887), *Sec. 17—"Amount due under the decree"—Interpretation of.*

The words "the amount due under the decree" as used in Sec. 17 of the Provincial Small Causes Courts Act, 1887, mean "the amount due under the decree at the date it was given" and not "the amount due under the decree at the date when the application for restoration was presented". KALLU MAL v. BIKRAMAJIT SINGH. 260

———*Secs. 23 and 25—Order under Sec. 23 returning plaint—Whether appealable—Whether High Court can interfere under Sec. 25.*

No appeal lies from an order purporting to be passed under Sec. 23 of the Provincial Small Causes Courts Act for the return of a plaint to be filed in the proper court. But if the order is illegal or irregular, the High Court would have jurisdiction to interfere under Sec. 25 of the Act because the return of the plaint terminates the proceedings in the court of small causes and a case is decided thereby. KASTURI v. BALMUKAND. 1068

———*Sch. II, Art. 35(ii)—Whether suit cognizable by small cause court—Test.*

Where the plaintiff sued in the Court of Small Causes to recover a sum of money on the ground that the defendant had cut a *nim* tree belonging to the plaintiff which was growing upon the plaintiff's ground, and had done so without the knowledge of the plaintiff and without any right, and had taken it away, *held*, that on a fair reading of the plaint it did not disclose a criminal offence, and the suit was cognizable by the court of Small Causes. BHAN DATT v. MOTI LAL. 306

'PUBLIC PROSTITUTE'—*Interpretation of.*

A public prostitute is a woman who openly and habitually offers her person to promiscuous sexual intercourse for gain, and who advertises and acknowledges her occupation by word of mouth, deportment or conduct.

For the bye-laws framed under Section 298 of the Municipalities Act to be applicable a woman should be not only a prostitute but a public prostitute. MUNICIPAL BOARD, ETAH THROUGH THE CHAIRMAN v. ASGHARI JAN. 117

RAILWAY—*Consignment of 'wrought timber' despatched at owner's risk—Rate charged by Booking Clerk—Lower than Tariff rate (company's risk)—No rate for carriage at owner's risk—Whether Company entitled to freight at Tariff rate—Mistake in classification—Conditions of contract noted on back of Railway Receipt did not provide for right of re-classification—Whether Company protected.*

In the Goods Tariff of the Railway Company there was only one class of rate fixed for 'Wrought timber', viz., those at the Company's risk, and none at the owner's risk. The plaintiff handed over planks (Wrought timber) to the Company to be despatched from Shahjahanpur to Agra. Owing to the mistake of the booking clerk the consignment was despatched at the owner's risk, and the consignor was charged at a rate lower than that notified in the Tariff for 'Wrought timber'. *Held,* (1) that the rate actually charged was within the limits fixed by the Railway Board and the Company could without any previous sanction of the Railway Board have fixed that rate as the rate of 'Wrought timber' and notified the same in the Tariff which they issued, and it could not therefore be said that the charging at the lower rate was contrary to any rule or regulations issued by the Railway Board which had the force of law; (2) that so far as the rules and notifications of Railway Companies issued under the authority of the Railway Board are concerned, it might possibly be assumed that there was constructive notice to the public, but the same assumption cannot be made as regards the rate entered in Tariff issued by the Railway Company without reference to the Railway Board; (3) that the consignor was not responsible for the mistake made by the clerk in not charging at the Tariff rate, because private instructions issued by a principal to an agent are not binding on a third party unless the latter has notice, and the Company must be deemed to be bound by the rate of contract entered into on their behalf by their agent, viz., the Booking Clerk, and it could not charge a higher rate; (4) that as there was no separate rate for 'unwrought timber' there could have been no mistake in classification.

Under the rules issued by the Railway Board the Company can seek protection if there was a mistake in classification (Rule 15, General Rules, 1926). The conditions of the contract noted on the back of the Railway Receipt stated that the Company had the right of re-measurement, reweighment and recalculation of charges at the place of destination, but the paragraph did not contain the word 're-classification' which occurred in Rule 15; *held,* that the term of the written contract as notified to the consignor did not protect the Company from a mistake made in classification of goods. CHHOTEY LAL PANNA LAL THROUGH PREM DIAL MODI v. R. K. RAILWAY THROUGH THE AGENT R. K. R., BAREILLY. 526

———*Risk Note H—'Misconduct'—Meaning of—Bale weighing 9½ mds. consigned—Lock on platform side opened and bale removed at some intervening station—Whether 'misconduct' to be inferred.*

'Misconduct' need not be wilful, and means bad management, or mismanagement, or culpable neglect of an official in regard to his office.

Where a bale weighing 9½ maunds consigned under Risk Note H was found missing at the destination and the lower court came to the conclusion "that while the train was standing at some intervening station, on the platform side, some man managed to wrench off the ring and open the lock of the wagon and removed the bale" *held,* that there seemed to be no escape from the conclusion that the bale was removed owing to either deliberate misconduct of the railway servants in the shape of standing by or helping in the theft, or at any rate in so neglecting the wagon that it was possible for several men to arrive at the place to 'wrench off the ring' and to remove a heavy load like the bale in question. The neglect, in the latter case, was culpable and the whole affair was mismanaged. THE EAST INDIAN RAILWAY v. NARAIN DAS GANGA SARAN. 217

RAILWAYS ACT (IX of 1890), *Sec. 72—Goods despatched under Risk Note forms A and B—Diversion of route—Delay in delivery and shortage in weight—Damages—Whether loss occurred at particular time—Burden of proof on bailee.*

The exemption from liability afforded to the railway administration by the risk note forms A and B is operative and available to the railway administration only during the transit on the ordinary route and once the goods are diverted from that route the protection afforded by these risk notes ends.

Where, owing to the mistake of the Railway Co., certain goods despatched under Risk Note Forms A and B were diverted from the ordinary route for a short distance with the result that their delivery was delayed at the destination and there was a shortage in weight, *held,* that the consignor was entitled to damages for the shortage, and the railway administration could not invoke to its aid the benefits of Forms A and B, and its responsibility must be judged by reference to the provisions of Sec. 72 of the Railway Act untrammelled by the stipulations contained in the forms.

When the goods are solely under the control of the bailee, the fact as to when loss, destruction or deterioration occurred, is a matter especially within his knowledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must, in view of the provisions of Sec. 106 of the Evidence Act, be on him; and in the present case the railway administration did not prove that the loss occurred prior to the commencement of default on its part, viz., the diversion of goods from the ordinary route. The Secretary of Estate for India in Council through The Agent, E. I. Railway, Calcutta v. Kesho Prasad Sheo Prasad, Belanganj, Agra, through Kesho Prasad. 788

———*Secs. 77 and 140—Suit for refund of over-charge—Not imperative to mention in plaint that refund had been demanded from railway—Notices purporting to be under Sec. 80 C. P. C. served on managers—Requirements of Sec. 77 complied with—Whether notices good.*

There is nothing in Sec. 77 or 140 of the Railways Act which makes it imperative on a plaintiff to mention in the plaint that refund had been demanded from the railway administration in the manner required by law. If the fact is denied by the defendant but is proved from the evidence, the plaintiff's suit is not liable to be dismissed.

REGISTRATION ACT (XVI of 1908)—Sec. 17(2) (*vi*)

Where in a suit for refund of an over-charge in respect of goods carried by four state railways, it was proved that notices purporting to be those under Sec. 80 C. P. C. were served on the managers in the manner provided by Sec. 140, Railways Act and the notices substantially complied with the requirements of Sec. 77, Railways Act, *held,* that the mere fact that Sec. 80 C. P. C. was mentioned in the notices will not detract from their real character as demands made under Sec. 77 Railways Act. Mela Ram Gorwara v. The Secretary of State for India in Council through The Collector, Allahabad. 405

REGISTRATION ACT (XVI of 1908), *Sec. 17—Applicability of—Document should by itself declare or create a title.* Bageshwari Charan Singh v. Jagannath Kuari. 186

———*Sec. 17(1) (b)—'Declare'—Meaning of—Document containing acknowledgment of title relating to immovable property within meaning of Sec. 19 Limitation Act—Whether compulsorily registrable.*

A document containing an acknowledgment of title relating to immovable property within the meaning of Section 19 of the Limitation Act is not compulsorily registrable under Section 17 of the Indian Registration Act. To attract the operation of Section 17, it is essential that the document should by itself declare or create a title. There is clear distinction between a mere recital of a fact and something which in itself creates a title. Bageshwari Charan Singh v. Jagannath Kuari. 186

———*Sec. 17(2) (vi) (as amended by Sec. 10, Transfer of Property Supplementary Act XXI of 1929)—Award—Purporting to divide up movable and immovable property—When compulsorily registrable.*

By Section 10 of the Transfer of Property (Amendment) Supplementary Act of 1929 the words "and any award" have been deleted from Section 17(2) (*vi*) of the Registration Act of 1908 with the result that an award is no longer excepted and if it amounts to a non-testamentary instrument purporting to create, declare, assign, limit or extinguish, whether in the present or in future, and right, title or interest whether vested or contingent, of the value of Rs.100 or upwards to or in immovable property, it is compulsorily registrable.

Where the award in dispute amounted in substance to a deed of partition purporting to divide up considerable movable and immovable property among the parties to the arbitration and compensations were given by the arbitrators in cash for the differences in the values of the properties allotted to the parties, the entire property being treated as forming part of one estate and the document was not registered within the time allowed by law, *held,* that the award must be treated as one inseparable document incapable of being split up and being inadmissible in evidence for want of registration, it must be rejected. BACHCHAN LAL v. NAROTTAM DATT. 1090

———*Sec. 49—Admitted document—Not registered—When court compelled to take notice of non-registration—Practice.*

There is nothing in Sec. 49 of the Registration Act to compel the court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in such document.

When the only claim is one for damages for breach of an admitted agreement to purchase immovable property against an alleged undisclosed principal who denies he was a principal and the property affected by the agreement has passed out of the picture—the parties having arranged to minimise damages by concurring in a sale of the property and in handing the proceedings of sale to the respondent—, the proceedings do not in any respect affect any immovable property. THE OFFICIAL LIQUIDATOR OF M. E. MOOLLA SONS, LIMITED v. MRS. PERRIN R. BURJORJEE. 706

RES JUDICATA

See Civil Procedure Code, Sec. 11.

RIPARIAN RIGHTS—*Riparian owner—Has inherent right to take water from river for domestic use and irrigation—Irrespective of ownership of soil of stream—When river belongs to Government—Madras Irrigation Cess Act (VII of 1865), Sec. 1, Proviso—Interpretation of.*

A person who owns land abutting on a stream has an unrestricted right to take water from the stream for domestic use, and a restricted right to take water for other uses connected with the land, of which irrigation of the lands which form the property is one—in the latter case the only limitation is that the amount taken shall not be so much as to hurt the right of the lower owner to have the stream passed on to him practically undiminished. The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of that stream. This right is a natural right and not in the strict sense of the word an easement, and it is not capable of being lost *non utendo.*

A river only belongs to the Government when the solum of the stream belongs to the Government. This will happen either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF EAST GODAVARI DISTRICT v. SANNIDHIRAJU SUBBARAYUDU. 348

SPECIFIC RELIEF ACT (I of 1877), *Sec. 9—Inapplicability of—Decree-holder put in formal possession by execution court—Plaintiff's objection under Or. XXI, R. 100 C. P. C. dismissed—Suit under Sec. 9 of Specific Relief Act—Whether maintainable.*

After formal delivery of possession had been given to the defendants of a house purchased by them in execution of a decree, the plaintiffs filed an objection under Or. XXI, R. 100 C. P. C. The execution court, holding that plaintiffs had not been in possession, dismissed their objection. They then sued under Sec. 9 of the Specific Relief Act, and the lower court, finding that plaintiffs had been in possession of the house and were wrongly dispossessed within 6 months of the suit, restored possession to them. *Held*: that formal delivery of possession was given to the defendants in due course of law and Sec. 9 of Specific Relief Act had no application, and the lower court acted without jurisdiction or, to say the least, with material irregularity, in decreeing the plaintiffs' claim under that section without going into plaintiff's right to possession. (2) that as a regular suit under Or. 21, R. 103 was now barred by time, the plaintiff should be allowed to amend the plaint and convert the suit into one for possession based on title or right to possession. MURLIDHAR v. JAINTI PRASAD. 812

———*Sec. 27(b)—Agreement between parties—Term of—'In case of contemplated transfer, property to be transferred to other party for proper price'—Deed of exchange executed between representatives of one party and a stranger—For value and without notice—Previous agreement unenforceable against transferee.*

Two sets of persons entered into an agreement in 1874 that in case of a contemplated transfer of certain property, it would be transferred to the other party for proper price. In 1928 a deed of exchange was executed between the representatives of one party and a stranger. In a suit for enforcement of the previous agreement brought by the representatives of the other party, the lower court found that the transferee had no notice of this agreement. *Held,* that no matter what principle or statute governed the obligation of the representatives, the provisions contained in Sec. 27 of the Specific Relief Act must apply and the transferee for value without notice was protected and the contract could not be enforced against her. SHAHZAD SINGH v. JIACHHA KUNWAR. 853

———*Sec. 27(b)—Covenant in a sale deed—Whether can be enforced against receiver.*

See Provincial Insolvency Act, Sec. 28. 36

———*Sec. 42—Declaration to be refused at a preliminary stage—And not by court of appeal.*

Where a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a court of appeal after the issues on fact and law have been decided. RAGHUNATH BARAIE v. JAINARAIN BARAIE. 99

STAMP ACT (II of 1899), *Sec. 2(10) and Companies Act, Sec. 104—Deed of conveyance—Test of—Agreement to transfer business, good will, etc.—Agreement for allotment of shares in future—Duty to be paid.*

If the parties choose to be satisfied with a mere contract for sale, without an actual deed of sale, stamp duty payable on a conveyance cannot be demanded.

The proprietors of a private firm called 'the vendors' of the one part and the Swadeshi Cotton Mills Co., Ltd. called 'the company' of the other part entered into an agreement which provided that the vendors shall sell all their business undertakings and assets, including good will, free-hold plant, etc., that the purchase was to be completed on such date as might be arranged mutually between the parties, and possession of the premises was to be given to the company on the completion of the purchase, that in the meantime the vendor was to carry on the business on behalf of the company, that part of the consideration be paid by allotment of shares in the company, and that the costs of all the documents required for the purpose of transferring the properties agreed to be sold were to be paid by the company. After the execution of this agreement a sale deed was executed by the vendors in respect of the immovable property but no subsequent deed of transfer was executed as regards the good will or the movable properties. The allotment of shares was made subsequent to the agreement which bore a stamp of eight annas only, and was filed with the Registrar of the Joint Stock Companies under Sec. 104 of the Companies Act (VII of 1913). *Held:* that the instrument in question could not be regarded as a deed of conveyance but was only an agreement for which the duty due under the Stamp Act was fully paid.

There is nothing in the provisions of Sec. 104 of the Companies Act which requires that a duty payable on a conveyance should be levied on an agreement for the allotment of shares by a company in future. SWADESHI COTTON MILLS CO., LTD.—*In the matter of.* 394

———*Art. 1—Unconditional acknowledgment of indebtedness—Of the description given in Art. 1—Whether constitutes a new cause of action—Inclusion of time-barred debts in acknowledgment—Burden of proof.* ABDUL RAFIQ v. BHAJAN. 77

SUCCESSION ACT (XXXIX of 1925), *Sec. 172—Will—Testatrix gave to P (Executor under will) the right to spend the entire income of her estate—For maintaining himself and his family—Whether income of estate given to P.* MANNU LAL v. LACHHMAN DAS. 564

———*Secs. 211(1) and 307—Executor—Not clothed with probate—Estate vests from date of testator's death—Not dependent upon grant of probate.* KADIYALA VENKATA SUBAMMA v. KATREDDI. 293

———*Sec. 214—Policy holder executed a will in favour of adopted son before his death—Insurance Co. refused payment without production of probate or letters of administration—Whether company acted within its rights.*

A Hindu took out an Insurance Policy payable on his death. Before he died he adopted a minor and also executed a will in his favour. The Insurance Company having refused to pay to the court of wards, who had taken over management of the minor's estate, without production of either a probate or letters of administration, the court of wards brought the present suit to recover the sum payable on the policy. *Held,* that Section 214, Succession Act, applied and the company acted within its rights and no decree could be made against the company without production of a probate or letters of administration or a succession certificate.

There is nothing in law to prevent a company from entering into a contract with a proposer for life assurance that the company would pay the money only to him or his assign or to his executor or administrator and such a contract must bind not only the assured but also anybody claiming title under him. The Gresham Life Insurance Society, Limited v. The Collector of Etawah. 1015

———*Secs. 214 and 381—Property descends to Crown by escheat—Whether Sec. 214 applicable.*

Where the property descends to the Crown by escheat, it could not be said that the Crown was claiming the property by right of 'succession' within the meaning of Sec. 214 of the Succession Act. The Succession Act is not applicable to the Crown where it takes the property upon escheat. Secretary of State for India in Council v. Girdhari Lal Shambhunath. 150

———*Sec. 291 and Contract Act, Secs. 129 and 130—Administration Bond—Surety to—Whether can claim as of right to be released from future liability—Court's power to release surety from future liability—When to be exercised.*

A surety to an administration bond cannot claim *as of right* to be relieved of all further liability by merely expressing his intention to do so either by notice or by a proper application to the court. Secs. 129 and 130 of Contract Act do not apply to such a surety.

The court has power to release a surety for the administrator of the estate of a deceased person from all liability for future transactions from a date when full accounts are rendered and the assets duly accounted for, if it is satisfied that there is ground for it, and after providing safeguards for the heirs of the deceased. Such release however will only be operative after the date of the release and the surety will continue to be liable for any maladministration that might hereafter be discovered and which was committed prior to the date of release. Avinas Chandra Banerji—*In the matter of.* 140

———*Secs. 299 and 271—Objector moves District Judge under Sec. 271—District Judge decides not to refuse application for letters of administration—Whether so-called order passed by him appealable.*

Where the appellant moved the District Judge under Sec. 271 of the Succession Act (XXXIX of 1925), which does not in terms require any application by the objector, to refuse to hear the respondent's application for letters of administration and exercise his discretion to return it for presentation to another court, and the District Judge decided to go on with the proceeding and not to refuse the application for letters of administration, *held,* that the District Judge did not refuse the application for letters of administration and therefore literally speaking did not make any order by virtue of the power conferred on him by Sec. 271, and the so-called order passed by him was more or less in the nature of a finding and it could not be treated as a final order adjudicating upon the rights of the parties or disposing of any matter absolutely, and the case therefore did not come within the scope of Sec. 299 so as to give the objector a right of appeal.

Quaere—Whether appeals under Sec. 299 Succession Act (XXXIX of 1925) are limited exclusively to the appeals which are provided for in the Code of Civil Procedure. Lal Bhupendra Narain Singh v. Ashtabhuja Ratan Kuer. 418

———*Sec. 369—Executor—Liability of—Funds in his hands remain uninvested—Liability to payment of interest.*

No one is bound to become an executor but if he does accept the position he must act with the ordinary care and the prudence of a reasonable and diligent business man. He must make the funds in his hands productive and in order to do this he must invest them in interest bearing securities. If he fails to do this, he will be liable for the consequent loss. In the Goods of R. V. A. Stock. 363

TENANCY ACT (Local Act II of 1901), *Sec. 22—Occupancy holding—Succession.*

An occupancy tenure is the creation of statute, and where a special rule of succession has been laid down in the statute, it is the statute which regulates the devolution of inheritance and not the personal law of the tenant (Sec. 9 of Act XII of 1881 and Sec. 22 of Act II of 1901). Sri Ram Singh v. Baldeo Prasad. 605

———*Sec. 25—Sub-lease by occupancy tenant—When document necessary—Sub-lessee out of possession must prove title in order to regain possession—Omission of landlord to have illegal sub-lease cancelled—Effect of.*

No document is necessary for the creation of a valid sub-lease in a case where the occupancy tenant sub-lets his land for one year, and at the close of one year he agrees that the tenant, who has already paid one year's rent, should hold the land for another year.

Where a sub-lessee is in possession, he can be ousted only by a person who has a better title and a right to maintain a suit. If the landlord comes to court for the cancellation of an illegal sub-lease after the expiry of one year, he would be put out of court on the ground of limitation and the sub-lessee without title would continue. Where the sub-lessee was out of possession, the mere fact that the landlord had omitted to sue within one year would not give him a title. He could succeed only if he could prove a title and a right to possession.

The plaintiffs took possession of certain plots in 1924 under an oral sub-lease from the occupancy tenant and remained in possession for over a year when they were dispossessed by the defendants. Nearly three years after dispossession the plaintiffs brought the present suit for possession and based their title on the oral sub-lease. *Held,* that the oral sub-lease would last for only one year and at the end of the year it expired, and the plaintiffs having no title could not succeed. SARNAM PRASAD v. SUNDER SAHU. 1097

———*Sec. 31(2)—Unauthorised transfer by occupancy tenant—Suit by zamindar—To eject transferee—Tenant not impleaded—Whether maintainable in civil court.*

Where the plaintiffs sued for ejectment of defendant on the allegation that the heirs of an occupancy tenant of the land of which the plaintiffs were the owners, had transferred it to defendant, though they had no right to do so, and the heirs of the occupancy tenant were not impleaded, *held,* that the question of jurisdiction must, in the first instance, be decided on the statement of facts to be found in the plaint which merely sought the ejectment of an alleged trespasser, and the suit was cognizable by the civil court; and Sec. 31(2) of the Tenancy Act of 1901 did not apply as the plaintiffs had not sued for the ejectment of both the tenant and the transferee.

The word '*maurusi*' means heritable and is not the recognised equivalent of occupancy, which is more appropriately translated as '*dakhilkari*'. JOTI PRASAD v. HAR PRASAD. 567

———*Secs. 165 and 194—Suit for profits against co-sharers—Lambardar included as a co-sharer—Collection by co-sharers—Basis of division.*

In a suit under Sec. 165 of Act II of 1901 (=Sec. 227 of Act III of 1926) the lambardar, in the array of the defendants, cannot be treated as a lambardar, but must be treated as a co-sharer; and therefore he is entitled to deduct out of the colections made by him his full share of the profits of the mahal, the balance alone being divisible among the other co-sharers.

Where in a suit under Sec. 165 of Act II of 1901 it was proved that *karinda* made collections on behalf of certain co-sharers, one of whom was the lambardar, the collection must be treated as a collection by the defendant co-sharers, and not as a collection on behalf of the lambardar alone, and the liability of the co-sharers must be a joint one. KANHAIYA LAL v. R. H. SKINNER. 129

———**(Local Act III of 1926),** *Secs. 15 and 14(5)—Usufructuary mortgage of* sir *in terms of Sec. 14(5)—Stipulation—In the event of mortgagor being declared exproprietary tenant, he would be liable to pay rent determined—But mortgagee to retain possession of property—Whether this amounted to waiver of exproprietary rights.*

Where a specific area of *sir* was transferred by a usufructuary mortgage in terms of Sec. 14(5) of the Tenancy Act of 1926, and there was a stipulation in the mortgage bond that in the event of the mortgagor being declared an exproprietary tenant he would be liable to pay the rent determined but the mortgagee should retain full possession and enjoyment of the mortgaged property, that is the grove, *held,* that the stipulation amounted to a waiver of his exproprietary rights, since the mortgagor expressly consented that the mortgagee should retain possession of the mortgaged property which would form the subject of the exproprietary rights, and the mortgagee could not be deprived of the benefit of this stipulation. RAGHUNATH PRASAD v. JWALA PRASAD. 574

———*Sec. 37—Co-tenants—Holding divided —Effect of—New tenancy not created nor mode of succession given in Secs. 24 and 25 changed.*

On the death of an occupancy tenant, with whom plaintiff shared in cultivation, his widow, who had a life-interest in the tenancy under

Sec. 24 of the Tenancy Act, sued for partition with the result that the holding was divided. The widow subsequently associated with herself in cultivation, defendants 2 to 4 with the consent of the landlord. In a suit by plaintiff for a declaration that on the widow's death defendants would have no rights in the tenancy as against himself; *held*, that plaintiff's suit should be decreed. The partition merely changed the mode of enjoyment by the widow but did not confer on her greater rights than what she had before partition; nor did it change the mode of succession given in Secs. 24 and 25 of the Tenancy Act. BEHARI v. MATHURA. 1024

———*Sec. 44—Decree for ejectment of tenant—'Dakhalnama' obtained but defendant still in physical possession—Suit for possession in Civil Court treating defendant as trespasser—Whether maintainable.*

Plaintiff obtained a decree for ejectment against defendant, who was then his tenant, on May 26, 1927 but failed to take possession prior to June 30, 1927 as required by Section 94 of the Tenancy Act. He, however, obtained a 'dakhalnama' giving formal possession on July 14, 1927 but defendant was still in physical possession in July 1928. On September 1, 1928 plaintiff brought the present suit for possession in the civil court describing the defendant as a trespasser. *Held*, that the 'dakhalnamah' either operates as a break in the tenancy of the defendant or it does not. If it does not, the defendant is still a tenant and there is no question that proceedings against him must be taken in the revenue court. If, on the other hand, the 'dakhalnamah' does operate as a break in the tenancy and determines the tenancy, then the defendant is a person who has taken possession of the plot without the consent of the landholder and in contravention of the provisions of the Tenancy Act, and he is liable to ejectment on a suit by the landholder in the revenue court. In either case, the civil court has no jurisdiction to determine the dispute between these parties. DAN SAHAI v. JAI RAM SINGH. 517

———*Sec. 72, Sub-sections (6) and (1)—Remission claimed under alleged local custom—Failure to prove custom—Whether court can grant remission under Sec. 72(1)—Sub-sec. (6)—"Local custom"—Meaning of.*

The local custom referred to in Sec. 72(6) of the Tenancy Act of 1926 means an *existing* local custom. In other words, if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion and similar calamities and if a claim for remission is made under such local custom, then the provisions of Sec. 72(1) will not apply. Accordingly, the mere fact that a tenant has claimed a remission under an alleged local custom which he has failed to prove does not prohibit the court from granting a remission under Sec. 72(1). JUTHI UPADHYA v. KESHO PRASAD SINGH. 495

———*Secs. 79 and 80, and Civil Procedure Code, Or. 20, R. 11—Suit for recovery of arrears of rent—Against tenant other than permanent tenure holder or fixed rate tenant—Revenue court incompetent to make decree payable by instalments.*

In a suit for recovery of arrears of rent against a tenant other than a permanent tenure-holder or fixed rate tenant, it is not open to the revenue court to make a decree payable by instalments under Or. 20, R. 11 C. P. C. HARAKH CHAND v. SAJIDA BEGUM. 315

———*Sec. 82—Grove—Sold in execution of decree against grove-holder—Landholder's suit for possession of grove alleging that transfer was prohibited by custom—Lies in revenue court only.*

Where a grove was sold in execution of a decree against the grove-holder after the enforcement of the new Tenancy Act, the landholder could sue for the recovery of the grove from the auction-purchaser on the allegation that there was a custom prohibiting transfers of groves, in the revenue court only, under Sec. 82 of the Tenancy Act, impleading both his tenant and the transferee, and an appeal in such a suit lay to the revenue court. SHRI KISHAN LAL v. BIJAI SINGH. 857

———*Secs. 99 and 230—Tenant ejected from holding by a landholder—And not by the entire body of landholders—Tenant must still sue for possession in the revenue court.*

According to Sec. 99 of the Tenancy Act of 1926 read with Sec. 230, a tenant ejected from his holding by his landholder or any person claiming as landholder to have a right to eject him, must sue such persons for possession in the revenue court, and it is not necessary that all the proprietors of the mahal should eject a tenant in order to give jurisdiction to the revenue court. RAM AGYAN PANDEY v. CHATRUGHUN SINGH. 864

———*Sec. 121—Co-tenants—Suit for determination of shares in occupancy holding—Cog-*

nizable by revenue court alone.

A suit for the determination of the quantity of share held by each co-tenant in an occupancy holding is covered by Sec. 121 of the Tenancy Act (III of 1926) and is cognizable by the revenue court. BHAGWAN SAHAI v. RAM CHANDER. 849

———*Sec. 121 and Schedule IV, Group D—Alleged tenants of a plot—Declaratory suit in Civil Court—Relief—'Owners of a* pucca *well'—Whether Civil Court has jurisdiction.*

Plaintiffs alleging themselves to be tenants of a certain plot instituted a suit in the Civil Court for a declaration that they were owners of a *pucca* well in the plot, and the defendants who were admittedly zemindars of the land in question denied that the plaintiffs were tenants and alleged that the well had been made by them. *Held,* that the suit amounted to one for a declaration of the right of the plaintiffs as tenants, and such a suit will cover the question of the ownership of the well, and the revenue court alone had jurisdiction to entertain it. HIRA SINGH v. CHANDAN SINGH. 815

———*Sec. 197—Groveholder's right to maintain his grove by replacing fallen trees—Not taken away by new Act.*

The right which a groveholder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

Replacing trees which have fallen down in a grove by planting new trees amounts only to "repairs" and should not be held to amount to an "improvement" within the meaning of Sec. 3(11) of the Act. AMBA SAHAI v. NATHU. 1026

———*Sec. 225(1)—Profits divisible on a prescribed date—Profits accrue from day to day and vesting not postponed—Principle of Sec. 36 Transfer of Property Act applicable.*

Applying the principle of Sec. 36, Transfer of Property Act, the profits accrue from day to day and become vested in the co-sharers, and although the time for payment is postponed for the sake of convenience till the following August, it does not imply that the right to a share in the income does not vest till the arrival of that date. MOHAMMAD ABDUL JALIL KHAN v. MOHAMMAD ABDUS SALAM KHAN. 93

———*Sec. 225(2)—Co-sharer entitled to simple interest at 1% p.m. on net profits—From date when profits became divisible till actual realization.*

There is no reason why the principle underlying Sec. 225 should not be applied to future interest after the decree up to the date of realisation. Accordingly in a suit for profits against the lambardar, the plaintiff co-sharer is entitled to simple interest at the rate of 1% per mensem on his share of net profits from the date when they became divisible *till actual realisation.* MOHAMMAD ABDUL JALIL KHAN v. MOHAMMAD ABDUS SALAM KHAN. 93

———*Sec. 226—Suit for profits—Accounting—Lambardar entitled to 5% on the actual collections, as expenses of collection—In addition to lambardari dues.*

See Tenancy Act, Sec. 226(2). 93

———*Sec. 226—Suit for profits—Accounting—No set off can be allowed, which is not due under a decree.*

See Tenancy Act, Sec. 226(2). 93

———*Sec. 226—Suit for profits—Accounting—Unavoidable litigation—Lambardar to be credited with taxable costs.*

Litigation is not a part of the ordinary expenditure in the management of a mahal; but where it is *unavoidable,* it is a necessary part of the expenditure incurred by a lambardar and it is undoubtedly incurred for the benefit of the entire coparcenary body, and there is no reason why the lambardar should not be credited with the taxable costs of the litigation. MOHAMMAD ABDUL JALIL KHAN v. MOHAMMAD ABDUS SALAM KHAN. 93

———*Sec. 226(2)—Suit for profits against lambardar—When decree to be passed on basis of gross rental—Collections exceed 75% of gross rental—Presumption of no negligence.*

In a suit for profits by a co-sharer against the lambardar, if the lambardar succeeds in showing the actual collections, then unless those collections are so low that the court may presume negligence on the part of the lambardar, the decree has to be made on the basis of the actual collections and not on the gross rental. On the other hand, if the discrepancy between the gross rental and the actual collection is very large, then, in the absence of any satisfactory explanation on the part of the lambardar why he was not able to collect a larger amount, the presumption would be that he was negligent and the decree should be on the basis of gross rental. In the absence of any definite evidence either way, those cases in which collections exceed 75% of the gross rental should be taken as cases in which no negligence can be presumed, and in cases in which collections are less than 75% there is *prima facie* a presumption of such negligence. Mohammad Abdul Jalil Khan v. Mohammad Abdus Salam Khan. 93

———*Sec. 266(3)—Suit for profits against lambardar—Court's power to estimate 'unrealizable arrears'—To be based on evidence.*

Where in a suit for profits against the lambardar, it was found that the lambardar had not shown in his books the actual realisations and that his books were extremely unreliable and misleading, but the court, without giving any reason, allowed 'a rebate of 10%' on the gross rental as covering the possible arrears in the collections, *held*, that the estimate of unrealisable arrears should be based on some evidence which can be acted upon, and the deduction should not be merely conjectural, and the rebate should not have been allowed. Ganpatji v. Hanuman Singh. 1

———*Sec. 227—Family settlement—Person having the right to have and enjoy the profits of the property but cannot possess, partition on transfer—Not to be regarded as a 'co-sharer' —Suit for recovery of arrears of profits—Not cognizable by revenue court—Art. 120 of the Limitation Act applied to such a suit.*

Where a person under an instrument in the nature of a family settlement has the right to have and enjoy the profits of the property without having the rights of possession, partition or transfer which are the incidents of ownership, such a person is not and cannot be deemed to be a "co-sharer" within the orbit of the Agra Tenancy Act, and a suit for profits accruing to the plaintiff under the terms of the instrument is maintainable in the civil court, and is not cognizable by the revenue court, and Art. 120 of the Limitation Act applied to such a suit. Lakhmi Chand v. Anandi. 177

———*Sec. 230—Civil suit—Revenue court could substantially grant the relief for which plaintiff asked under Sections 121 and 44 of the Tenancy Act—Suit not maintainable.*

The allegations in the plaint were that plaintiff and defendant No. 1 were joint occupancy tenants, that the defendant No. 1 had made without plaintiff's consent a perpetual lease to defendants 2 and 3 and that plaintiff was still in possession. The relief sought was that on establishment of plaintiff's right a decree invalidating the lease may be passed in plaintiff's favour, and her possession may be maintained and in case of proof of dispossession, a decree for possession may be passed. *Held*, that the civil court had no jurisdiction to entertain this suit as the revenue court could substantially grant the relief for which plaintiff asked under Sections 121 and 44 of the Tenancy Act. Duiji Kunwar v. Baila Kunwar. 521

———*Secs. 249 and 248(3)—Order by revenue court in execution proceedings—Appeal lies to District Judge—But no second appeal lies to the High Court.*

By Sec. 248(3) of the Agra Tenancy Act (III of 1926) an appeal lies to the District Judge from an order of the revenue court passed in proceedings in execution of a decree for profits, but by Sec. 249 no further appeal is allowed, and no second appeal therefore lies to the High Court from the order passed by the District Judge in the execution appeal before him. Gobardhan Das v. Dau Dayal. 365

———*Sec. 253—Revisional powers of High Court—Not governed by Sec. 115 C. P. C.—But confined to Sec. 253.*

Sec. 115 C. P. C. is inapplicable to revenue cases, and the revisional power of the High Court is restricted to Sec. 253 of the Tenancy Act (III of 1926), and the High Court has therefore no jurisdiction to interfere in revision with an order of the District Judge passed by him in a revenue appeal, but the High Court has power to revise the order of the first court if it is open to any of the three objections mentioned in Sec. 253, and if it does so revise it, the order of the District Judge in appeal has to be assumed to be a nullity by implication. Gobardhan Das v. Dau Dayal. 365

———*Sec. 253 and Civil Procedure Code, Or. 9, Rules 8 and 9—Suit for profits—Dismissed for want of prosecution—Suit subsequently restored—Whether High Court can revise order restoring suit.*

Where a suit for profits, which had been adjourned several times to enable plaintiff to produce evidence, was ultimately dismissed "for want of prosecution" and the court subsequently granted plaintiff's application for restoration, *held*, that the order dismissing the suit was one under Or. 9, R. 8 and could be set aside under Or. 9, R. 9 C. P. C. or under Sec. 151. In either case the order was not appealable to the District Judge and therefore no revision lay to the High Court under Section 253 C. P. C. BOHRA PANNA LAL v. BASDEO. 1100

———*Secs. 253 and 271—'Subordinate revenue court'—Meaning of—Issue remitted to Civil Court under Sec. 271—Whether Civil Court deemed to be a revenue court.*

Where the revenue court acting under Sec. 271 of the new Tenancy Act frames an issue on the question of proprietary right and submits the record to the Civil Court for the decision of that issue only, the latter cannot be considered to be a 'subordinate revenue court' within the meaning of Sec. 253. SATYA NIDHAN BANERJI v. MOHD. HAZABBER ALI KHAN *alias* GHULAM JABALI KHAN. 1123

———*Sec. 253 and Sec. 115 C. P. C.—Order of Assistant Collector setting aside dismissal for default of appearance—Whether revision lies to High Court.*

No revision lies to the High Court from an order of the Assistant Collector setting aside a dismissal for default of appearance in a suit for profits. The language of Sec. 253 of the Tenancy Act of 1926, which has replaced the provisions of Sec. 115 C. P. C., precludes the High Court from entertaining the revision, because no appeal lies to the District Judge from the order sought to be revised. KANAUJI LAL v. CHIRAUNJI LAL. 863

———*Secs. 264 and 247, and Civil Procedure Code, Order 21, Rule 63—Order of Assistant Collector, second class under Order 21, Rule 58—Appeal to Collector under Section 247 of Tenancy Act—Appellate order against claimant—Whether claimant has a right to institute a suit under Order 21, Rule 63.*

In execution of a decree for arrears of rent (passed by the Assistant Collector, second class) the decree-holder attached certain property as belonging to the judgment-debtor. The present plaintiff intervened with the claim that the property belonged to him. His claim was allowed by the Assistant Collector, second class, but on appeal to the Collector under Section 247 of the Agra Tenancy Act, the appelate court held that the property belonged to the judgment-debtor. Thereupon the present plaintiff instituted the present civil suit under Order 21, Rule 63 C. P. C. *Held,* that there was no inconsistency between the right to file a civil suit and a right to appeal under the Tenancy Act, and the present suit was, therefore, maintainable. BIKRAM SINGH v. DIP SINGH. 514

———*Sec. 264 and Provincial Insolvency Act, Sec. 28—Whether insolvency law applicable to suits and proceedings under the Tenancy Act.* THE OFFICIAL RECEIVER OF MORADABAD v. MURTAZA ALI. 402

———*Sec. 265—Lambardar—Agreement with certain co-sharers that they should collect rents of their shares separately—Whether binding on other co-sharers.*

Where a lambardar, for the sake of good management, entered into an agreement with the purchasers that they should collect the rents of their shares separately, while he should collect the rents of the remaining share separately and the agreement was acted upon by the parties, *held,* that the agreement was perfectly valid and binding upon the other co-sharers.

Of the heirs of a deceased plaintiff one was brought on the record within time and the others filed an affidavit that they had relinquished their rights in favour of the heir whose name was on the record, *held,* that the affidavit could not be treated as a transfer of the rights of the remaining heirs in favour of the heir on the record and the suit abated as regards the heirs whose names were not brought upon the record. SHER PAL SINGH v. AIJAZ FATIMA. 1029

———*Sec. 265(1)—Lambardar of a* mahal—Mahal *sub-divided into* pattis—*Suit for arrears of rent—Land situated in a* patti *in which lambardar was not a co-sharer—Whether lambardar empowered to collect rent—Part of arrears in respect of a period prior to passing of Act III of 1926.*

The lambardar of a *mahal,* which was subdivided by an imperfect partition into a number of *pattis,* brought a suit for arrears of rent against the defendant. The land for which rent was claimed was situated in a *patti* in which the lambardar himself was no co-sharer and had no proprietary interest. *Held,* that the lambardar was not empowered to collect rent in respect of such land, as he had no proprietary interest in such land.

In view of the procedure laid down by Act III of 1926 in Ss. 265 and 266 for the collection of rent, decisions under the previous enactment cannot operate as *res judicata.*

Any authority which a lambardar might have had before the passing of the Act of 1926 became subject to the limitations imposed by Ss. 265 and 266, regardless of the fact whether arrears were in respect of a period subsequent to the passing of that Act or prior to it. SUN- 1203

der Lal v. Subedar Singh. 507

———*Sec. 266(1)—Several co-sharers—Tenant let into possession by one co-sharer without consent of others—Co-sharers entitled to treat lease as nullity and to eject the tenant.*

Where land belonging to three co-sharers was let to the defendant by the agent of only one of them without the consent of the other two co-sharers, *held,* (1) that Sec. 266(1) of the Tenancy Act of 1926 applied and the defendant, not having been admitted to tenancy by all the three co-sharers, did not acquire the rights of a statutory tenant and was not entitled to retain possession as such; (2) that there was nothing to prevent the co-sharer who had granted the lease to the defendant from joining the other co-sharers to eject him. Panchanan Banerji v. Anant Prasad Pandey. 477

———*Secs. 271(4) and 242(3)—Suit for ejectment—Issue on proprietary right—Decided in plaintiff's favour by Civil Court—Suit dismissed on different ground—Appeal—Question of proprietorship raised again by defendant in his cross-objection—Commissioner's jurisdiction ousted—Memorandum of appeal to be returned to plaintiff for presentation to proper court.*

Where in a suit for ejectment the revenue court, accepting the finding of the civil court in plaintiff's favour on an issue involving the question of proprietary right, dismissed it on a different ground, and on appeal by plaintiff to the Commissioner the defendant filed a cross-objection attacking the finding that he was not the proprietor, *held,* that the Commissioner having come to the conclusion that his jurisdiction was ousted as the result of the cross-objection, the only way open to him was to return the memorandum of appeal to the appellant for presentation to the proper court. In the absence of any specific provision permitting the sending of an appeal direct to the civil court, the provisions of Or. 7, R. 10 read with Sec. 107(2) C.P.C. would be applicable. Sukhdeoji v. Ram Lal. 1085

TORT—*Joint tort-feasors—Suit for damages—Decree—Executed against one alone—Decree satisfied—When suit for contribution lies against co-tort-feasors.*

Where a person obtains a decree against joint tort-feasors, and executes the decree against one of them alone, who is compelled to pay the whole damages, he has no right of contribution from the others, if they committed the act of tort knowing that what they were doing was nothing but a clear case of tort.

No distinction can properly be drawn, in principle, between a case where a joint liability has been liquidated without a suit, and where a joint liability has been established by a suit and the judgment has been liquidated by one of the parties. Parbhoo Dayal v. Dwarka Prasad. 215

———*Suit for damages—Against joint tort-feasors—Some entered into compromise with plaintiffs by which they agreed to accept a certain sum—Whether compromise operated as a bar to a decree against the other tort-feasors.*

In a suit for damages for injuries caused to the persons of the plaintiffs as a result of missiles being thrown at them by the defendants who were acting as a body in pursuance of the common object of stopping the Hindu procession, of which the plaintiffs formed a part, which was passing the mosque, some of the defendants, who were joint-tort-feasors, entered into a compromise with the plaintiffs by which they agreed to accept a certain sum; *held,* (1) that a compromise of this nature was no bar to a decree against the other defendants; (2) that the plaintiffs were entitled to bring a joint suit for damages against all the defendants (Or. 1, R. 1 C. P. C.).

A release granted to one joint tort-feasor operates as a discharge of the other tort-feasors where the cause of action, which is one and indivisible, has itself been released. Basharat Beg v. Hira Lal. 497

TRANSFER OF PROPERTY ACT (IV of 1882), *Sec. 3 and Registration Act, Secs. 58 and 59—Signature of sub-registrar and identifying witnesses—Whether sufficient attestation.* Lachman Singh v. Surendra Bahadur Singh. 653

———*Section 3—Actionable claim—Cause of action in respect of debt not having arisen or time for its payment not having arrived—Whether amounts to actionable claim.* Amir Hasan Khan v. Mohd. Nazir Hasan. 275

———*Section 3—'Actionable claim'—Mohammedan widow's claim to unpaid dower debt—Whether amounts to—Mohammedan Law—Dower—Widow in possession of husband's property in lieu of dower debt—Transfers claim to debt and right to possession, to a legal practitioner—Legal practitioner does not in law acquire widow's right to dower (Sec. 136 T. P. Act)—Whether husband's heir can dispossess legal practitioner.*

A Mohammedan widow entered into possession of her husband's property peacefully and without force or fraud in lieu of her dower debt. Later she executed a sale deed in favour of the present defendant-appellant, *a legal practitioner,* transferring her right to recover the dower debt and the right to remain in possession of the property till her dower was paid. Possession was obtained by the present defendant. Thereupon the present plaintiff-respondent, in whom the ownership of the property in possession of the defendant vested as the heir of the husband, instituted a suit for recovery of possession. *Held,* (1) that a Mohammedan widow's claim to unpaid dower debt is an actionable claim as now defined in Sec. 3 Transfer of Property Act, and the defendant being a legal practitioner was debarred under Sec. 136 T. P. Act from taking a transfer of such claim, (2) that the defendant, who had not in law acquired the widow's right to receive dower, was not entitled to retain possession as against the husband's heir who owned the property. Amir Hasan Khan v. Mohammad Nazir Hasan. 275

———*Section 6 (d)—Applicability of—Award—Co-sharer—To appropriate income—Condition in restraint of alienation during his life-time—Rights of transferee from him.*

By an award, which partitioned the family property, specified shares in the shops in question were allotted to *M*. The award defined the rights of *M* in the shops as follows:—"He is the absolute owner thereof. He is to appropriate and maintain himself with the income and rent of such property, but he will have no power to make any transfer, such as sale, mortgage, lease, hypothecation as security and *theka* for a term or in perpetuity, etc., in respect of such property; and if he does make a transfer, the same shall be considered to be invalid. Besides *M* any one among his descendants will have power to make mortgage, etc." *M* while in possession assigned his rights in the shops to the plaintiff, who thereupon instituted a suit for partition, making *M's* co-sharers parties to the suit. *Held,* that subject to the condition in restraint of alienation, assuming it to be valid, the shares in the shops in question vested in *M* and no one else, and his right of enjoyment described as full ownership being unfettered, he could claim separate enjoyment of his share of the shops by partition, and the defendants, who had no *locus standi* to eject the plaintiff or to question his right of possession could not question his right to obtain partition by virtue of his present possession of the shares of *M* in the shops in dispute; and Sec. 6 (*d*) of Transfer of Property Act had no application. Ram Nath v. Nanak Chand. 821

———*Sections 6(e) and 130—Lease—Lessee agreed to pay Government revenue—On failure of lessee to do so, lessor paid revenue—Later lessor assigned his right to recover the revenue paid—Whether assignee entitled to sue.*

Under a lease the lessee agreed to pay the lessor a yearly rent and, in addition, the Government revenue, cesses and other public demands. On failure of the lessee to pay the Government revenue the lessor paid the sums due. Later the lessor executed a deed of assignment in favour of the appellant by which he assigned his right to recover the amount (with interest) of the revenue paid by him. *Held,* that what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with the lessor to repay to him, and this would be an actionable claim to which Sec. 130 of T. P. Act would apply. Manmatha Nath Mullick v. Hedait Ali. 341

———*Section 10—Absolute estate—By family settlement—Restraint against alienation outside the family—Whether repugnant.*

In compromise of their conflicting claims a family settlement was come to between *A* and *B*, by which it was agreed that *A* should take an absolute estate in what she claimed, saddled with the condition that she would not alienate the property outside the family. *Held,* that an agreement of this nature was not contrary to justice, equity and good conscience and the condition was binding upon *A*.

Under Sec. 10, Transfer of Property Act, 1882, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos,* be regarded as repugnant, and there is no authority suggesting that before the Act of 1882 a different principle was applied by the courts in India.

Quaere—Whether the Shia Law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person. Mohammad Raza, since deceased (represented by Syed Mohammad Abbas and others) Abbas Bandi Bibi. 709

———*Section 11—Proviso to—Vendee undertook to remove certain constructions at vendor's pleasure—Whether proviso applicable.*

See Provincial Insolvency Act, Sec. 28. 36

———*Section 52 and Tenancy Act (III of 1926), Sec. 19—Lease for 20 years in favour of defendant during pendency of mortgage suit—Civil suit by purchaser in execution of mortgage decree—Relief—That lease was void and defendant be ejected—Status of defendant —Whether suit for ejectment maintainable in civil court.*

The plaintiffs purchased certain property at a sale in execution of a mortgage decree. Prior to this the same property was purchased by one *H* in execution of a simple money decree, who executed a lease for 20 years in favour of the defendant during the pendency of the mortgage suit. On a suit by the plaintiffs in the civil court for a declaration that the lease was void and for the ejectment of the defendant, *held,* (1) that at the time the lease was granted, *H* was the landlord, and was authorised to admit the defendant to the occupation of the land, and the position of the defendant was that of a tenant, and when the suit was brought, the possession of the defendant was, under Sec. 19 of the Tenancy Act of 1926, that of a statutory tenant, and he could be ejected only under the provisions of that Act; (2) that the lease could be challenged under the terms of Sec. 52 T. P. Act, and the civil court could grant a declaration that the lease was void as against the plaintiffs. AZIZ FATMA *v.* MUKUND LAL. 572

———*Section 52—Explanation added by Act XX of 1929—Does not introduce a new rule of law—Mortgage suit—*Lis *continued even after final decree and subsisted during pendency of execution proceedings.*

The explanation appended to Sec. 52, Transfer of Property Act, by the Amending Act XX of 1929, has not introduced a new rule of law, but has put the impress of legislature upon certain judicial pronouncements in which it has been held that in a mortgage suit the *lis* continued even after the final decree and subsisted during the pendency of proceedings in execution. MOTI CHAND v. THE BRITISH INDIA CORPORATION LTD., CAWNPORE. 54

———*Section 55(2)—Sale deed—Covenant —Entitling vendee to recover consideration by sale of property sold—On being dispossessed from whole or part of property—Whether implied covenant of title in terms of Sec. 55(2) excluded.*

Where there was an express covenant in the sale deed entitling the vendee, on being dispossessed from the whole or part of the property sold, to recover the whole of the consideration by sale of the property transferred or from other property; *held,* that there was nothing in the sale deed which excluded an implied warranty of title, contemplated by Sec. 55(2) T. P. Act, nor was there anything in the sale deed which limited the vendee's remedy to the rescission of the contract; and the covenant was an enabling clause, intended for the benefit of the vendee, and conferred a right, which he would not otherwise possess, and which he could exercise in addition to any right which the law gave him. NANHI v. KETKI. 69

———*Section 55(2)—Sale-deed—No covenant of indemnity—Vendee had some idea as to defect in vendor's title—Whether vendor liable under Sec. 55(2).*

Where the sale-deed does not contain any statement to the effect that the vendor was assuring the vendee that his title subsists, *held,* that unless the vendor's liability as imposed by Sec. 55, Sub-sec. (2) Transfer of Property Act is excluded by express covenant, his liability must be deemed to subsist, notwithstanding the fact that the vendee may have some idea as to the defect in the title of the vendor. NEWAL KISHORE v. SARJU RAM SAHU. 611

———*Sections 55(2) and 55(1) (g)—Vendees—Property passes out of their possession—Suit for damages—Claim not founded upon covenant of idemnity in sale-deed—Whether vendees entitled to an implied warranty of title under Sec. 55(2).*

Defendant purchased certain property. Part of the sale consideration was left with him for payment of the pre-existing mortgage. As the money was not paid, the vendors brought a suit for recovery of the unpaid purchase money against the defendant, and the present plaintiffs, who had purchased the property from the defendant, were also made parties to this suit; and a decree was passed against defendant personally and against the property in the hands of the plaintiffs. In execution of the decree, the property was sold. Thereupon the plaintiffs instituted the present suit for damages against the defendant, and the claim was not founded upon the covenant of indemnity contained in the sale-deed. *Held,* (1) that the cause of action for the present suit accrued on the date of plaintiffs' dispossession consequent upon the sale of the property, and they were entitled to damages by reason of a breach of an implied warranty of title under Sec. 55(2) T. P. Act; (2) that the former suit did not operate as *res judicata.* GOBARDHAN DAS v. AFZAL HUSAIN AND (AFTER HIS DEATH) IQBAL HUSAIN. 598

———*Section 55(5) (b)—Agreement to sell—Suit for specific performance—Court had sale-deed executed—Liability to pay unpaid consideration arose at once—Limitation Act, Art. 120—Vendee agreed to pay balance of consideration to mortgagees—Delay in payment—Vendor had to pay interest—Suit for recovery of sum so paid—Limitation.*

One *B* agreed to sell (this village and another village were subject to a mortgage) to the defendant, who paid earnest money in cash; but later *B* sold the village to other persons. The defendant instituted a suit for specific performance making the vendees also parties. The suit was decreed, and the court had the sale-deed executed and completed in favour of the defendant. An appeal to the High Court by the vendees was dismissed. The defendant then deposited under Sec. 83 T. P. Act the balance of the sale consideration to the account of the mortgagees—this they had agreed to do under the terms of the agreement of sale—who agreed to accept the same in part satisfaction of the money due to them. The Court of Wards who had taken over the estate of *B* had to pay a large sum to the mortgagees as interest accruing between the date of the execution of the sale-deed in favour of the defendant and the date of deposit under Sec. 83. The Court of Wards thereupon sued the defendant for recovery of the sum paid with interest from the date of demand. *Held,* (1) that it was the duty of the defendant to pay the amount to the mortgagees on the date the sale-deed was executed in his favour, and the fact that an appeal was preferred to the High Court in the specific performance suit, could not suspend his liability. He insisted on the immediate execution of the sale-deed and must accept his liability arising from it; (2) that the defendant was not entitled to retain the balance of purchase money, as there was no plea that the payment of this sum was conditional on the remaining incumbrance being discharged; (3) that the cause of action arose on the date the mortgagees were paid off, and the suit was governed by Art. 120, Limitation Act, and was within time. MAHTAB SINGH v. THE COLLECTOR OF SAHARANPUR. 556

———*Section 59, Evidence Act, Secs. 68 to 71 and Registration Act, Secs. 58 and 59—Suit to enforce mortgage—Execution and attestation not admitted—No specific plea that the deed, for want of proper attestation, did not operate as a mortgage deed—What must mortgagee prove to obtain a decree—Signature of Sub-registrar and identifying witnesses—Whether sufficient attestation.*

Where a mortgagee sues to enforce his mortgage and, on the one hand, the execution and attestation of the deed are not admitted and, on the other, there is no plea that the deed for want of proper attestation does not operate as a mortgage deed, the mortgagee need prove only this much that the mortgagor signed the document in the presence of the attesting witness called (or the attesting witness received from the executant a personal acknowledgment of his signature) and the attesting witness signed in the presence of the executant, provided the document on the face of it bears the attestation of more than one person.

But if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses.

Neither the registering officer nor the witnesses identifying the executant at registration sign as attesting witnesses, and they cannot therefore be treated as such for the purpose of the validity of the mortgage. LACHMAN SINGH v. SURENDRA BAHADUR SINGH. 653

———*Section 63 and Trusts Act (II of 1882), Sec. 90—Scope of—Suit for redemption—Occupancy rights acquired by mortgagee—Mortgagor claims them as accretions to suit mortgage—When entitled.*

Section 63 of the Transfer of Property Act cannot be read as entitling the mortgagor on redemption to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within Sec. 90 of the Trusts Act, 1882, that is to say, when he did not have any special advantage by reason of his position as mortgagee in acquiring them.

Where in a suit for redemption the mortgagor claimed occupancy rights acquired by the mortgagee, who was also a co-sharer with him in the mauza, subsequent to the creation of the mortgage, as accretions to the suit mortgage, *held,* that it was incumbent on the mortgagor to show that the occupancy rights were acquired under such circumstances as to bring them within the provisions of Sec. 90, Trusts Act. SORABJI v. DWARKADAS RANCHHODDAS. 889

———*Section 70—Accession to mortgaged property—After final decree—Mortgagee not entitled to such accession.* MOTI CHAND v. THE BRITISH INDIA CORPORATION LTD., CAWNPORE. 71

———*Section 76(e)—Mortgagee in possession—Entitled to appropriate wood of fallen tree.*

Under Sec. 76(*e*) Transfer of Property Act, a mortgagee in possession must not commit any act which is destructive or permanently injurious to the property. That means that he must not commit waste, such as felling unripe timber. But there is no prohibition in this clause against taking wood of a fallen tree which fell from natural causes. Such wood is part of the profits of the property and a mortgagee in possession is entitled to take the profits. DURGA SHANKAR v. GANGA SAHAI. 493

———*Section 82—Mortgage of properties A, B and C—Property A subject to prior incumbrance jointly with properties X, Y and Z—Value of property A for contribution purposes—How to be determined.*

To arrive at the value for contribution purposes, within the meaning of Section 82 of the Transfer of Property Act, of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior encumbrances upon such properties must be ascertained and deducted. Where properties *A, B* and *C* are all made security for one mortgage, if property A is subject to a prior encumbrance jointly with properties *X, Y* and *Z*, the rateable share to be attributed to *A* under the prior encumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. To take into consideration only the total amount of the prior encumbrance to which *A* was liable, irrespective of the question whether that liability was to be shared by *X, Y* and Z or not, would be quite erroneous. FAQIR CHAND v. AZIZ AHMAD KHAN. 195

———*Section 91—Mortgage by sub-tenant—Death of tenant heirless—Right of tenant-in-chief to redeem—N. W. Tenancy Act (XII of 1881), Sec. 9—Grove land—Mortgage by sub-tenant—Not illegal.*

The plaintiff's grandfather was sir-owner and zamindar of a portion of a plot and occupancy tenant of the remaining portion. He got a guava grove planted on the plot by his sub-tenant. In 1885 the sub-tenant (and his wife) executed a usufructuary mortgage of the said plot in favour of the father of defendants. The mortgagors died about 1903. In 1928 the plaintiff brought a suit for redemption of the usufructuary mortgage; *held*, (1) that on the extinction of the rights of the mortgagors as sub-tenants their rights reverted to the plaintiff in his capacity of sir-owner and zamindar in one part of the plot and in his capacity of tenant-in-chief in the other part of the plot, and he had an interest in the property in question and was therefore entitled to redeem. (2) that there is nothing in Act XII of 1881 which makes a mortgage of a grove by a tenant illegal, as the prohibitions refer to tenants of agricultural land. ARJUN SINGH v. MAHESHA NAND. 474

———*Section 91(f)—Simple money decree-holder attaches property subject to mortgage—Suit for sale on mortgage—Attaching creditor not made party—During pendency of mortgage suit attaching creditor purchases property in execution of his decree and obtains possession—Subsequent purchase by mortgagee in execution of his decree—Suit for possession by mortgagee—Whether attaching creditor's right to redeem subsists.*

The defendant, who held a simple money decree, attached the property of his debtor, which was subject to a mortgage. After this attachment the mortgagee brought a suit for sale in which he did not make the attaching creditor a party. At the auction sale in execution of the simple money decree (which took place during the pendency of the mortgage suit) the defendant himself purchased the attached property and obtained possession. Subsequently a decree for sale was passed in the mortgage suit, and the mortgagee himself purchased the mortgaged property, and took out formal delivery of possession, but the revenue court refused to order mutation of names in his favour. Consequently the mortgagee brought the present suit for possession in the civil court; *held*, that the plaintiff was entitled to a decree for possession subject to the defendant's right to redeem on payment of the amount due to the plaintiff on his mortgage, and this right was not lost when the sale in pursuance of the attachment took place during the pendency of the mortgage suit. FATIMA BEGAM v. BANSIDHAR AND JAFRI BEGAM. 289

———*Sections 92 and 101 (as amended by Act*

XX of 1929)—Embody rule of justice, equity and good conscience—Whether have retrospective effect—Three successive mortgages—Third mortgagee pays off first mortgagee with a part of the mortgage money—Suit for sale by second mortgagee—Whether third mortgagee subrogated to the position of the first mortgagee.

Sections 92 and 101 of the Transfer of Property Act (as amended by Act XX of 1929) have retrospective effect. Supposing, however, that the said sections have no retrospective effect, the rule laid down by the Legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act XX of 1929.

Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay of the first and second mortgages and pays off only the first mortgage, and the second mortgagee brings a suit to enforce his mortgage, *held*, that the third mortgagee is subrogated to the position of the first mortgagee. TOTA RAM v. RAM LAL. 627

———*Sections 95, 82, and 100—One of several mortgagors redeems mortgage—Charge accrues in favour of mortgagor who redeems—Rule not limited to possessory mortgages—Art. 132 Limitation Act applicable to such a claim.*

On redemption of the mortgage property by one of the several mortgagors, even in a case where the mortgage is not a possessory one, a charge accrues in favour of the mortgagor who discharges the mortgage, and he is entitled to enforce the charge against his co-mortgagors, and the right accrues on the date of payment, and Art. 132, Limitation Act is applicable to such a claim. COLLECTOR OF FARRUKHABAD v. KISHORE MOHAN *alias* MUNNA LAL. 19

———*Secs. 108 and 111 (a)—Second lease—to take effect after first lease for 10 years had expired—First lease expired by efflux of time under Sec. 111 (a)—First lessee holding over—Whether second lessee entitled to eject first lessee.*

Defendant obtained a lease of a house for a period of ten years. A few months before the expiry of the lease, the lessor executed another lease in favour of the plaintiff for a further period of ten years. The second lease was to take effect a few days after the expiry of the first lease. As the first lessee, whose lease determined by efflux of time under Sec. 111 (*a*) T. P. Act, was holding over, the second lessee brought a suit for ejectment of the first lessee from the house, *held*, that under Sec. 108 T. P. Act the second lessee was entitled to eject the first lessee who was holding over. HAKIM MOHD. FAZIHZZAMAN v. ANWAR HUSAIN. 126

———*Section 122—Gift—Acceptance—May be either express or implied—No presumption of acceptance operating immediately upon gift.*

Under Sec. 122 Transfer of Property Act there is no presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee.

There is nothing in Sec. 122 T. P. Act to limit acceptance to an express acceptance and acceptance may be either express or implied. ANANDI DEVI v. MOHAN LAL. 335

———*Section 122—Gift—By husband to wife—Gift within wife's knowledge—Mutation effected—Acceptance to be implied.*

Actual or constructive possession is undoubtedly proof of acceptance, and in zamindari property, and especially in a case concerning husband and wife, mutation means delivery of possession, and the acts of the husband after mutation are acts on behalf of his wife. ANANDI DEVI v. MOHAN LAL. 335

———*Sections 130 and 6(e)—Lease—Lessee agreed to pay Government revenue—On failure of lessee to do so, lessor paid revenue—Later lessor assigned his right to recover the revenue paid—Whether assignee entitled to sue.* MANMATHA NATH MULLICK v. HEDAIT ALI. 341

———*Section 136—Legal practitioner takes a transfer from Mahomedan widow of her claim to dower and right to possession—Whether transfer void.* AMIR HASAN KHAN v. MOHD. NAZIR HASAN. 275

U. P. COURT OF WARDS ACT (IV of 1912).

See Court of Wards Act.

TRUSTS ACT (II of 1882), *Sec. 88, Illustration (f) and Sec. 90—Mohammedan family—Joint business and joint purse—Partnership—Death of a member—Surviving members carry on business as before—Rights of heirs of deceased member—Limitation Act, Articles 144 and 106—Suit for joint possession by heirs of deceased member of Mohammedan joint family constituting a partnership—Whether maintainable—Limitation.*

Where male members of a (Mohammedan) family carry on business jointly and have a joint purse and there is an understanding with regard to the sharing of the profits, they are

members of a partnership as defined in Sec. 239 of the Contract Act. On the death of a member it is open to the surviving male members of the family to wind up the business and to pay off the heirs of the deceased member by valuing their interests. If the surviving male members prefer to carry on the business, retaining the entire assets, including the shares of the heirs of deceased member, with the result that the profits of their shares in the business and the property are made use of for improving the business and making acquisitions instead of being paid to them, Sec. 88, Illustration (*f*) and Sec. 90 of the Trusts Act (II of 1882) apply and the heirs of the deceased member are entitled to their shares (under the Mohammedan Law) not only in the property and the business as they were at the time of the death of the member but also in the subsequent improvements and acquisitions; and the heirs of the deceased member can maintain a suit for joint possession of the assets in the hands of the surviving members and Art. 144 of the Limitation Act applies to such a suit. It is not incumbent on them to institute a suit for an account and a share of the profits of a dissolved partnership to which Art. 106 of the Limitation Act applies.

It is open to the surviving members to charge for their personal services a reasonable remuneration, but if they do not do so, they cannot afterwards insist on account being taken of their personal services which it is impossible to assess in terms of money or a share in the improvements and acquisitions. SHUKRULLAH v. ZUHRA BIBI. 1039

U. P. LAND REVENUE ACT (III of 1901).

See Land Revenue Act.

U. P. MUNICIPALITIES ACT (II of 1916).

See Municipalities Act.

WILL—*Construction of—Testatrix gave to P (Executor under the Will) the right to spend the entire income of her estate—For maintaining himself and his family—Whether income of estate given to P—Succession Act* (*XXXIX of 1925*), *Sec. 172.*

Where the testatrix expressly said in her will that she was maintaining one *P* and she wanted to maintain him in future, and she authorised him to deal with her property by appointing him the executor and gave him the right to spend the entire income of her estate for maintaining himself and his family, on this condition that if *P* turned out to be a man of dissolute habits, her property was to be utilized in raising money and in constructing a temple, *held*, (1) that the testatrix intended to give and did give the income of her estate to *P*, and as a matter of law the estate belonged to *P* (Sec. 172 of Succession Act of 1925); (2) that the prohibition against alienation being inconsistent with the interest given, was bad in law. MANNU LAL v. LACHHMAN DAS. 564

———*Series of successive interests—Each legatee given powers like testator—Bequests of life-interests only—Tests for determination of.*

Where a testator appointed *A* as the successor to his property and the will recited that whatever powers the testator had in respect of the property, the legatee shall have like himself, the very same powers with powers of possession and enjoyment as owner and on the death of *A*, *B*, if alive, was to be his successor with the same powers as were bestowed on *A*. Similarly after *B*, *C* was to be his successor. After all these three successors the property was to pass to some one or more persons selected in a specified manner. *Held*, that successive life-interests only were conferred on *A*, *B* and *C*. The dominant intention of the testator was that the property should pass to three persons in succession, and this intention was inconsistent with the idea of a series of absolute interests, and the gift in the will of the same powers as the testator had, must be read as a gift of such powers so far as was consistent with the subsequent provisions of the instrument. NISAR ALI KHAN v. MOHAMMAD ALI KHAN. 691

ALLAHABAD LAW JOURNAL

[1932] APRIL 1, 1932 NUMBER 1

LAW LIBRARY

THE HISTORY AND STATUS OF LANDLORDS AND TENANTS IN THE UNITED PROVINCES, *by* S. N. A. Jafri, B.A., Barrister-at-Law. (The Pioneer Press, Allahabad, pages 438).

It is common knowledge that the effects of the catastrophic fall in prices of primary products has been felt more severely in the United Provinces than in any other Province in India, and the system of land tenure in these Provinces has been put to a very severe test. At a time like the present men's minds are prone to be carried away by clap-trap, and we think Mr. Jafri's book will be very helpful to those who want to trace the roots of the present system, and view it in its true perspective. A reformer who has before his mind's eye a historical picture of the evolution of the present system, can put his finger with certainty on the weak spots.

The book is divided into two parts. The first two chapters deal with 'Ancient India', and the 'Muslim period' and in about seventy three pages the author has summarised the results of his extensive reading of the literature relating to the period. Chapter III sketches the 'Early history of British revenue administration', and Chapter IV contains a good account of the controversy as to the merits of the permanent and periodical settlements. Chapter V views historically 'The assessment in the Agra Province'. Chapters VI & VII, which deal with the 'Legal position of the tenant in the United Provinces' have been written with care and precision, and will provide a useful guide to the practising lawyer. Chapter VIII outlines the 'Administrative machinery to safeguard tenures'.

Part II is mainly descriptive. The author gives a vivid account of village life, methods of agriculture, irrigation, education and sanitation. Chapter VIII deals with the problem of Indebtedness. Chapter XI and XII deal with 'Rural economy' and 'Village uplift'. In this part much useful information which is scattered over a very large number of Blue Books, has been collected in one place in a systematic way.

We have no doubt that the book will prove exceedingly useful to those who are interested in the 'Agrarian Problem', and even a practising lawyer will find certain parts of the book well worth careful study.

ALLAHABAD LAW JOURNAL

1932 AUGUST 12, 1932 NUMBER 2

LAW LIBRARY

THE LAW OF SHAH JOG AND OTHER HUNDIS, *by* Ramniklal R. Mody, B.A., LL.B. (Published by the Author). pp. 60.

This book is a reprint of articles which have appeared in the Bombay Law Journal. The nature of the Shah Jog Hundi was first discussed by Arnould, J. in *Doulatram's* case (1869) 6 Bom. H. C. 24, which is the leading case on the subject. In this little book Mr. Mody has brought together all the available decisions, and the discussion of the case-law is clear and exhaustive. The book will be greatly appreciated by those who have occasion to study this subject.

THE COURT FEES AND SUITS VALUATION ACTS, *by* Mr. Anand Swarup, B.A., LL.B., Vakil, Allahabad (1932) Price Rs.1-8-0.

This book embodies the recent amendments made in the Court Fees Act which came into force on May 1 last. To the sections are added short commentaries and the important cases on the point. A comparative table showing the changes made in the amounts of the court-fees now payable enhances the usefulness of the work. There are appendices dealing with the refund, renewal and remissions of the court-fees. A note on the valuation of suits serves as a helpful introduction to the book. The get-up is neat and the price moderate. It should prove a handy book of reference alike to the members of the profession and the officers of the Court.

THE ALL-INDIA LAW DIGEST (1921-1930) AND CENTURY REFERENCER (1821-1920), *by* A. S. Srinivasa Aiyar. (The Law Publishing Company, Mylapore, Madras). Two Volumes.

This Digest in two volumes covers the cases reported from 1921 to 1930. The cases digested have been grouped under appropriate headings and catch-words to be prefaced to cases have been selected with care. A novel feature of the book is the incorporation of a 'Referencer,' where deemed necessary, which gives references to cases decided between 1821-1920, and thereby facilitates the collection of the case-law on the point under study in the shortest possible time. We have no doubt these volumes will be very useful to the legal profession.

THE LAW OF EVIDENCE IN INDIA, *by* A. K. Ghose, Bar-at-Law (Butterworth & Co.).

The aim of the author is to write a text-book on the Law of Evidence, such as would be useful to students and junior practitioners in India. The book has been divided into six parts, viz., General Principles of Evidence; Relevancy of Evidence; Cogency of Evidence; Witnesses; Instruments of proof; General. Each part is again divided into a number of chapters, which contain a clear and logical account of the subject, and the case-law has been utilised with discrimination to throw light on the principles discussed. The last part contains a valuable chapter on the 'Rights and duties of the Profession of the Advocate.' The Indian Evidence Act has been reproduced in the Appendix for convenience of reference. We strongly recommend this book to those who want to form clear ideas on the subject.

ELEMENTS OF THE LAW OF CONTRACT, *by* W. G. H. Cook, LL.D. (Lond.), Bar-at-Law (Butterworth & Co. Ltd.). pp. 203.

This book sets out the Law of England relating to contract as it stands at the present time without undue use of technical terms. Questions of the historical development of the law have also to a large extent been avoided. The book contains an admirably clear and succinct statement of the Law of Contract, and has not been unnecessarily burdened with cases, which have been given throughout the book in the form of illustrations.

A novel feature in the arrangement of the work is the insertion of a chapter entitled "Conditions, warranties and covenants" immediately after the chapter dealing with the parties to a contract, and a number of matters are considered in this chapter, which are generally scattered throughout the chapters dealing with misrepresentation, illegality and assignment. There is a very full discussion of the Law relating to Bills of Exchange, Promissory Notes and Cheques. The general get-up and printing is excellent.

ALLAHABAD LAW JOURNAL

[1932] OCTOBER 21, 1932 NUMBER 3

MR. JUSTICE LALIT MOHAN BANERJI

We deeply regret to record the sudden death of Mr. Justice Lalit Mohan Banerji on the morning of October 15, 1932, from heart-failure. The eloquent tributes which were paid to his memory by the Bench and Bar of the Allahabad High Court, and the numerous meetings which have been held all over the province to mourn his loss are indicative of the high esteem in which he was held by the people of these Provinces. Born and bred in this part of the country, he was regarded by all as one of themselves. He was an advocate and Judge of ripe experience and combined wide legal knowledge with strong common sense. As a man he inspired confidence and was held in genuine affection by a large circle of friends. He was one of the founders of the Allahabad Law Journal and his interest in it continued unabated and his advice was always at our disposal. As was truly said by Sir Tej Bahadur Sapru, Sir Promada Charan Banerji and his son have left a name in the history of the Allahabad High Court which will never be forgotten. We tender our most heart-felt sympathies to the members of his family.

REFERENCES IN HIGH COURT

A touching reference was made to the sudden death of Mr. Justice Lalit Mohan Banerji, by the Bench and the Bar, on Oct. 17, at the High Court. As a mark of respect to the memory of the deceased, the Judges closed their courts for the day.

CHIEF JUSTICE

The Chief Justice said—Members of the Bar, it was with the deepest sorrow and grief that we received the sad news of the sudden death of Mr. Justice Lalit Mohan Banerji. The shock was so sudden that for a moment it was difficult to believe that he had really passed away from our midst. He attended the High Court on Friday last and he sat at an English meeting till 4 P.M. that day. He looked so strong and fit that no one could have imagined that he would expire in a little over 12 hours.

Mr. Justice L. M. Banerji was a distinguished judge of this High Court and enjoyed the respect, reverence and confidence of the bench and the bar.

His relations with his colleagues on the bench and with the members of the bar were most cordial and friendly. He had a deep and sound knowledge of the principles of law and a vast experience of judicial work, particularly criminal work. His jovial temperament made him very popular with every one who came in contact with him and for us judges it was a pleasure to sit with him on the bench.

Mr. Justice Banerji had been associated with this High Court for over thirty years. He was born in 1875 and after taking the degrees of Master of Arts and Bachelor of Laws from the Muir Central College, Allahabad, he joined the legal profession in 1899. During his college days he was a good cricketer, a fine sportsman and later he developed into a keen motorist. For the first time in 1906 he officiated as the Government pleader of this High Court and was later on made the permanent Government pleader in 1913 and continued to work as Government pleader till 1921 when he was made the permanent Government advocate. His work was very highly appreciated and the title of Rai Bahadur was conferred on him on the New Year's Day in 1921 when he was still the Government pleader. In 1925 he officiated as a judge of the High Court and from 1926 onwards he had been a permanent member of our bench. Besides performing his judicial duties he served on several Government committees and educational bodies. He was for instance a member of the Racial Discriminations Committee and also a member of the Indian Bar Committee which were both appointed by the Government of India.

He was indeed a dear friend. His memory will remain fresh not only in the minds of those who have known him but through his weighty judicial pronouncements he will be remembered long by the future generations of lawyers. He has died at the early age of 57 years and undoubtedly he had a peaceful end. He was found as if he were sleeping calmly in his bed in the morning. It must have been a painless death to him though by the mere fact of its unexpectedness it is all the more painful to the survivors who are left behind to mourn his loss. The loss has been very great to the High Court. On behalf of my learned colleagues and myself I offer our most heartfelt condolence and sympathy to the members of his bereaved family.

SIR T. B. SAPRU

Sir Tej Bahadur Sapru said—My lord Chief Justice and my lords, it is hardly possible for us to realize that we have assembled this morning to mourn the death of one who occupied such a large space in this court during the last 33 years. Your lordships are mourning the loss of a valuable colleague on the bench. We on this side are mourning the loss of one who was not merely an ornament of the profession until he was raised to the bench but who also was a personal friend, and a very good friend, of many of us. He joined the profession just one year after I moved to the High Court, and during the last 32 years of our close and intimate association I cannot recollect a single occasion when there was the slightest misunderstanding between him and myself or, for the matter of that, between him and any other member of the profession. We all recognized his ability as a lawyer, his great common sense, his power of appreciation of evidence both when he was at the bar and when he was elevated to the bench. Above everything else, I can say with confidence that the feeling in all the grades of the profession about him was that it was a real genuine pleasure for any one of us, senior or junior, to appear before him and argue our cases before him. To untiring industry he united common sense, great and varied experience and above everything else, a temper which could never be ruffled.

My lord, I cannot recollect of any legal family in India with a more distinguished record than that of the Banerjis of this court. Their history takes us back to 1871, that is to say, to a period some six years after the establishment of this court. His great and distinguished father was, if I may say so respectfully, one of the most outstanding members of this bench for 30 years. There was hardly any interregnum before the son succeeded, if I may say so, the father on the bench. Long legal and judicial traditions ran in his blood and though it would be difficult for any one to say that he was in every respect as great a judge as his father, yet I feel confident when I say that he very nobly maintained the traditions of this bench and the traditions which he had inherited from his father.

To many of us and, if I may respectfully say so, to me in particular, his death has come as a great personal loss. He returned from England, after seeing his son who is a cadet at Sandhurst at present, only a week or 10 days ago and some of us had not even met him in private. If you had asked any one of us on Friday night that on Monday morning we should meet in this court to mourn his loss we should have considered it an absolute impossibility. But such is life. We are assembled here to mourn his loss—the loss of a dear and valued friend of many of us and the loss of a judge who served his country and his King with zeal, ability, honesty and integrity. My lord, I shall stop there.

SIR C. R. ALSTON

Sir Charles Ross Alston said.—May it please your lordships, it would be a true statement if I said that we have met this morning to lament the sudden death of a dear friend who happened to have been a judge of this High Court and the emotion we all feel is proof of the esteem and affection with which we regarded Mr. Justice Banerji. The passing away of a friend is always a painful event. When such an event comes in as unexpected a way as in the present case the suddenness accentuates the feeling.

Nevertheless, to pass away after a life of fulfilment without the not uncommon interlude of a long-drawn out illness, accompanied by suffering, is a thing that many would envy. My friendship with Lalit Mohan Banerji—for it was as such that I always thought it was—was a long-standing and very sincere friendship. I got to know him first when he joined the bar of this court. I saw him proceed from private practitioner to Government pleader, then to Government advocate, and ultimately to a seat on the same bench that his distinguished father had occupied for many years. We who knew the son's qualities so well cannot doubt that the father must have been proud of his son's work as judge of this court.

Your lordship and Sir Tej Bahadur Sapru have dealt so fully with Mr. Justice Banerji's work as a judge and have put such just appreciation of its value that there is nothing that I can add on this subject. At the bar Lalit Mohan Banerji showed by his presentation of his cases how well he had prepared himself. His arguments were clear and precise. He was scrupulously fair to his opponent and would never make a statement that the record did not support. For this reason he was trusted completely by both the bench and the bar. As Government advocate he had the moral courage to give expression to any doubt he felt as to the soundness of a conviction. A mere desire to win his case never made him press any point which he considered was not a sound one.

None knew better than your Lordships how helpful he was as a colleague. Nor need I remind the bar of his courtesy, his patience and his fairness on the bench. As a man he was a charming and interesting companion. He knew human nature and had a strong sense of humour. He will be missed by all of us to an unusual degree for his popularity was great. As a judge we of the bar admired him, as an advocate we appreciated his abilities and as a friend we loved him much.

DR. N. C. VAISH

Dr. N. C. Vaish said—My lords, for myself as well as for those whom I represent (members of the High Court bar who do not belong either to the Advocates' Association or to the Bar Library on whose behalf Sir Tej Bahadur Sapru and Sir Charles Ross Alston, respectively, had already spoken), I beg to associate myself with everything that has fallen from the lips of Sir Tej Bahadur Sapru and Sir Charles Ross Alston.

As the sad news that Providence had removed our beloved judge from the field of his activities into the beyond broke upon us, we all felt staggered, and I have no doubt whatever that each one of us, high or low in office, wealth and name, aspiring for the same, deeply felt for the moment how insignificant man was, how in his vanity he lays out plans for his future, not always mindful of others, as if he were going to live for ever, while there is a mysterious power which dashes to pieces all his plans by terminating his earthly sojourn without notice at its sweet will.

In life the late judge brought lustre to the court by bright sunny smiles and good will towards all. He meted out justice tinged with mercy and overflowed with genuine sympathy for the losing party. Even in his severest strictures against the subordinate judiciary, police or litigants as his righteous ire was roused when he smelt anything neglectful or unclean, he differentiated the act from the actor.

So good indeed was the late judge that even in parting company from us he has provided us with a moral. His sudden departure will always remind us that each one of us, however situated, is after all a soldier on the march likely to be removed into the eternal beyond at any moment. Its recollection will always bring us nearer to our Maker and serve as a wholesome warning to us amidst our manifold activities.

MR. U. S. BAJPAI

Mr. Uma Shankar Bajpai, Government Advocate, said—My lords, a distinguished son of a distinguished father, is no more. More than two years ago we assembled in this very room to offer our mournful tribute to the late Sir Promoda Charan Banerji. But then he died at a ripe old age in the fullness of time and who could have thought that so soon after we shall have to assemble again here to mourn the loss of his son in such an unexpected way?

About 10 days back he came from England where he had gone for his vacation, and when we saw him every one of us complimented him upon his health for we in our short-sighted vision saw him looking extremely bright and little did we dream that Death with muffled steps was staring behind him! On the 14th he came to court, did his full quota of work, went home, had his dinner and smoked his usual cigar and then retired to bed, but in the early hours of the morning God's finger touched him and he slept a sleep that knows no waking.

Mr. Justice Banerji was a good judge. He had a strong common sense, a quick grasp of facts and a sound knowledge of the principles of law. His great experience on the criminal side of the bar made him an exceptionally good criminal judge. He had almost a weird knack of getting at the bottom of things.

'Your client is a blackguard' was a favourite expression of his, which he used against a member of the bar when he was trying to present his case in a favourable light and that expression very often induced the advocate concerned to take his seat with a good grace. His fund of wit and humour was inexhaustible and his cheerfulness was always great. I overheard one of your lordships telling another, 'We shall miss his cheery presence in the English meetings.' I heard a junior member of the bar telling another, 'The human judge is gone.' He meant no disrespect to any of your lordships, but Mr. Justice Banerji was above all intensely human.

He has left a number of friends to mourn his loss here and elsewhere. Enemies he had none. To his son and to his daughter, to his brother and to his sister, we offer our sincerest condolence and share with them in their great grief.

ALLAHABAD LAW JOURNAL

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PRINCIPLES GOVERNING THE FORFEITURE OF BAIL-BONDS

(*By* H. K. SHARGHA, B.A., LL.B.)

It is proposed in this little essay to give a short and analytical statement of the principles and precedents underlying the forfeiture of bail-bonds. The definition of 'bailable offences' in the Cr. P. C., is neither accurate nor illuminating and, in view of the amendments and the latest decisions, only an heirloom of archaelogical interest. 'Bail' is derived from the Latin 'Bajulare', 'to keep in custody', through the Old French 'baillier', 'to give or deliver.' It means: (i) 'the custody of a prisoner or person under arrest by a person who procures his release from imprisonment by giving security for his appearance' (as distinguished from official custody); or (ii) the security given for the due appearance of a prisoner in order to obtain his release from imprisonment and involves the undertaking by the surety of the appearance 'at a certain day and place of the person bailed'.

The Cr. P. C. permits the taking of such an assurance, with a fixed penalty for default, in any of the following *three* ways: By taking from (*a*) '*the person wanted*' or the 'principal', if *sui juris*, a '*Muchalka zati,*' variously called a 'personal recognizance', 'bond without sureties' or 'personal bond'; or (*b*) a bond from third persons called 'sureties', (i) in addition to a 'personal bond' from the 'principal, if he is *sui juris*, otherwise (ii) in lieu thereof[1]; or a deposit[2] of money or G. C. Notes as a substitute for both or for a bond from the 'principal.'

Strictly speaking, 'bail' is really a tripartite contract[3] of continuing[4] guarantee[5], on behalf of a third person, and a personal recognizance is of the nature of a contract of indemnity[6].

Thus it is necessary for the proper appreciation of the subject to refer to the principles of contracts. For the sake of facility, I have borrowed from American phraseology, the terms: (1) '*obligor*' as commonly or jointly referring, both to the principals or sureties; and (2) '*obligee*', likewise referring to the 'office' or 'court' for whom or to whom this assurance is given.

GENERAL POLICY

Before discussing the other aspects of the subject it appears desirable to remove some misapprehensions about the policy of the law in such cases. The administration of criminal justice is in the hands of the executive, interested equally in the maintenance of law and order, the prevention of crime and the dispensing of justice—with all its technicalities and formalities. It is very difficult to maintain a strict and proper balance between the various capacities. The result is such that the High Court had to repeat again and again that 'the Magistrate trying the case has to protect the interests of the prosecution and the defence alike' and he 'is expected to afford all facilities to the accused not only when he is compelled by law to do so, but also when he has a discretion in the matter and the ends of justice require that'[7]. Similarly, undue reliance on the advice of the Superintendent of Police or Kotwal has been disapproved[8], as also a reference to the opinions of the Government Advocate or the Public Prosecutor[9]. And in actual practice, the influence of the police is very often felt. So far as the sureties are concerned, High Courts have recommended that they should always be treated in a considerate manner[10] ' lest indiscriminate forfeitures should bring our administration on that point into general disrepute.'

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[1] Ss. 466 and 514B Cr. P. C.

[2] S. 513

[3] S. .10 Contract Act

[4] S. 129 Contract Act

[5] S. 126 Contract Act

[6] S. 124 Contract Act

The subject may for the sake of convenience be divided into three broad divisions: (*a*) Where the contract is not valid from the beginning. (*b*) Where the obligor is under no obligation to perform his part. (*c*) Where performance is rendered impossible by subsequent events.

(*a*) The contract may be void *ab initio* on the following grounds:—

1.—INCOMPETENCY OF THE PARTY

On the principles contained in Sections 11 and 13 of the Contract Act, the incompetency to contract may arise from minority, unsoundness of mind or some other law placing the party under a disability to contract. The first two conditions would generally govern the cases of the obligee but not of the obligors who take bail in their official capacity.

(*i*) *The incompetency of the obligee.*—(*a*) A Police officer's capacity to take bail is restricted by Section 57 or 59, Clause (3), Cr. P. C. and if he happens to be *investigating the case* by Sections 167 and 169. Such an officer's bond would be useless if he takes bail under conditions other than those mentioned in these sections. Similarly, an officer incharge of a Police Station (and also his superior officer under Section 551) can take bail under Sections 84, 169, 170, 171, 496 and 497. This is all subject to the local limitations of the district in which they are operating or the terms of the legal orders of the court on which they are acting and also to the ouster of their jurisdiction by the cognizance of courts.

Thus a Police officer's capacity to take bail is restricted by the Code according to the nature of his office and the nature of the offence. This is all subject to the territorial limits and sub-limits of Police districts as well as by the local jurisdiction of the officer, to whom the court sends a warrant for execution. He is not competent to act beyond his limitations and if he does so, his bond would probably be considered void.

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[7] *Per* Niamatullah, J., 1932 Cr. C. (All.) 176

[8] *Ibid*

[9] *Per* Shah and Martin, JJ., 45 I. C. 512

[10] *Per* Kensington, J., 21 I. C. 176

(*b*) The Jurisdiction of the Courts

(*i*) *Absence of local jurisdiction.*—Sections 12, 14-15, 20-22 , 25 Cr. P. C. govern the local jurisdiction of the criminal court. In a case where a first class magistrate of Rai Bareli took bail from a person against whom a warrant from the court of the District Magistrate of Badaun was pending; and in spite of the bond, the accused did not appear at Badaun and the bond was forfeited, the order of forfeiture was cancelled on the ground that the Magistrate of Rai Bareli had no jurisdiction to take it[11].

Similarly, in a Rangoon case where an Additional Sessions Judge had taken bail, it was cancelled as that court had no jurisdiction to allow bail being not specially empowered in that behalf[12].

(*ii*) *Absence of jurisdiction in certain classes of cases.*—Under Schedule 2, Column 8 of Cr. P. C., groups of offences to be tried by different classes of magistrates are given and Section 530 mentions the voidability of certain proceedings, if done by courts not having that jurisdiction, e.g., bonds under Chapter VIII by Second or Third Class Magistrates.

(*iii*) *Jurisdiction may not have arisen.*—For example, under Sections 190-194, Cr. P. C. or

(*iv*) *Having arisen, it might have been* (*a*) *ousted by transfer* or by being *excluded by being in the siesin,* even of a subordinate magistrate. Where a district magistrate cancelled bail in a case pending before a subordinate court, his order was considered void and illegal. It would have been illegal on the same principle to have taken bail[13], (*b*) *or exhausted, e.g.,* by pronouncement of the final order when the court becomes *functus officio* for the purposes of that case. Where a person was bound over after discharge his bond was considered illegal[14], but this is different from a bond under Section 562—when there is a non-technical discharge after a warning. After conviction it is only the appellate or revisional court alone that can grant *bail*[15]. If the trying magistrate were to take bail after conviction that would be void.

(*v*) *Special jurisdiction.*—The Cr. P. C. has specially extended powers of bail even to Civil and Revenue Courts[16] only for offences mentioned in Clauses (*b*) and (*c*) of Section 195 when committed in their courts. Where bail was taken for the personal attendance of the appellant in a civil case, it was considered void—being a bail which that court was not authorized to take.

Thus, it is clear that the capacity of the 'obligee', i.e., the officer or the court taking bail is exactly commensurate and coeval with his legal power to demand it.

(*ii*) *The 'incompetency' of the 'obligors'.*—'Minority' and 'unsoundness of mind' would account for incapacity in either case. But incapacity of the principal would not affect the liability of the surety or

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[11] *Per* Mears, C. J. and Sen, J., 120 I. C. 194: 1930 A. L. J. 199: 1929 Cr. C. 642: A. I. R. (1929) A. 914

[12] *Per* Doyle, J., 1930 Cr. C. (Rang.) 1151

[13] 1932 Cr. C. (All.) 308

[14] 84 I. C. 944: A. I. R. 1925 (Oudh) 314

[15] Ss. 426-427, 432, 434, 438-9 Cr. P. C.

[16] Ss. 476, 476A, 476B, 478, 482, 485-6

vice versa. So far as the surety is concerned, he can be a juristic person and the validity of his bonds will probably be affected by its constitution. If the releasing on bail does not come within its objects, the bond would probably be void. Section 514-B has now clearly provided for the bond of surety in place of that of the principal. Section 466 makes similar provision for the case of an insane person. Bonds by minors and insane persons, if taken, are void; but in those cases sureties are treated as principals. If no personal bond is taken from the principal where he is major or of sound mind, the surety has been held not to be *liable*[17].

In a civil case where the principal was insane, his surety was held liable for the contract[18].

But the surety's incapacity to contract is quite different from his 'sufficiency' or 'fitness' which refers to his financial stability or in some cases his capacity to control the conduct or behaviour of the principal[19].

2.—ABSENCE OF FREE CONSENT

This would cover two sorts of cases: (*i*) where there is *no consent*, i.e., where the parties do not agree to the same thing in the same sense or (*ii*) when the consent is *not free*.

(*i*) *Such cases* would arise where parties come to an agreement without both of them meaning the same thing. In other words, they come to an apparent agreement, while in reality they do not. This may be the result of a *mistake*[20], which both the parties have made or even the obligor alone about some essential matter, e.g., regarding date, time, place[21], or *necessity*[22] of appearance or where the meaning of the pact is uncertain[28] or incapable of being made *certain*[24]. Such cases may arise where, as sometimes happens, the police officers take bonds which are blank at the time of signatures of the obligors and are filled in later.

(*ii*) *Another set of cases* arises where obligor agrees to give bail as a result of the 'obligee' or somebody on his behalf succeeding in taking it by (*a*) abuse of authority or (*b*) fraud.

(*a*) In a Punjab case where an allegation was made by the surety, that he had to stand bail for another, because his son was involved in another case, and he was afraid that his son would be prejudiced, by his refusing the police officer asking him to do so; it was held that this was a case of abuse of influence and as such the surety was excused[25]. Probably the same principle would apply where the question of coercion is raised.

But the test of undue influence or coercion[26] requires very careful consideration against abuse, as whoever gives bail in a criminal case must, by the very nature of the circumstances, be under some sort of fear of his own or of some friend's being sent to jail in the alternative.

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[17] 109 I. C. 219: A. I. R. (1928) Lahore 318

[18] [1907] 17 Mad. L. J. 78

[19] Chapter VIII or 562 Cr. P. C.

[20] Ss. 20-22 Contract Act

[21] 124 I. C. 85: A. I. R. (1929) Pat. 658

[22] 34 I. C. 944: A. I. R. 1925 (Oudh) 314: 97 I. C. 672: A. I. R. 1926 (Lah.) 636

[23] 65 I. C. 420: 23 Cr. L. J. 68

[24] S. 29 Contract Act

[25] 5 P. W. R. (1918) Cr.

[26] Ss. 15 and 16 Contract Act

But such a plea does not appear to have ever been raised on behalf of the principal.

(*b*) Similarly, consent might be secured by *abuse of the ignorance* of the obligor or some special knowledge of circumstances of the obligee by (*i*) *fraudulent concealment* or (*ii*) misrepresentation[27] of the facts which ought to have been fully and truly made known to the obligor, for a full and correct appreciation of the facts necessary for the deliberation and consideration of the obligor.

It has been held in an English case that "a surety ought to be acquainted with the whole contract entered with his principal[28]." This is specially necessary where the obligors are ignorant and illiterate.

3.—ABSENCE OF LAWFUL CONSIDERATION OR OBJECT[29]

Like other contracts, a bail bond would become illegal, if the purpose for which it is taken is in contravention of a statute or opposed to its general policy and intent, or forbidden by law, or is of a nature different from that sanctioned by the Code[30]. For example, a bond for the personal attendance of the surety[31], or a bond from an agent[32] or possibly from sureties under Sections 217, 171 or 170, Clause (2) or of an appellant under the civil law[33] or for production of witnesses before police[34].

Probably, the same principles would cover those cases where magistrates in mofussils sometimes bind the '*pairokars*,' relations or friends of persons (specially female witnesses under Section 498 I. P. C.), who cannot be otherwise traced but are thought to be under their influence—just to facilitate appearance of a defaulter or an accused[35].

4.—A PARTICULAR FORM IN WRITING

Schedule V gives the various forms on which different bonds should be taken[36]. A particular form being prescribed, no amount of verbal instructions or agreement would be binding on anybody. But the contract being one of continuous performance, no writing is essential for a subsequent appearance, an oral direction from the court had been thought to be enough[37]. But not so, if it proceeds from the Peshkar alone, if the court is not being held.

For a bond, usually the details in Clause (2) of Section 76 or Section 499 are necessary except those taken under Section 169 Cr. P. C.

Bonds have been considered illegal where these essentials were missing: e.g., time, place, or money penalty[38] or court or officer before whom attendance is required[39].

[27] Ss. 17 and 18 Contract Act, read with 19-22, and 142-3

[28] *Per* Littledale and Bayley, JJ., *Bedcock* v. *Bishop*, 27 R. R. at 433 and 435. Also 15 Bom. 64: 2 K. B. 72: 15 B. 585

[29] S. 23 Contract Act

[30] 32 P. R. (1903)

[31] 5 B. H. C. R. (Cr.) 64

[32] Ss. 207 and 117 Cr. P. C.

[33] P. R. 75 of 1866

[34] 11 C. 77; 22 P. W. R. (Cr.)

[35] e.g. 22 P. W. R. (1907)=6 Cr. L. J. 275

[36] e.g. Forms Nos. 2, 3, 15-16, 37, 42 and 45

[37] 1 Weir 87

[38] [1885] A. W. N. 44; 6 Cr. L. J. 275; 20 I. C. (1913) 414

[39] 36 C. 749

These bonds should be *strictly*[40] interpreted and an obligor should not be made to suffer for any condition which is not expressed in it[41] or which is outside or contrary to its scope[42], or for an offence other than for which bail is taken[43].

Certain additional conditions were imposed on an application for bail presented by some persons accused in the Meerut Conspiracy Case[44]. The cases being under trial would not admit of discussion.

It has been held that bonds cannot be forfeited, if the penal clause is not inserted in persuance of the order of the magistrate[45]; nor for an offence different from the one for which bail is taken[46]; or for not appearing before another court[47], if that court is on tour and the accused is asked to appear before another.

Similarly, where a bond under Chapter VIII was taken and an offence was committed in a Native State, it was held that the bond could not be forfeited, as the obligation referred to the King-Emperor, which could not be extended to the ruler of a Native State[48]; but the penalty could not be avoided where the offence was committed in another Indian district under the British Government[49]. Nor could the offender be held liable, when he had given a bond under one clause of Section 110 when the offence referred to another *clause*[50] unless the obligation was wide enough to include both the clauses[51]. Nor was he held liable when he was bound under Section 107 and committed an offence which was not one involving breach of the *peace*[52].

B.—Fact justifying non-performance or rendering the performance of the bail-obligations voidable inspite of the validity of the contract[53].

It has been held in an American case that: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the conviction is rendered impossible by the Act of God, the Act of the obligee or the Act of the law . . . . "

This may be due to the subsequent events making performance impossible or optional by *acts of* (*a*) *obligee,* amongst which might be included illegal omissions or some other default of the obligee, (*b*) *third party,*.(*c*) *obligor.*

(*a*) Among the acts of the obligee would come two sorts of cases: (i) *obligee not doing its own part of the obligation*: e.g., fixing a date on

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[40] 23 Cr. L. J. 68.

[41] [1930] Cr. C. 1015: A. I. R. 1930 Pat. 519; 11 P. L. T. 578

[42] Rat. Un. Cr. C. 547; 26 A. L. J. 443

[43] 76 I. C. 227=25 Cr. L. J. 131

[44] A. I. R. 1931 (All.) 356, *per* Mukerjee and Boys, JJ. and *per* Sulaiman, A. C. J. and Young and King, JJ., in A. I. R. [1931] 504

[45] A. I. R. 1928 (Rang.) 310: 114 I. C. 682; 1930 Cr. C. 1015

[46] 16 I. C. 27

[47] 84 I. C. 933: 30 C. 107:

[48] 47 I. C. 440

[49] 2 B. L. R. App. XI

[50] 14 Cr. L. J. 430

[51] 1906 A. W. N. 13

[52] 4 Cr. L. J. 278; 18 W. R. 48 (Cr.); 25 I. C. 517

[53] S. 56 Contract Act

Sunday and then not holding court on that day[54]; or not informing obligor of the next date[55]; or passing no order for the next date or giving him a wrong date, time or place for appearance. *But absence* of written order would be insufficient to excuse the *defaulter*[56] or if he attends the court but not at the time *fixed*[57] or when *called*[58] or if he departs before the conclusion of the *trial*[59] or if he is absent at the time the next date is *fixed*[60].

Similar provisions would govern the agent of the *obligor*[61] and neither of them would be excusable if the principals do not appear from day to day if required to do so[62]. The same principles would extend to orders of the magistrate which are either illegal or legal if they create an impossibility of performance. In a case where a magistrate of Agra ordered the accused to proceed to South India with the result that the surety could not produce him at Agra, Banerji, J. held:

> It is the duty of the surety to see that the accused does not run away, but I do not agree with the view, that where a surety has failed to produce the accused, by reason of an illegal order passed by a magistrate, which the surety was not bound to carry out, and where there is no connivance and no negligence, it cannot be said that the petitioner has stood surety irresponsibly, and I do not think that this would be a case which would give an impression that any one can stand as a surety and not be penalised in the event of failing in his *trust*.[68]

Similarly, where in a Punjab case a person accused of murder was released on bail and kept in hospital under police guard and later he absconded and the surety alleged that he was not allowed to keep full watch and guard on the accused, the High Court held that the circumstances ought to have been considered, if not for completely excusing the surety, at least for mitigation[64]. Similarly, where a court at Nowada, without the surety's consent permitted the accused to leave the district without surety's consent, for purposes of trade and later transferred the case to Gaya where the accused did not appear, it was held that the bond was not forfeited[65]. Under almost identical circumstances it was held in an American[66] case that:

> It would be against all principle and all justice, to allow the Government to recover against the sureties, for not producing their principal, when it had itself consented to his placing himself beyond their reach and control.

This would also probably extend to omission of the court to take action under Section 502 C. P. C. or if after forfeiture the obligee does not

[54] 106 I. C. 108: A. I. R. 1928 (Lah.) 20: 2 C. W. N. 15

[55] 31 Cr. L. J. 605'

[56] 5 M. H. C. R. (Cr.) App. XV: I Weir 87

[57] A. I. R. 1928 (Cal.) 261

[58] *People* v. *Wiglas*, 5 Ben. 58

[59] *People* v. *Mc. Coy*, 59 Barb. 73

[60] *People* v. *Bartlett*, 3 Hill 570

[61] Ss. 205 and 116 Cr. P. C; 5 B. H. C. R. 64

[62] 6 M. H. C. R. App. 38: 2 Weir 662

[63] 102 I. C. 554

[64] 125 I. C. 376: A. I. R. 1930 (Lah.) 591

[65] 13 W. R. (Cr.) 53

[66] U. S. Supreme Court Report, Volume XIX 541

take a *fresh bond.* On a similar ground a surety was discharged of his obligations in a civil case in England[67].

(*ii*) The other set of cases would arise where the *obligee varies the terms of the bond without express consent*[68] *of the surety.* In an English case Lord Lyndhurst, L.C. held that the surety could be responsible only when

> the engagement is carried into complete, literal and strict effect. He enters into a particular and specific contract and that contract alone, he is bound to perform.[69]

In English rulings there is some difference of opinion as to the effect of "Self evident and unsubstantial" variation but the better opinion seems to be that a variation without surety's consent would be to discharge him. This point has been discussed in an American *case which happened* to be for forfeiture of a bail bond where it is said:

> Any change in the contract, on which they are sureties, made by the principal parties to it, without their assent discharges them and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented; nor does it matter how trivial the change or *even that it may be of advantage to the sureties.* They have a right to stand upon the very terms of their *undertaking*[70].

Nor would they permit a substitute. In a Privy Council case from New Zealand it was held that the obligee cannot alter the contract without the surety's consent and then say:

> Although the contract has been altered and I have put it out of my power to carry it out by a voluntary act, I offer you an equivalent[71].

But in an Indian case they seem to have gone even further and held that even a written stipulation in a contract of guarantee whereby the surety purports to waive all his rights, legal, equitable, statutory or otherwise, which may be inconsistent with the guarantee, will not deprive the surety of his right to discharge under the section[72].

Similarly where the sureties agreed to certain conditions in the bond which were bad in law, the order demanding them was considered illegal and the bail-bond void[73].

(*b*) *Acts of third party* making performance impossible are not usually considered valid under the American law. They consider acts of other courts as acts of third parties and do not recognise them as good for this purpose. But under the Indian Law they appear to be considered just as good as other unavoidable events like an "Act of God." But where complainant and accused in a 107 case agreed to stay away, and thus allowed it to be dismissed for default, the compromise was not considered a bar to forfeiture[74].

[67] *Phillips* v. *Foxall,* L. R. 7 Q. B. 666

[68] Cf. S. 133 Contract Act

[69] *Bonser* v. *Cox,* 13 L. J. Ch. 260; 55 R. R. 120

[70] 9 Wallace 13 at 21: U. S. Sup. Court Reports Vol. XIX 541

[71] *Ward* v. *National Bank of New Zealand,* 8 App. Cas. 755

[72] 58 I. C. 184 and S. 133 Contract Act

[73] *Wadhava* v. *King-Emperor,* 4 P. L. R. 1904

[74] 26 A. 202 (204); A. W. N. (1903) 237

(c) The events which make performance impossible may as well be due to an act of the *obligor*. Such cases may be due to the rashness or negligence of the obligor. These need not be repeated here as they have been dealt with under Clause (*a*) (*ii*) above[75].

Although suicide is certainly an act of the obligor making performance impossible but it is recognised as a good ground for the surety's exoneration. But it appears that anything short of suicide depending upon the act of the obligor would probably not excuse the default.

Thus it appears that in such cases unless the obligee himself is to blame whether for his act, omission, negligence or carelessness, with or without any act proceeding from the obligee or a third party, the obligor is liable for the penalty, otherwise not.

C.—Unforeseen events rendering performance impossible

Then there are certain events which are beyond human control and foresight and which could not be contemplated or avoided either before their occurrence or at least at the time the contract was executed inspite of ordinary care or prudence[76]. For the sake of convenience they may further be subdivided into (*i*) "Acts of God" or (*ii*) "Acts of Law."

(*i*) *Acts of God*

Roughly speaking, for our purposes, this term would include all events mentioned above, which do not depend for their existence on the authority of law, i.e., not being acts of Law,—sudden seriously *illness*[77] not allowing attendance at court, some such other misfortune, which could not be contemplated or provided against at an earlier time. This would include cases where the accused commits suicide[78] and has been held equally to apply to cases where though the accused had not committed suicide till after the date was over but was thought to have been contemplating suicide and as such could not be expected to have attended the court and it was remarked by Beamon and Heaton, JJ., that it was "an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation and responsibility to the courts." For if he elects to die sooner than face his trial, that can hardly be sufficient reason for forfeiting the surety bonds since that was an event which his sureties would not have had in contemplation[79].

Suicide is certainly not an "Act of God" but of man but it is treated as such. Similarly the death of any of the *obligors* *before* forfeiture would discharge the heirs[80].

(*ii*) *Acts of Law*

For our purposes, an act may be considered to be an act under the authority of law or probably even sometimes under colour of office, which should prevent the obligor from performing his contract. Where a person was confined, so that he could not attend court on the date fixed, he was excused the penalty[81] but not when he was arrested some days earlier and released in time to attend court: MacPherson, J., held that "The important point is not mere arrest on the day when production is to be made, but which makes such production impossible[82]." This gives greater latitude to the Indian citizen. In America, they usually do not consider cases in which such a hindrance is the result of an act of a third party amongst which they include other courts. They make a "distinction between the act of the law proper, and the act of the obligor which exposes him to the control and action of the law[83]. While the former exonerates, the latter gives no immunity. It is the willing act of the obligor which creates the obstacle and the legal effect of it is the same as of any other act of his, which puts performance out of his power. This applies only where the accused has been convicted and sentenced, before judgment *non-constat* but that he may be innocent. He violated the law and thus put in motion the machinery provided to bring him within the reach of the punishment denounced for his offence. But for this, that machinery, so far as he was concerned, would have remained dormant. To hold that the surrender was the act of the law, in the sense contended for, would be as illogical as to insist that the blow of an instrument used in the commission of a crime of violence, is the act of the instrument and not of the criminal. The principal in the case before us cannot be allowed to avail himself of an impossibility of performance thus created and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him, what he undertook for himself[84]." But this principle has not been applied in Indian decisions.

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[75] *See* page 7 supra.

[76] 35 I. C. 514

[77] 5 P. W. R. (1918) Cr.; 122 I. C. (1930) at 533

[78] 37 M. 156: 151 C. 1008

[79] 35 I. C. 514

[80] S. 514 Cl. 6 Cr. P. C.

Other causes coming up for the consideration of appellate courts such as the violation of the principles of procedure contained in Section 514 are not discussed here as like all other rules of procedure, they must be strictly followed and an obligor should be given a full opportunity to know the cause of the forfeiture and afforded an opportunity of defence according to law[85], or when the bond has already been forfeited once[86] or where the surety has applied under Section 502[87].

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[81] 86 I. C. 657: 1925 A. I. R. (Pat.) 389: Ref. 16 C. W. N. 550. 37 M. 156

[82] A. I. R. (1930) Pat. 17-18: Cf. A. I. R. (1925) Pat. 389: 86 I. C. 58: 16 I. C. 332 *distinguished*

[83] *U. S. v. Fossen*, 1 Dil 409

[84] *Taylor* v. *Taintor*, 16 Wallace 366-7; U. S. Sup. Court Decisions, Vol. XXI, 287

[85] 122 I. C. (1930) 532; 67 I. C. 830; 25 C. 40; 15 W. R. (Cr.) 87; 11 B. H. C. 120; 9 W. R. (Cr.) 2 N. W. P. 113

[86] 11 P R. 1889

[87] S. 130 Contract Act

HIGH COURT NOTIFICATION*

ENGLISH (CIVIL) DEPARTMENT

Dated Allahabad, July 4, 1932

NOTIFICATION No. 3540|45—19(2)

THE following amendment is made in the Rules of Court revised and corrected up to December 3, 1931:—

Insert the following as Chapter IXA, page 71A.

(71A)

Special Rules of Procedure in First Appeals

1. The following rules shall govern the procedure to be observed before listing First Appeals for hearing.

2. No First Appeal shall be set down for hearing unless, before the dates mentioned in rules 8 and 9, a *precis* of the case shall have been handed to the Registrar by the counsel of both parties. The Registrar shall not accept the *precis* unless it is accompanied with a note signed by the counsel that a copy has been given to the other side.

3. The *precis* shall consist of:—

(1) Brief statement of the case.

(2) Important and material issues arising out of the pleadings.

(3) Findings of the trial court.

(4) Points to be raised in the appeal by the party.

(5) Reference on the margin to the material documentary and oral evidence relied on by the party without any comment, but with a brief indication of their nature.

(6) Reference to any ruling referred to by the trial court which is sought to be distinguished.

4. The *precis* shall be prepared on the lines of a Privy Council brief. It shall on no account be in the nature of a written argument. The counsel shall not be bound by it, and shall be free to put the case in any way he considers best. There shall be no discussion of evidence in the *precis*, and as a rule there need be no reference to the rulings to be relied upon by a party except as indicated in rule 3(6) above.

5. The Press Clerk shall, on the day on which he forwards the manuscript of the paper book to the Press, deliver to the Superintendent, Vernacular department, for publication in the next day's Cause List a notice in the following form:—

> "The manuscripts of the following paper books in First Appeals have been sent to the Press and the fees for the preparation of the *precis* must be deposited within the time allowed by rule 6 of Chapter IX-A of the Rules of Court."

6. The time for depositing the fee for the preparation of the *precis* shall be 60 days of the publication of the notice referred to in rule 5.

Provided that the Registrar may on good cause being shown extend the time for payment of fees up to any date immediately preceding the date of the receipt of the paper book from Press. The Registrar shall, if he considers it necessary, demand an affidavit in support of the request for extension of time.

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*Published in Government Gazette, dated Allahabad, July 16, 1932

Once the printed paper book is received, time can only be granted on a written application made to a Judge on which shall first be obtained a report by the Deputy Registrar.

7. As soon as the printed paper book is received from the Press, a notice shall be published in the Cause List.

"The *precis* for the following First Appeals must be filed by the counsel within the time specified in rules 8 and 9 of Chapter IX-A of the Rules of Court."

8. The appellant's counsel shall supply two copies of the *precis* to the Registrar for the use of the Bench and one copy to the senior counsel of the opposite party within six weeks of the date of the publication of the notice of the arrival of the printed paper book (rule 7). It shall be the duty of the senior counsel to inform all other counsel appearing on the same side that the appellant's *precis* has been filed and the date on which it was filed.

Provided that the Registrar may, on good cause being shown, grant an extension of time not exceeding 72 days from the receipt of the printed paper book from the press.

9. The respondent's counsel shall, within one month from the date on which the appellant's *precis* was supplied to him, supply two copies of his *precis* to the Registrar for the use of the Bench and one copy to the senior counsel for the appellant.

Provided that the Registrar may, on good cause being shown, grant an extension of time not exceeding 45 days of the date on which the appellant's *precis* was supplied to him.

10. In cases where there are different sets of respondents who have either separate or distinct cases to urge or have conflicting interests they may file separate *precis*, but it shall be in the discretion of the Court to award separate costs of these *precis*.

11. A Judge alone shall have authority on a written and stamped application to grant an extension of time beyond the extensions granted by the Registrar under rules 8 and 9 of these rules. Such application shall first be presented to the Deputy Registrar for an office report.

12. A supplemental *precis* will be admitted provided that it is supplied by the appellant, within one week, and by the respondent, within two weeks of the date on which the appeal appears in the Provisional List (rule 13). In this case also there must be a written notice to the Registrar that a copy has been supplied to the other side.

13. If the fee required from the appellant for the preparation of the *precis* is not deposited within the time or extended time allowed or if the *precis* is not filed within the time or extended time allowed by rule 8, the appeal shall be listed before the senior First Appeal Bench which may dismiss the case for non-prosecution.

If the respondent fails to deposit the fee for its preparation or omits to file his *precis* within the time or extended time allowed by rule 9, he shall not be entitled to be heard, except on the question of costs.

14. Except as provided for in rule 12, no First Appeal shall be listed for hearing unless it has appeared in the Provisional List of cases ready for hearing. Each appeal shall be set down in the Provisional List according to its serial number, and shall be listed for hearing in that order except when cases have been adjourned or expedited.

15. The *precis* shall be clearly type-written with double spacing and leaving a quarter margin on one side only of good durable white paper of the size of a First Appeal paper book.

16. The fees allowed for the preparation of the *precis* shall be paid on oral application to those counsel who sign the *precis*.

17. The fee for the preparation of the *precis* shall be on the following scale:—

Valuation of appeal	Amount Rs.
Below Rs. 5,000	20
Between Rs. 5,000 and Rs. 9,999	32
Between Rs. 10,000 and Rs. 14,999	50
Rs. 15,000 and above ..	64

18. The fee for the preparation of the *precis* shall be paid by the parties and the amount to be recovered from them shall be included in the estimate for translating and printing.

19. The fee for the preparation of the *precis* shall be taxed in the decree as ordinary costs, unless the Bench otherwise directs. Ordinarily there shall be only one set of costs for each party, unless the Bench otherwise directs.

20. Every counsel engaged in an appeal may obtain a certified copy of either of the *precis* on application in the usual way for copies and on payment of the usual fee.

21. In connected appeals arising out of the same suit, either party may file only one *precis*.

22. These rules shall, except rule 13, have effect from the date of publication in the *Local Government Gazette.*

Rule no. 13 shall come into full effect from January 1, 1933.

23. These rules are at present only experimental.

AGRA TENANCY (AMENDMENT) ACT

(No. II of 1931)*

[Received the assent of the Governor-General on January 19, 1932]

An Act to amend the Agra Tenancy Act (United Provinces Act III of 1926).

WHEREAS it is expedient to amend the Agra Tenancy Act for the purpose hereinafter appearing: It is hereby enacted as follows:—

Short title and duration.

1. (*i*) This Act may be called the Agra Tenancy (Amendment) Act, 1931.

(*ii*) It shall remain in force for a period of one year.

Insertion of new section 132-A in the United Provinces Act III of 1926.

2. After Section 132 of the Agra Tenancy Act the following section shall be inserted, namely,—

Recovery of arrears of rent as arrears of revenue.

132-A. (1) In case of any general refusal, on the part of the under-proprietors or tenants of any local area to pay arrears of rent, rates or cesses due by them to their landlords, the Local Government may, by notification in the Gazette, declare that such arrears may be recovered as arrears of land revenue.

(2) In any local area to which a notification made under Sub-section (1) applies, a landlord to whom an arrear of rent, rate or cess is due by an under-proprietor or tenant may (notwithstanding anything to the contrary contained in this Act or the United Provinces Local Rates Act, 1914, or any other enactment for the time being in force), instead of suing for recovery of the arrear under this Act, apply, in writing to the Collector to realize the same, and the Collector shall, after satisfying himself that the amount claimed is due, proceed, subject to rules made under Section 275, to recover such amount with costs and interest as an arrear of land revenue.

(3) Nothing in this section shall be held to prevent the Collector from proceeding under Section 185 of the United Provinces Land Revenue Act, 1901, in any case to which that section applies.

(4) The Collector shall not be made a defendant to any suit in respect of an amount for the recovery of which an order has been passed under this section.

(5) No appeal shall lie from an order of a Collector under this section, but nothing herein contained and no order passed under this section shall debar—

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*Published in the Government Gazette, dated Allahabad, Jan. 30, 1932 (*a*) a landlord from maintaining a suit under Section 230 for the recovery of any amount due to him which has not been recovered under this section, or

(*b*) a person from whom any amount has been recovered under this section, in excess of the amount due form him, from recovering the said amount under Section 230.

U. P. ARREARS OF RENT ACT, 1931

(No. I OF 1931)*

[Received the assent of the Governor-General on January 28, 1932]

An Act to protect tenants and thekadars from ejectment and distraint on account of arrears of rent.

WHEREAS it is necessary to provide, as a temporary measure, that tenants and *thekadars* in the United Provinces of Agra and Oudh shall be protected from ejectment or distraint on account of their inability to pay arrears of rent in full: It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act shall be called the United Provinces Arrears of Rent Act, 1931.

(2) It shall extend to the territories for the time being comprised in the United Provinces of Agra and Oudh.

Protection from ejectment.

U. P. Act III of 1926 and U. P. Act XX of 1886.

2. Notwithstanding anything contained in the Agra Tenancy Act of 1926 or the Oudh Rent Act of 1886, the ejectment of a tenant or *thekadar* shall not be ordered for arrears of rent falling due between July 1, 1927, and June 30, 1931, provided that within two months of date of the decree the tenant or *thekadar* has paid two-thirds of the arrears decreed in addition to the costs of the suit.

Protection from distraint.

U. P. Act III of 1926 and U. P. Act XX of 1886.

3. Notwithstanding anything contained in the Agra Tenancy Act of 1926 or the Oudh Rent Act of 1886, where rent falling due between July 1930, and June 30, 1931, in respect of any holding, is in arrears, a landlord shall not be competent to distrain or sell the produce of the holding, for an amount exceeding two-thirds of such arrears.

Published in the Government Gazette, dated Allahabad, Feb. 6, 1932

U. P. MUNICIPALITIES (AMENDMENT) ACT

(No. II OF 1931)[1]

[Received the assent of the Governor-
General on January 31, 1932]

An Act to amend the United Provinces Municipalities Act, 1916 (II of 1916).

WHEREAS it is inexpedient that the term of office of the elected members and of the Chairman of the Cawnpore municipal board should expire on February 14, 1932, and February 22, 1932, respectively; It is hereby enacted as follows:—

Short title.

1. This Act may be called the United Provinces Municipalities (Amendment) Act, 1931.

Addition of new section after Section 38 of the United Provinces Municipalities Act (II of 1916).

2. After Section 38 of the United Provinces Municipalities Act, 1916, the following section shall be inserted as Section 38-A, namely:—

Special temporary provision for extending the term of office of members of the Cawnpore municipal board.

"38-A. Notwithstanding anything contained in Section 38 the term of office of the elected and nominated members of the municipal board of Cawnpore, who were members on the date when the United Provinces Municipalities (Amendment) Act, 1931, came into force, or who became members subsequent to its enactment and prior to December 14, 1932, shall expire on December 14, 1932."

Addition of new section after Section 46 of Municipalities Act (II of the United Provinces 1916).

3. After Section 46 of the United Provinces Municipalities Act, 1916, the following section shall be inserted as Section 46-A, namely:—

Special provision for extending the term of office of the Chairman of the Cawnpore municipal board.

"46-A. Notwithstanding anything contained in Section 46 the term of office of the Chairman of the Cawnpore municipal board shall continue until the date upon which his successor is elected or nominated."

U. P. MEDICAL (AMENDMENT) ACT, 1931

(No. IV OF 1931)[2]

[Received the assent of the Governor-
General on February 12, 1932]

An Act further to amend the United Provinces Medical Act, 1917.

WHEREAS it is expedient further to amend the United Provinces Medical Act, 1917; It is hereby enacted as follows:—

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[1] Published in the Government Gazette, dated Allahabad, Feb. 13, 1932

[2] Published in the Government Gazette, dated Allahabad, Feb. 20, 1932

1. This Act may be called the United Provinces Medical (Amendment) Act, 1931.

Short title.

2. In Sub-section (1) of Section 4 of the United Provinces Medical Act, 1917—

Amendment of Sub-section (1) of Section 4 of the United Provinces Act, III of 1917.

(1) clause (*c*) shall be *deleted;*

(2) clauses (*d*), (*e*), (*f*), (*g*), (*h*) and (*i*) shall be re-lettered (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*) respectively; *and*

(3) in clause (*g*) as re-lettered, the words "two members" shall be substituted for the words "one member".

INDIAN COMPANIES (SUPPLEMENTARY AMENDMENT) ACT, 1932

(No. I OF 1932)[1]

[Received the assent of the Governor-General on March 5, 1932]

An Act to amend the Indian Companies (Amendment) Act, 1930, for a certain purpose.

WHEREAS it is expedient to amend the Indian Companies (Amendment) Act, 1930, for the purpose hereinafter appearing; It is hereby enacted as follows:—

XIX of 1930.

1. This Act may be called the Indian Companies (Supplementary Amendment) Act, 1932.

Short title.

2. In the proviso substituted by Sub-clause (*ii*) of clause (*a*) of Section 2 of the Indian Companies (Amendment) Act, 1930, for the words "whereof the partners all", the words "whereof all the partners practising in India" shall be substituted.

XIX of 1930.

Amendment of Section 2, Act XIX of 1930.

CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1932

(No. X OF 1932)[2]

[Received the assent of the Governor-General on April 8, 1932]

An Act further to amend the Code of Civil Procedure 1908, for a certain purpose.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purpose hereinafter appearing; It is hereby enacted as follows:—

V of 1908.

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[1] Published in the Government Gazette, dated Allahabad, March 26, 1932

[2] Published in the Government Gazette, dated Allahabad, April 23, 1932

Short title.

1. This Act may be called the Code of Civil Procedure (Amendment) Act, 1932.

Amendment of Section 78, Act V of 1908.

2. In Section 78 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code),— V of 1908.

(*a*) before the words "The provisions" the words "Subject to such conditions and limitations as may be prescribed," shall be inserted;

(*b*) after the words "issued by" the words "or at the instance of" shall be inserted; and

(*c*) in Clause (*c*), the words "for the time being in alliance with His Majesty" shall be omitted.

Insertion of new rules in Order XXVI of the First Schedule, Act V of 1908.

3. In Order XXVI of the First Schedule to the said Code, the following heading and rules shall be added, namely:—

"*Commissions issued at the instance of Foreign Tribunals.*

19. (1) If a High Court is satisfied—

(*a*) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it.

(*b*) that the proceeding is of a civil nature, and

(*c*) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may, subject to the provision of rule 20 issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in Clauses (*a*), (*b*) and (*c*) of Sub-rule (1)—

(*a*) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor-General in Council, or

(*b*) by a letter of request issued by the foreign court and transmitted to the High Court through the Governor-General in Council, or

(*c*) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding.

20. The High Court may issue a commission under rule 19—

(*a*) upon application by a party to the proceeding before the foreign court, or

(*b*) upon an application by a law officer of the Local Government acting under instructions from the Local Government.

21. A commission under Rule 19 may be issued to any court within the local limits of whose jurisdiction the witness resides, or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil

jurisdiction, to any person whom the court thinks fit to execute the commission.

22. The provisions of Rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions and when any such commission has been duly executed it shall be returned together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign court."

PUBLIC SUITS VALIDATION ACT, 1932

(No. XI OF 1932)*

[Received the assent of the Governor-General on April 8, 1932]

An Act to validate certain suits relating to public matters.

WHEREAS it is expedient to validate certain suits relating to public matters which may be or have been held to be invalid by reason of the previous sanction of the Local Government in respect thereof not having been obtained as required by Section 93 of the Code of Civil Procedure, 1908; It is hereby enacted as follows:— V of 1908.

Short title and extent.

1. (1) This Act may be called the Public Suits Validation Act, 1932.

(2) It extends to all parts of British India to which Sections 91, 92 and 93 of the Code of Civil Procedure, 1908, extend. V of 1908.

Validation of certain pending public suits.

2. Where a suit relating to any of the public matters specified in Sections 91 and 92 of the Code of Civil Procedure, 1908, is pending at the commencement of this Act, the institution of such suit shall not be deemed to be invalid on the ground that the previous sanction of the Local Government in respect of such suit has not been obtained as required by Section 93 of that Code. V of 1908.

Explanation—For the purposes of this section a suit pending at the commencement of this Act includes a suit in respect of which an appeal lies or is pending at the commencement of this Act.

Restoration of certain dismissed public suits.

3. Where any suit relating to any such public matter has, after November 30, 1931, and before the commencement of this Act, been dismissed by a Court of first instance solely on the ground that the sanction of the Local Government in respect of such suit has not been obtained as required by Section 93 of the V of 1908.

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*Published in the Government Gazette, dated Allahabad, April 23, 1932

Code of Civil Procedure, 1908, the Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the suit.

Retrial of certain appeals relating to public suits.

4. Where, in any appeal arising from a suit relating to any such public matter, a decree has been passed after November 30, 1931, and before the commencement of this Act, dismissing the appeal or dismissing the suit from which the appeal arose, solely on the ground that the previous sanction of the Local Government in respect of the suit had not been obtained as required by Section 93 of the Code of Civil Procedure, 1908, the Appellate Court shall, on application made within six months from the commencement of this Act, make an order setting aside its decree and shall proceed with the appeal.

U. P. LAND REVENUE (AMENDMENT) ACT, 1932

(No. II of 1932)*

[Received the assent of the Governor-General on May 10, 1932]

An Act to amend the United Provinces Land Revenue Act (U. P. Act III of 1901).

WHEREAS it is expedient to amend the United Provinces Land Revenue Act of 1901 for the purposes hereinafter appearing; It is hereby enacted as follows:—

U. P. Act III of 1901.

Short title.

1. This Act may be called the United Provinces Land Revenue (Amendment) Act, 1932.

2. In this Act the expression "the principal Act" means the United Provinces Land Revenue Act, 1901.

U. P. Act III of 1901.

Addition of definition of "sub-proprietor" to Section 4 of principal Act.

3. The following definition of "sub-proprietor" shall be added to Section 4 of the principal Act, namely:—

"(16) A sub-proprietor in the Province of Agra means a person who possesses a subordinate but heritable and transferable right and whose name is recorded in the register of proprietors as such; and includes such persons as a rent-free grantee to whose grant the provisions of Sections 185 and 186 of the Agra Tenancy Act apply, a *gawanhadar,* an *arazidar* or other like person owning these rights."

Addition of explanation to Section 34 of principal Act.

The following explanation shall be added to Section 34 of the principal Act, namely:—

"*Explanation.*—The word 'transfer' includes a family settlement by which the proprietary share or part of the proprietary share recorded in the register of proprietors in the name of one or more members of that family is declared to belong to another or other members."

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*Published in the Government Gazette, dated Allahabad, May 21, 1932

Amendment of Section 39 of principal Act.

5. Sub-section (2) of Section 39 of the principal Act shall be deleted, Sub-section (3) shall be renumbered (2) and the following explanations shall be added to this section, namely:—

"*Explanation.*—The word 'changes' in Sub-section (1) shall include division of a holding and distribution of rent payable in respect thereof made in accordance with Section 37 of the Agra Tenancy Act; provided that where the landholder has not consented in writing to the division of the holding and distribution of rent payable in respect thereof a note to that effect shall be made in the record of rights."

U. P. Act III of 1926.

Addition of explanation to Section 40 of principal Act.

6. The following explanation shall be added to Section 40 of the principal Act, namely:—

"*Explanation.*—The term "possession' in this section means possession based on succession or transfer or on such transfers and changes as are dealt with in Section 39."

Amendment of Section 112 and addition of new Section 112-A.

7. In Section 112 of the principal Act the words "and the Appellate Court may issue a precept to the Collector, desiring him to stay the partition pending the decision of the appeal" shall be deleted and the following new section shall be added after Section 112, namely:—

Stay of partition pending decision of appeal.

"112-A. The appellate court may issue a precept to the Collector, directing him to stay the partition pending the decision of the appeal, whether the appeal is pending from a civil court under Section 111(1)(*b*) or from the court of the Collector under Section 111(3)."

Amendment of Sub-section (1) of Section 138 of principal Act.

8. The following Sub-section shall be substituted for Sub-section (1) of Section 138 of the principal Act, namely:—

"(1) The partition of sub-proprietary rights in Agra, and of taluqdari and under-proprietary mahals and of mahals held by lessees whose rent has been fixed by the Settlement Officer or other competent authority in Oudh shall be carried out according to the provisions of this chapter, so far as they are applicable."

Addition of new Section 192-A.

9. The following new section shall be added after Section 192, namely:—

Consolidation of cases.

"192-A. Where more cases than one involving substantially the same question for determination and based on the same cause of action are pending in one or more courts they shall, on application being made by any party to the court to which the court or courts concerned are all subordinate, be consolidated in one court and decided by a single judgment. Such cases may be filed direct in the superior court".

Amendment of Section 200 of principal Act.

10. The following section shall be substituted for Section 200 of the principal Act, namely:—

Hearing in absence of party.

"200. Whenever any party to such proceeding neglects to attend on the day specified in the summons or on any day to which the case may have been postponed, the court may dismiss the case for default or may hear and determine it *ex parte*."

Addition of Sub-section (5) to Section 210 of principal Act.

11. The following sub-section shall be added to Section 210 of the principal Act, namely:—

"(5) When a party desires to appeal in a partition case against several decisions passed on objections relating either to the partition proceedings or to the final partition he may do so in a single appeal. The period of limitation for such an appeal shall run from the date on which the partition proceedings or the final partition papers are submitted to the Collector for confirmation."

Amendment of Sub-section (1) of Section 214 of principal Act.

12. At the commencement of Sub-section (1) of Section 214 of the principal Act the words "Except as provided in Sub-section (5) of Section 210" shall be inserted.

Substitution of "Agra Tenancy Act, 1928" for "North-Western Provinces Tenancy Act, 1901" in principal Act.

13. For the words "the North-Western Provinces Tenancy Act, 1901," wherever they occur in the principal Act shall be substituted the words "the Agra Tenancy Act, 1926," "U. P. Act III of 1926," being substituted in the margin for "U. P. Act II of 1901."

Substitution of "Section 14" for "Section 10."

14. In Sub-section (1) of Section 36, in Sub-section (2) of Section 72, in Sub-section (2) of Section 87 and in Sections 127 and 186 of the principal Act for the words "Section 10" shall be substituted the words "Section 14".

Substitution of "the Agra Province" for "the North-Western Provinces" in principal Act.

15. For the words "the North-Western Provinces" wherever they occur in the principal Act shall be substituted the words "the Agra Province".

Addition of the words "Additional Collector" or "Additional Collectors" in certain sections of principal Act.

16. In Section 4(8), Sections 189, 203 and 210(*b*) of the principal Act after the word "Collector" or "Collectors" shall be added the words "Additional Collector" or ""Additional Collectors" as the case may be.

17. In Sections 203, 210(*c*), 212, 212-A and 218 of the principal Act, after the word "Commissioner' shall be added respectively the words "an Additional Commissioner," "or Additional Commissioner", "and Additional Commissioner", "or Additional Commissioner", and "the Additional Commissioner."

Addition of the words "Additional Commissioner" in certain sections of principal Act.

U. P. MUNICIPALITIES (AMENDMENT) Act, 1932

(No. V of 1932)*

[Received the assent of the Governor-General on June 10, 1932]

An Act further to amend the United Provinces Municipalities Act, 1916.

WHEREAS it is expedient to amend certain provisions of the United Provinces Municipalities Act, 1916, in certain respects; It is hereby enacted as follows:—

Short title.

1. This Act may be called the United Provinces Municipalities (Amendment) Act, 1932.

Definition.

2. In this Act the expression "the principal Act" means the United Provinces Municipalities Act, 1916.

Amendment of Clause (*n*) of Section 7(1) of the principal Act.

3. In Section 7(1) of the principal Act, Clauses (*n*) to (*r*) shall be re-numbered as (*o*) to (*s*) and the following clause inserted as Clause (*n*):—

"Maintaining or contributing to the maintenance of veterinary hospitals."

Amendment of Sub-section (2) of Section 7 of the principal Act.

4. In Section 7(2) "Clause (*o*)" shall be substituted for "Clause (*n*)".

Addition of new section after Section 29 in principal Act.

5. After Section 29 of the principal Act the following section shall be inserted as Section 29-A, namely:—

General election.

"In the year 1936 and thereafter in every fourth year there shall be a general election of members of municipal boards."

Amendment of Section 31-A in principal Act.

6. Section 31-A of the principal Act shall be amended as follows:—

(1) In Clause (*a*) after the words "all members of the board" the words "except the chairman" shall be inserted; and

(2) for Clause (*c*) the following shall be substituted, namely,—

"(*c*) the provisions of Sections 43 and 44 shall apply as if the election was being held after a general election of the members of the Board."

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7. In Section 38 of the principal Act the following shall be substituted for Sub-section (1), namely,—

Substitution of new Sub-section (1) and omission of Sub-sections 1(a) (3) and (4) of Section 38 in principal Act.

"the term of office of a member of a board shall begin from the date upon which he is declared by the returning officer to be elected or from the date of his nomination or from the date upon which the vacancy occurs which he is elected or nominated to fill if the vacancy occurs subsequent to the election or nomination, and shall cease, subject to the provisions of Sections 39 and 40, upon the first day of the general election."

and Sub-sections 1(*a*), (3) and (4) shall be omitted.

8. For Section 43 of the principal Act the following Section shall be substituted, namely,—

Substitution of new section for Section 43 of principal Act.

Election or nomination of chairman.

"43. (1) All members and persons qualified to be members of the board shall be eligible for election to the office of chairman of the board: provided that no whole-time salaried Government servant and no member or servant of a district board shall be so eligible.

Explanation 1—A Government treasurer or Government pleader is not a whole-time salaried servant of Government.

Explanation 2—A member of the District Board Education Committee co-opted under Section 63A(2) of the District Boards Act is not a member of the District Board.

(2) When a board is completed after a general election it shall elect its own chairman in the manner provided in Section 44: provided that if any board fails to do so the local Government shall nominate a chairman for that board. A board shall be deemed to be complete if all elected seats have been filled up after a general election.

(3) The local Government may by notification in the gazette declare that the provisions of Sub-section (2) shall not apply in the case of a board specified in the notification and shall in such case nominate such person as it thinks fit to be chairman of such board: provided that no such notification shall be operative for more than one year in respect of any board the chairman of which on April 1, 1929, was not a Government servant.

(4) If there is a question whether the chairman of a board was duly qualified for election or has been duly elected or nominated under this section the decision of the local Government shall be final."

9. For Section 44 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Sec. 44 of principal Act.

"44. (1) For the purpose of electing a chairman under Sub-section (2) of Section 43, a meeting of the board of which no previous notice shall be required to be given shall be held at the office of the board at 2 P.M. on a date which shall be subsequent to the election of members of the board and shall be fixed by the local Government by notification in the gazette.

Procedure for election of chairman.

(2) A stipendiary civil judicial officer previously appointed by the Government in this behalf shall act as chairman of a meeting held under the provisions of this section: provided that the chairman of a meeting held under the provisions of this section shall have no right to vote thereat.

(3) The following procedure shall be observed at a meeting held under the provisions of this section, namely,—

(*a*) If only one duly qualified candidate is proposed and seconded he shall be elected.

(*b*) If two but not more than two duly qualified candidates are proposed and seconded, the candidate who obtains the greater number of votes shall be deemed to be elected.

(*c*) If more than two duly qualified candidates are proposed and seconded, the names of the two candidates who obtain the greater number of votes shall again be put to the vote and the candidate who then obtains the greater number of votes shall be deemed to be elected.

(*d*) Every member who desires to vote shall write the name of the candidate for whom he wishes to vote upon a blank voting paper and shall also sign his own name thereon, and the voting papers shall form part of the minutes of the proceedings.

(*e*) In case of equality of votes the chairman shall decide the question by drawing lots.

(4) If at 4 P.M. on the date of a meeting held under the provisions of this section a chairman has not been elected the meeting shall stand adjourned.

(5) If a meeting is adjourned under the provisions of Sub-section (4) the adjourned meeting shall be held at 2 P.M. at the office of the board on the seventh day after the adjournment and the procedure shall be the same as at the previous meeting.

(6) If at 4 P.M. on the date of an adjourned meeting held under the provisions of Sub-section (5), a chairman has not been elected the chairman of the meeting shall send the minutes of the

meeting and of the adjourned meeting to the district magistrate who shall send them to the local Government."

Addition of new section after Section 44 of principal Act.

10. After Section 44 of the principal Act the following section shall be inserted as Section 44-A, namely:—

Election or nomination of chairman on casual vacancy.

"44-A. (1) If a casual vacancy in the office of chairman occurs owing to the death, resignation or removal of the chairman, a meeting of the board for the purpose of electing a chairman shall be held on such day as the local Government may, by notification in the gazette appoint after the occurrence of the vacancy.

(2) To a meeting held under Sub-section (1) the provisions of Section 44 shall apply as far as may be.

(3) If the board fails to elect a chairman under the provisions of this section the local Government shall nominate a chairman.

(4) When there is a question whether a chairman of a board has been duly elected or nominated under the provisions of this section the decision of the local Government on the question shall be final."

Amendment of Sub-section (2) of Section 45 of principal Act.

11. In Sub-section (2) of Section 45 the word "previous" shall be inserted before the word "sanction" in each case.

Substitution of new section for Section 46 and omission of Section 46-A of principal Act.

12. (1) For Section 46 of the principal Act the following section shall be substituted, namely,—

Term of office of chairman.

"46. (1) The term of office of a chairman shall begin from the date on which he is elected or nominated or from the date upon which the vacancy occurs which he is elected or nominated to fill if the vacancy occurs subsequent to the election or nomination.

(2) Subject to the provisions of Sections 47, 47-A and 48 and notwithstanding anything in Section 38 the term of office of an elected or nominated chairman shall cease upon the date upon which his successor is elected or nominated."

(3) Section 46-A of the principal Act shall be omitted.

Amendment of Sub-Clause (i) of Clause (*e*) of Section 50 of principal Act.

13. In Sub-clause (i) of Clause (*e*) of Section 50 of the principal Act after the words "Section 60" the following words shall be added, namely,—

> "and where there is a medical officer of health, those vested in the medical officer of health by Section 60-A."

Substitution of new section for Section 57 of principal Act.

14. For Section 57 of the principal Act the following section shall be substituted, namely,—

"57. (1) Every board with an income of Rs.50,000 per annum or over shall, unless the local Government otherwise directs, appoint an executive officer by a special resolution:

Power of board to appoint and employ executive officer and medical officer of health.

Provided that in every case in which such board has at the time of the passing of the Act a secretary but no executive officer the secretary shall be deemed to be the executive officer until or unless he is duly replaced.

(2) Every board with an income of Rs.50,000 per annum or over shall, unless the local Government otherwise directs, employ a medical officer of health who belongs to the United Provinces Public Health Service.

(3) The appointment, salaries and conditions of service of executive officers and medical officers of health shall be subject to the approval of the local Government."

15. For Section 58 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Section 58 of the principal Act.

"58. (1) A board may punish, dismiss or remove its executive officer by a special resolution supported by not less than two-thirds of the members constituting the board, subject to his right of appeal to the local Government within thirty days of the communication to him of the order of punishment or dismissal.

Punishment, dismissal or removal of executive officer and transfer of medical officer of health.

(2) The local Government may suspend the executive officer pending the decision of an appeal under Sub-section (1), and may allow, disallow or vary the order of the board.

(3) If a board by special resolution recommend the transfer of its medical officer of health the local Government shall transfer the medical officer of health from the board's employment provided the board gives sufficient reasons therefor."

16. For Sub-section (1) of Section 59 of the principal Act the following shall be substituted, namely,—

Amendment of Section 59 of principal Act.

"(1) During the absence on leave, or other temporary vacancy in the office of an executive officer, if the period does not exceed two months the chairman may appoint a person to act as executive officer; If the period exceeds two months an appointment shall be made by the board in accordance with the provisions of Section 57(1)" and for Sub-section (3) of the same section the following sub-section shall be substituted, namely,—

"(3) All appointments made under Sub-section (1) and the salaries and conditions of service appertaining to such appointments shall be subject to the approval of the local Government if the term of appointment exceeds two months, and the provisions of Section 58 shall apply to persons so appointed."

Addition of new section after Section 60 of principal Act.

17. After Section 60 of the principal Act the following section shall be inserted as Section 60-A, namely,—

Functions to be discharged by medical officer of health.

"60A. Notwithstanding anything contained in Section 60 the local Government may, by notification in the Gazette, direct that in any municipality the medical officer of health, with the concurrence in writing of the executive officer, shall exercise the following powers: provided that in case of disagreement between these officers the question shall be referred to the chairman, whose decision shall be final—

(*a*) the power to grant and issue under his signature every permit or licence, other than a permit or licence for a market or slaughter-house, which can be granted by a board in respect of bye-laws framed under parts B, D, F, G and I of list I and part I of list II of Section 298;

(*b*) the power to suspend or withdraw any such permit or licence;

(*c*) the powers conferred on the executive officer under Section 60(1) (*d*) in respect of Sections 191(1) and (2), 192(1), 196(*c*) and (*d*), 201(1), 202(1), 225(1) and (2), 227, 244(1) and (2), 245(1), 249, 250(2), 267, 268, 269, 270, 271, 273(1) (*a*), 276, 277, 278, 280, 283, 294, and also in respect of 307 so far as the notice referred to therein relates to the other section specified in this clause;

(*d*) in respect of servants of the board employed for conservancy, public health, vaccination, and the registration of births and deaths the powers vested in the executive officer by Section 75(*a*) and 76(*a*) and the power to grant leave of absence to the holder of any post to which he has power to appoint.

Amendment of section 61 of principal Act.

18. In Sub-section (1) of Section 61 of the principal Act, after the words "executive officer" the words "or medical officer of health" shall be inserted, and after the words "Section 60" the following words shall be inserted, namely,—

"or Section 60-A."

Amendment of Sections 62, 63 and 64 of principal Act.

19. In Sections 62, 63 and 64 of the principal Act the words "for medical officer of health" shall be inserted after the words "executive officer" wherever they occur, and in Section 63 for the words "the administration of the municipality" shall be sub-

stituted the words "that branch of the administration of the municipality with which he is concerned."

20. For Section 65 of the principal Act the following Section shall be substituted, namely,—

Substitution of new section for Section 65 of principal Act.

"65. If a board, being bound to make an appointment under the provisions of Section 57 or Section 59, fails to make an appointment and to obtain the approval of the local Government to such appointment within such time as the local Government considers reasonable, the local Government may itself make the appointment and may fix the salary, contributions to provident fund or pension and other conditions appertaining to such appointment: provided that if the local Government has made an appointment in exercise of the powers conferred by this section, the board shall not be bound to pay a sum exceeding a monthly average of Rs.1,000 in the case of municipalities with an income of three lakhs or over or of Rs.500 in the case of other municipalities on account of the salary, leave allowances, and contributions of the person so appointed."

Power of local Government to appoint executive officer.

21. For Sub-section (1) of Section 68 of the principal Act the following sub-section shall be substituted, namely,—

Substitution of new sub-section for Sub-section (1) of Section 68 of principal Act.

"(1) Any board by special resolution may, and if so required by the local Government shall, appoint an engineer, a water-works engineer, a water-works superintendent, an electrical superintendent, a secretary or a qualified sub-overseer."

Appointment of engineer, water-works engineer, water-works superintendent, electrical superintendent, secretary or sub-overseer.

22. For Section 71 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Section 71 of principal Act.

"71. Except as provided by Sections 57, 66, 68, and 70 a board may, by resolution, determine what servants are required for the discharge of the duties of the board and the salaries to be paid to them respectively."

Power of board to determine permanent staff.

23. For Section 74 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Section 74 of principal Act.

"74. Subject to any provisions to the contrary contained in Sections 57 to 73 servants on a monthly salary exceeding Rs.30, or in a city Rs.75, shall be appointed and may be punished or dismissed by the chairman, subject in the case of dismissal or removal to an appeal to the local Government, which must be presented to the local Government within one month of the date up-

Appointment and dismissal of permanent superior staff.

on which the order of dismissal or removal is communicated to the person in respect of whom the order is made:

Provided that an appointment on a monthly salary of Rs.250 or over in the case of cities and of Rs.100 or over in other cases shall be subject to confirmation by the board."

24. For Section 75 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Section 75 of principal Act.

"75. Except as otherwise provided the executive officer shall appoint—

Appointment of permanent inferior staff.

(*a*) servants on a monthly salary not exceeding Rs.15, or in a city Rs.30; and

(*b*) with the sanction of the chairman servants on a monthly salary exceeding Rs.15 but not exceeding Rs.30 or in a city exceeding Rs.30 but not exceeding Rs.75:

Provided that in case there is no executive officer the said appointments shall be made by the chairman."

25. For Section 76 of the principal Act the following section shall be substituted, namely,—

Substitution of new section for Section 76 of principal Act.

"76. Except as otherwise provided the executive officer may punish or dismiss—

Punishment and dismissal of permanent inferior staff.

(*a*) servants on a monthly salary not exceeding Rs.15, or in a city Rs.30; and

(*b*) servants on a monthly salary exceeding Rs.15 but not exceeding Rs.30 or in a city exceeding Rs.30 but not exceeding Rs.75, but in such case each order of dismissal or order imposing a fine exceeding in amount one month's pay of the person fined, or order of suspension for a period exceeding one month, or order of reduction by way of punishment shall be appealable to the chairman:

Provided that in case there is no executive officer the powers conferred by this section may be exercised by the chairman."

26. For clause (*c*) of Sub-section (1) of Section 112 of the principal Act the following clause shall be substituted, namely:—

Substitution of new clause for Clause (*c*) of Sub-clause (1) of Section 112 of principal Act.

"(*c*) Where there is an executive officer or a medical officer of health, reserved to the executive officer by Section 60 or to the medical officer of health by Section 60-A."

27. In Section 243 of the principal Act after the words "executive officer" the following words shall be inserted, namely,—

Amendment of Section 243 of principal Act.

"the medical officer of health."

Addition of new section after Section 279 in principal Act.

28. After Section 279 of the principal Act the following section shall be inserted as Section 279-A:—

Power to examine persons suspected to be suffering from infectious diseases.

"Where there is any reason to believe that a case of infectious disease notifiable under Section 279 has occurred in a building the medical officer of health or other competent person deputed by him shall, subject to the provisions of Section 287, enter the said building and make an examination of the person or persons suspected to be suffering from the disease and may also obtain material for pathological examination if necessary:

Provided that all females above the age of eight years shall be inspected by persons of their own sex only."

Amendment of Section 298 of principal Act.

29. In Section 288 of the principal Act after the words "executive officer" the following words shall be inserted, namely,—

"or the medical officer of health."

Addition of a new Clause (i) to Section 298 (2), *List I J.—Miscellaneous* of the principal Act.

30. The following shall be added as clause (*i*) to Section 298 (2), *List I. J. Miscellaneous* of the principal Act:—

"Providing for the registration and control of midwives and dais publicly practising their profession.

Amendment of Sub-section (1) of Section 315 of principal Act.

31. In Sub-section (1) of Section 315 of the principal Act for the words "in municipalities in which there is an executive officer, the executive officer," the following words shall be substituted, namely,—

"in municipalities in which there is an executive officer or a medical officer of health, either of these officers."

Amendment of First Schedule to principal Act.

32. (1) In the First Schedule to the principal Act an additional item shall be inserted after the item against Section 43, namely,—

"44-A. (1) To elect a chairman in a casual vacancy.

(2) To the entry against Section 59 shall be added in cases 'where the vacancy exceeds two months' and the entries in columns 1, 2 and 3, against Sections 74 and 76(2) (*b*) shall be deleted.

(3) For the entries in the second column against Sections 57, 58, 61, 63, 68 and 71 the following shall be substituted:—

57. To appoint and employ an executive officer and a medical officer of health.

58. To punish or dismiss an executive officer and recommend the transfer of a medical officer of health.

61. To entertain appeals from orders of the executive officer or the medical officer of health.

63. To require the executive officer or the medical officer of health to furnish returns, etc.

68. To appoint an engineer, a water-works engineer, a water-

works superintendent, an electrical superintendent or a secretary.

71. To determine the number and salaries of the board's permanent staff."

33. In the second schedule to the principal Act the following additional items shall be inserted before the item against Section 79(1):—

75. To appoint permanent and inferior staff.

76. To punish or dismiss permanent and inferior staff.

Amendment of seventh schedule to principal Act.

34. In the seventh schedule to the principal Act shall be inserted in numerical order the following new items:—

43. (2) To nominate a chairman where a board fails to elect one.

43. (4) To decide whether the chairman of a board has been duly elected or nominated under this section.

44. To fix a date for holding the election of chairman.

44-A. (1) To fix a date for the holding of a casual election of chairman.

44-A. (3) To nominate a chairman in a casual vacancy where the board fails to elect one.

44-A. (4) To decide whether the chairman of a board in a casual vacancy has been duly elected or nominated.

58. To entertain an appeal by an executive officer against an order of punishment or dismissal; to allow, disallow or vary such punishment or dismissal; to suspend the executive officer pending the decision of his appeal; and to transfer a medical officer of health from one board to another.

59.(3) To approve the appointment, salary and conditions of appointment of an officiating executive officer if the term of appointment exceeds two months.

60-A. To direct that in any municipality the medical officer of health and not the executive officer shall exercise certain powers conferred on the executive officer.

65. In default of his appointment by a board to appoint a person to be an executive officer or to act as executive officer and to fix the salary, contributions to provident fund or pension and other conditions appertaining to such appointment.

74. To entertain appeals from servants of boards on a monthly salary exceeding Rs.30, or in a city Rs.75 on their dismissal by the chairman.

76. (1) The entries in columns 1 and 2 against Sections 38 (4), 44, 58(3) and (4), 65(1), and (3) shall be deleted.

(2) For the entries in the second column against Sections 43 (3) and 57 the following shall be substituted:—

43. (3) To declare that the provisions of Sub-section (2) of this section shall not apply to a municipality.

57. To approve the appointment, salary and conditions of appointment of an executive officer and a medical officer of health.

U. P. STAMP (AMENDMENT) ACT, 1932

(No. IV OF 1932)*

[Received the assent of the Governor-General on April 25, 1932]
[PASSED BY THE LOCAL LEGISLATURE OF THE UNITED PROVINCES OF AGRA AND OUDH]

An Act to amend the Indian Stamp Act, 1899, in its application to the United Provinces

II of 1899

Preamble.

WHEREAS it is expedient to increase the revenues of the United Provinces and for that purpose to amend the Indian Stamp Act, 1899, in its application to the United Provinces, in the manner hereinafter appearing;

5 and 6, Geo. V, c. 61; 6 and 7, Geo. V, c. 37; 9 and 10 Geo. V, c. 101

And whereas the previous sanction of the Governor-General has been obtained, under Section 80-A, Sub-section (3), of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the United Provinces Stamp (Amendment) Act, 1932.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on the first day of May, 1932, and shall remain in force up till March 31, 1934.

Application of Act II of 1899.

2. The Indian Stamp Act, 1899, hereinafter referred to as the said Act, shall, in its application to the United Provinces, be amended in the manner hereinafter provided.

Amendment of clause (10) of section 2 of Act II of 1899.

3. To clause (10) of section 2 of the said Act the following shall be added, namely,—

"or by Schedule IA, as the case may be."

Amendment of section 3

4. In section 3 of the said Act—

(1) after clause (*c*) the following shall be inserted, namely,—

"Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clauses (*a*), (*b*) or (*c*) of this section or in Schedule I the amount indicated in Schedule IA to this Act shall, subject to the exemptions contained in that schedule, be the duty chargeable under this Act on the following instruments, mentioned in clauses (*aa*) and (*bb*) of this proviso, as the proper duty therefor respectively,—

(*aa*) every instrument mentioned in Schedule IA as chargeable with duty under that schedule, which not having been previously executed by any person, is executed in the United Provinces on or after the first day of May, 1932, and

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*Published in the Government Gazette, dated Allahabad, May, 7, 1932 (*bb*) every instrument mentioned in Schedule IA as chargeable with duty under that schedule which, not having been previously executed by any person, is executed out of the United Provinces on or after the first day of May, 1932, and relates to any property situated, or to any matter or thing done or to be done in the United Provinces, and is received in the United Provinces;"

(2) after the word "Provided" the word "also" shall be inserted.

Amendment of section 4 (1)

5. In sub-section (1) of section 4 of the said Act—

(*a*) after the words and figure "in Schedule I" the following shall be inserted, namely,—

"or in Schedule IA, as the case may be;"

(*b*) for the words and brackets "instead of the duty (if any) prescribed for it in that schedule" the following shall be substituted, namely,—

"if the principal instrument be chargeable with the duty prescribed in Schedule I, or with a duty of one rupee eight annas, if the principal instrument be chargeable with the duty prescribed in Schedule IA, instead of the duty (if any) prescribed for such other instrument in Schedule I or Schedule IA, as the case may be."

Amendment of section 6

6. In section 6 of the said Act—

(1) in the first paragraph, after the words and figure "in Schedule I" the following shall be inserted, namely,—

"or in Schedule IA, as the case may be;"

(2) in the proviso, after the words "one rupee" the words "and eight annas" shall be inserted, and after the words "has been paid" the following shall be added, namely,—

"unless it falls within the provisions of section 6-A."

New section 6-A

7. After section 6 of the said Act, the following shall be inserted, namely,—

Payment of the United Provinces stamp duty on copies, counterparts or duplicates when that duty has not been paid on the principal or original instrument.

"6-A. (1) Notwithstanding anything contained in section 4 or 6 or in any other law, unless it is proved that the duty chargeable under the United Provinces Stamp (Amendment) Act, 1932, has been paid—

(*a*) on the principal or original instrument as the case may be, or

(*b*) in accordance with the provisions of this section, the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument, or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would, when received in the United Provinces, have been chargeable under the United Provinces Stamp (Amendment) Act, 1932, with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under section 19-A.

(2) Notwithstanding anything contained in any law, no instrument, counterpart, duplicate or copy chargeable with duty under this section shall be received in evidence as properly stamped unless the duty chargeable under this section has been paid thereon:

Provided that a court before which any such instrument, counterpart, duplicate or copy is produced, may, in its discretion, permit the duty chargeable under this section to be paid thereon, and may then receive it in evidence."

New section 19-A

8. After section 19 of the said Act the following shall be inserted, namely,—

Payment of duty on certain instruments liable to increased duty in the United Provinces under clause (*bb*) of section 3.

"19-A. Where any instrument has become chargeable in any part of British India other than the United Provinces with duty under this Act or under any other law for the time being in force in any part of British India and thereafter becomes chargeable with a higher rate of duty in the United Provinces under clause (*bb*) of the first proviso to section 3—

(*i*) notwithstanding anything contained in the first proviso to section 3 the amount of duty chargeable on such instrument shall be the amount chargeable on it under Schedule IA less the amount of duty, if any, already paid on it in British India,

(*ii*) in addition to the stamps, if any, already affixed thereto, such instrument shall be stamped with the stamps necessary for the payment of the amount of duty chargeable on it under clause (*i*) in the same manner and at the same time and by the same persons as though such instrument were an instrument received in British India for the first time at the time when it became chargeable with the higher duty."

New section 29-A

9. After section 29 of the said Act the following shall be inserted, namely,—

Application of section 23-A, 24 or 29 to instruments chargeable with duty under Schedule IA.

"20-A. In applying section 23-A, 24 or 29 to any instrument chargeable with a higher rate of duty under the United Provinces Stamp (Amendment) Act, 1932, the references in those sections to the several articles in Schedule I shall be deemed to be references to the corresponding articles in Schedule IA.

Amendment of section 32

10. In section 32 of the said Act—

(1) in clause (*a*) of the proviso, after the words "any instrument" the words "other than an instrument

chargeable with a duty under clause (*bb*) of the first proviso to section 3" shall be inserted;

(2) the word "or" at the end of clause (*b*) of the proviso shall be omitted;

(3) after clause (*c*) of the proviso the following shall be inserted, namely,—

"or

(*d*) any instrument chargeable with duty under clause (*bb*) of the first proviso to section 3 and brought to him after the expiration of three months from the date on which it is first received in the United Provinces."

New section 48-A

11. After section 48 of the said Act the following shall be inserted, namely,—

Validity of certificate or endorsement in respect of instruments for which higher rate of duty is payable in the United Provinces.

"48-A. Notwithstanding anything contained in this Act, no certificate or endorsement under this Act in respect of an instrument chargeable in the United Provinces with a higher rate of duty under the United Provinces Stamp (Amendment) Act, 1932, shall be received in evidence or be in any way valid in respect of the payment of duty on such instrument or in respect of the chargeability of such instrument with duty unless the duty chargeable under the United Provinces Stamp (Amendment) Act, 1932, has been paid on such instrument."

Amendment of section 77

12. At the beginning of section 77 of the said Act the following shall be inserted, namely,—

"Except for the provisions as to copies contained in section 6-A."

New Schedule IA

13. After Schedule I to the said Act the following shall be inserted, namely,—

SCHEDULE IA

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932

(See section 3, first proviso.)

[NOTE.—The articles in Schedule IA are numbered so as to correspond with similar articles in Schedule I.]

Description of instrument	Proper stamp duty	
* * * * * *		
2. ADMINISTRATION BOND, including a bond given under sections 291, 375 and 376 of the Indian Succession Act, 1925, or section 6 of the Government Savings Banks Act, 1873—		
(*a*) where the amount does not exceed Rs.1,000 ..	The same duty as a Bond (no. 15) for such amount.	XXXIX of 1925 V of 1873
(*b*) in any other case	Two rupees.	
* * * * * *		
ADVOCATE. *See* entry as an Advocate (no. 30).		
4. AFFIDAVIT, including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing.	Two rupees.	
Exemptions		
Affidavit or declaration in writing when made—		
(*a*) as a condition of enlistment under the Indian Army Act, 1911.		VIII of 1911
(*b*) for the immediate purpose of being filed or used in any court or before the officer of any Court; or		
(*c*) for the sole purpose of enabling any person to receive any pension or charitable allowance.		X of 1874
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT—		
(*a*) if relating to the sale of a bill of exchange.	Three annas.	
(*b*) if relating to the sale of a Government security or share in an incorporated company or other body corporate.	Subject to a maximum of fifteen rupees, one and half annas for every Rs. 10,000 or part thereof of the value of the security or share.	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument		Proper stamp duty		
(*c*) if not otherwise provided for		Twelve annas.		
Exemptions				
Agreement or Memorandum of Agreement— (*a*) for or relating to the sale of goods or merchandise exclusively, not being a note or memorandum chargeable under no. 43; (*b*) made in the form of tenders to the Government of India for, or relating to, any loan; (*c*) made under the European Vagrancy Act, 1874, section 17.				
AGREEMENT TO LEASE. *See* Lease (no. 35).				
6. AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE, that is to say, any instrument evidencing an agreement relating to— (1) the deposit of title-deeds or instrument constituting or being evidence of the title to pay any property whatever (other than a marketable security): or (2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt— (*a*) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement—				
	Rs.	Rs.	a.	p.
when the amount of the loan or debt does not exceed	200	0	3	0
when it exceeds Rs. 200 but does not exceed	400	0	8	0

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument		Proper stamp duty
when it exceeds Rs. 400 but does not exceed	600	0 12 0
when it exceeds Rs. 600 but does not exceed	800	1 0 0
when it exceeds Rs. 800 but does not exceed	1,000	1 4 0
when it exceeds Rs. 1,000 but does not exceed	1,200	1 8 0
when it exceeds Rs. 1,200 but does not exceed	1,600	2 0 0
when it exceeds Rs. 1,600 but does not exceed	2,500	3 0 0
when it exceeds Rs. 2,500 but does not exceed	5,000	6 0 0
when it exceeds Rs. 5,000 but does not exceed	7,500	9 0 0
when it exceeds Rs. 7,500 but does not exceed	10,000	12 0 0
when it exceeds Rs. 10,000 but does not exceed	15,000	18 0 0
when it exceeds Rs. 15,000 but does not exceed	20,000	24 0 0
when it exceeds Rs. 20,000 but does not exceed	25,000	30 0 0
when it exceeds Rs. 25,000 but does not exceed	30,000	36 0 0
and for every additional Rs. 10,000 or part thereof in excess of Rs.30,000;		12 0 0
(*b*) if such loan or debt is repayable not more than three months from the date of such instrument.		Half the duty payable on a loan or debt under clause (*a*) for the amount secured.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
7. APPOINTMENT IN EXECUTION OF A POWER, whether of trustees or of property, movable or immovable, where made by any writing not being a will—	
(*a*) where the value of the property does not exceed Rs.1,000.	Fifteen rupees.
(*b*) in any other case	Twenty-five rupees.
8. APPRAISEMENT OR VALUATION made otherwise than under an order of the Court in the course of a suit—	
(*a*) where the amount does not exceed Rs.1,000.	The same duty as a Bond (no. 15) for such amount.
(*b*) in any other case	Seven rupees eight annas.
Exemptions	
(*a*) Appraisement or valuation made for the information of one party only, and not being in any manner obligatory between parties either by agreement or operation of law.	
(*b*) Appraisement of crops for the purpose of ascertaining the amount to be given to a landlord as rent.	
9. APPRENTICESHIP DEED, including every writing relating to the service or tuition of any apprentice, clerk or servant placed with any master to learn any profession, trade or employment, not being Articles of Clerkship (no. 11).	Seven rupees eight annas.
Exemption	
XIX of 1850 Instruments of apprenticeship executed by a Magistrate under the Apprentices Act, 1850, or by which a person is apprenticed by, or at the charge of, any public charity.	
10. ARTICLES OF ASSOCIATION OF A COMPANY.	Fifty rupees.
Exemption	
VII of 1918 Articles of any Association not formed for profit and registered under section 26 of the Indian Companies Act, 1913.	
See also Memorandum of Association of a Company (no. 39).	
* * * * * *	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty	
ASSIGNMENT. *See* Conveyance (no. 23), Transfer (no. 62), and Transfer of Lease (no. 63), as the case may be.		
ATTORNEY. *See* Entry as an Attorney (no. 30), and Power of Attorney (no. 48).		
AUTHORITY TO ADOPT. *See* Adoption-deed (no. 3).		
12. AWARD, that is to say, any decision in writing by an arbitrator or umpire not being an award directing a partition, on a reference made otherwise than by an order of the Court in the course of a suit—		
(*a*) where the amount or value of the property to which the award relates, as set forth in such award, does not exceed Rs.1,000.	The same duty as a Bond (no. 15), for such amount.	
(*b*) if it exceeds Rs.1,000 but does not exceed Rs.5,000.	Seven rupees eight annas.	
(*c*) in any other case ..	Ten rupees.	
Exemption Award under the Bombay District Municipal Act, 1901, section 160, or the Bombay Hereditary Offices Act, 1874, section 18, or the United Provinces Municipalities Act, 1916, section 324(1) or the United Provinces District Boards Act, 1922, section 190(1).		Bom. Act III of 1901 Bom. Act III of 1874 U. P. Act II of 1916 U. P. Act X of 1922
* * * * * *		
14. BILL OF LADING (including a through bill of lading).	Six annas. *N.B.*—If a bill of lading is drawn in parts the proper stamp therefor must be borne by each one of the set.	
Exemptions (*a*) Bill of lading when the goods therein described are received at a place within the limits of any port, as defined under the Indian Ports Act, 1908, and are to be delivered* at another place within the limits of the same port.		XV of 1908
(*b*) Bill of lading when executed out of British India and relating to property to be delivered in British India.		

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

	Description of instrument		Proper stamp duty
VII of 1870	15: BOND [as defined by section 2(5)], not being a DEBENTURE (no. 27), and not being otherwise provided for by this Act, or by the Court-fees Act, 1870—		
		Rs.	
	where the amount or value secured does not exceed	10	Two annas.
	where it exceeds Rs.10 but does not exceed	50	Four annas.
	where it exceeds Rs.50 but does not exceed	100	Eight annas.
	where it exceeds Rs.100 but does not exceed	200	One rupee.
	where it exceeds Rs.200 but does not exceed ..	300	One rupee eight annas.
	where it exceeds Rs.300 but does not exceed	400	Two rupees.
	where it exceeds Rs.400 but does not exceed	500	Two rupees eight annas.
	where it exceeds Rs.500 but does not exceed	600	Three rupees four annas.
	where it exceeds Rs.600 but does not exceed .	700	Four rupees.
	where it exceeds Rs.700 but does not exceed	800	Four rupees twelve annas.
	where it exceeds Rs.800 but does not exceed	900	Five rupees eight annas.
	where it exceeds Rs.900 but does not exceed	1,000	Six rupees four annas.
	and for every Rs.500 or part thereof in excess of Rs.1,000.		Three rupees twelve annas.
	See Administration Bond (no. 2), Bottomry Bond (no. 16), Customs Bond (no. 26), Indemnity Bond (no. 34), Respondentia Bond (no. 56), Security Bond (no. 57).		
	Exemptions		
	Bond when executed by—		
Bom. Act III of 1876	(*a*) headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act;		

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
(*b*) any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem.	
16. BOTTOMRY BOND, that is to say, any instrument whereby the master of a sea-going ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage.	The same duty as a Bond (no. 15) for a sum equal to the amount or value secured.
17. CANCELLATION—Instrument (including any instrument by which any instrument previously executed is cancelled) if attested and not otherwise provided for. *See* also Release (no. 55), Revocation of Settlement (no. 58-B), Surrender of lease (no. 61), Revocation of Trust (no. 64-B).	Seven rupees eight annas.
18. CERTIFICATE OF SALE (in respect of each property put up as a separate lot and sold), granted to the purchaser of any property sold by public auction by a Civil or Revenue Court, or Collector or other Revenue Officer—	
(*a*) where the purchase-money does not exceed Rs. 10.	Two annas.
(*b*) where the purchase-money exceeds Rs.10 but does not exceed Rs.25.	Four annas.
(*c*) in any other case	The same duty as a Conveyance (no. 23) for a consideration equal to the amount of the purchase-money only.
* * * * * *	
20. CHARTER PARTY, that is to say, any instrument (except an agreement for the hire of a tug-steamer), whereby a vessel or some specified principal part thereof is let for the specified purposes of the charterer, whether it includes a penalty clause or not.	Two rupees.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
* * * * * *	
22. COMPOSITION-DEED, that is to say, any instrument executed by a debtor, whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's business, under the supervision of inspectors or under letters of licence, for the benefit of his creditors.	Twelve rupees eight annas.
23. CONVEYANCE [as defined by section 2(10)], not being a transfer charged or exempted under no. 62—	
where the amount or value of the consideration for such conveyance as set forth therein does not exceed Rs.50;	Eight annas.
Rs.	
where it exceeds Rs.50 but does not exceed . 100	One rupee.
where it exceeds Rs.100 but does not exceed . 200	Two rupees.
where it exceeds Rs.200 but does not exceed . . 300	Three rupees.
where it exceeds Rs.300 but does not exceed 400	Four rupees.
where it exceeds Rs.400 but does not exceed . 500	Five rupees.
where it exceeds Rs.500 but does not exceed . 600	Six rupees eight annas.
where it exceeds Rs.600 but does not exceed 700	Eight rupees.
where it exceeds Rs.700 but does not exceed . 800	Nine rupees eight annas.
where it exceeds Rs.800 but does not exceed 900	Eleven rupees.
where it exceeds Rs.900 but does not exceed 1,000	Twelve rupees eight annas.
and for every Rs.500 or part thereof in excess of Rs.1,000.	Seven rupees eight annas.
Exemptions	
III of 1914 Assignment of copyright under the Indian Copyright Act, 1914, section 5.	
CO-PARTNERSHIP DEED, *See* Partnership (no. 46).	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
24. Copy or Extract, certified to be a true copy or extract by or by order of any public officer and not chargeable under the law for the time being in force relating to court-fees—	
(i) if the original was not chargeable with duty, or if the duty with which it was chargeable does not exceed one rupee.	Eight annas when the copy or extract is of an agricultural lease or of a mortgage-deed or sale-deed of agricultural land; in any other case twelve annas.
(ii) in any other case not falling within the provision of section 6-A.	One rupee when the copy or extract is of an agricultural lease or of a mortgage-deed or sale-deed of agricultural land; in any other case one rupee eight annas.
Exemptions	
(*a*) Copy of any paper which a public officer is expressly required by law to make or furnish, for record in any public office or for any public purpose.	
(*b*) Copy of, or extract from, any register relating to births, baptisms, namings, dedications, marriages, divorces, deaths or burials.	
25. Counterpart or Duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid—	
(*a*) if the duty with which the original instrument is chargeable does not exceed one rupee eight annas;	The same duty as is payable on the original.
(*b*) in any other case not falling within the provisions of section 6-A.	One rupee eight annas.
Exemption	
Counterpart of any lease granted to a cultivator, when such lease is exempted from duty.	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
26. CUSTOMS BOND—	
(*a*) where the amount does not exceed Rs.1,000.	The same duty as a Bond (no. 15) for such amount.
(*b*) in any other case .	Ten rupees.
27. DEBENTURE (whether a mortgage debenture or not), being a marketable security transferable—	
(*a*) by endorsement or by a separate instrument of transfer.	The same duty as a Bond (no. 15) for the same amount.
(*b*) by delivery— where the face amount of the debenture does not exceed Rs.100.	One rupee four annas.
Rs. where it exceeds Rs.100 but does not exceed .. 200	Two rupees eight annas.
where is exceeds Rs.200 but does not exceed .. .	The same duty as a Conveyance (no. 23) for a consideration equal to the face amount of the debenture.
Explanation.—The Term "Debenture" includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty.	
Exemption	
A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder whereby the company or body borrowing makes over, in whole, or in part, their property to trustees for the benefit of the debenture-holders: provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed.	
See also Bond (no. 15) and sections 8 and 55.	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
DECLARATION OF ANY TRUST. *See* Trust (no. 64).	
* * * * * *	
DEPOSIT OF TITLE-DEEDS. *See* Agreement relating to deposit of title-deeds, pawn or pledge (no. 6).	
DISSOLUTION OF PARTNERSHIP. *See* Partnership (no. 46).	
29. DIVORCE—Instrument of—that is to say, any instrument by which any person affects the dissolution of his marriage.	Five rupees.
DOWER—Instrument of—*See* Settlement (no. 58).	
DUPLICATE—*See* Counterpart (no. 25).	
30. ENTRY AS AN ADVOCATE, VAKIL OR ATTORNEY ON THE ROLL OF ANY HIGH COURT, in exercise of powers conferred on such Court by Letters Patent or by the Legal Practitioners' Act, 1879—	
(*a*) in the case of an advocate or Vakil	Five hundred rupees.
(*b*) in the case of any Attorney	Five hundred rupees.
Exemption	
Entry of an Advocate to, Vakil or Attorney on the roll of any High Court, when he has previously been enrolled in a High Court.	
31. EXCHANGE OF PROPERTY—Instrument of—	The same duty as a Conveyance (no. 23) for a consideration equal to the value of the property of greatest value as set forth in such instrument.
EXTRACT. *See* Copy (no. 24).	
32. FURTHER CHARGE. Instrument of, that is to say, any instrument imposing a further charge on mortgaged property—	
(*a*) when the original mortgage is one of the description referred to in clause (*a*) of article no. 40 (that is, with possession):	The same duty as a Conveyance (no. 23) for a consideration equal to the amount of the further charge secured by such instrument.
(*b*) when such mortgage is one of the description referred to in	

XVIII of 1879

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
clause (*b*) of article no. 40 (that is, without possession)—	
(i) if at the time of execution of the instrument of further charge possession of the property is given or agreed to be given under such instrument;	The same duty as a Conveyance (no. 23) for a consideration equal to the total amount of the charge (including the original mortgage and any further charge already made) less the duty already paid on such original mortgage and further charge.
(ii) if possession is not so given	The same duty as a Bond (no. 15) for the amount of the further charge secured by such instrument.
33. GIFT—Instrument of, not being a Settlement (no. 58), or Will or Transfer (no. 62).	The same duty as a Conveyance (no. 23) for a consideration equal to the value of the property as set forth in such instrument.
HIRING AGREEMENT or agreement for service. *See* Agreement (no. 5).	
34. INDEMNITY BOND	The same duty as a Security Bond (no. 57) for the same amount.
INSPECTORSHIP-DEED. *See* Composition-deed (no. 22).	
35. LEASE, including an under-lease or sub-lease and any agreement to let or sub-let—	
(*a*) where by such lease rent is fixed and no premium is paid or delivered—	
(i) where the lease purports to be for a term of less than one year;	The same duty as a Bond (no. 15) for the whole amount payable or deliverable under such lease.
(ii) where the lease purports to be for a term of not less than one year, but not more than five years;	The same duty as a Bond (no. 15) for the amount or value of the average annual rent reserved.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
(iii) where the lease purports to be for a term exceeding five years, but not exceedng ten years;	The same duty as a Conveyance (no. 23) for a consideration equal to the amount or value of the average annual rent reserved.
(iv) where the lease purports to be for a term exceeding ten years, but not exceeding twenty years;	The same duty as a Conveyance (no. 23) for a consideration equal to twice the amount or value of the average annual rent reserved.
(v) where the lease purports to be for a term exceeding twenty years but not exceeding thirty years.	The same duty as a Conveyance (no. 23) for a consideration equal to three times the amount or value of the average annual rent reserved.
(vi) where the lease purports to be for a term exceeding thirty years, but not exceeding one hundred years;	The same duty as a Conveyance (no. 23) for a consideration equal to four times the amount or value of the average annual rent reserved.
(vii) where the lease purports to be for a term exceeding one hundred years or in perpetuity;	The same duty as a Conveyance (no. 23) for a consideration equal in the case of a lease granted solely for agricultural purposes to one-tenth, and in any other case to one-sixth of the whole amount of rent which would be paid or delivered in respect of the first fifty years of the lease.
(viii) where the lease does not purport to be for any definite term;	The same duty as a Conveyance (no. 23) for a consideration equal to three times the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
(*b*) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved;	The same duty as a Conveyance (no. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.
(*c*) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.	The same duty as a Conveyance (no. 23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered: Provided that in any case when an agreement to lease is stamped with the *ad valorem* stamp required for lease, and a lease, in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed twelve annas.
Exemptions	
(*a*) Lease executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink), without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees.	
* * * * * *	

Description of instrument	Proper stamp duty	
In this exemption a lease for the purposes of cultivation shall include a lease of land for cultivation together with a homestead or tanks.		
(*b*) Leases of fisheries granted under the Burma Fisheries Act, 1905, or the Upper Burma Land and Revenue Regulation, 1889.		Bur. Act III of 1905, III of 1889
Explanation.—When a lessee undertakes to pay any recurring charge, such as Government revenue, the landlord's share of cesses or the owner's share of municipal rates or taxes, which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee shall be deemed to be part of the rent.		
* * * * * *		
LETTER OF GUARANTEE. *See* Agreement (no. 5).		
38. LETTER OF LICENCE, that is to say, any agreement between a debtor and his creditors that the latter shall, for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion.	Twelve rupees eight annas.	
39. MEMORANDUM OF ASSOCIATION OF A COMPANY—		
(*a*) if accompanied by articles of Association under section 17 of the Indian Companies Act, 1913.	Thirty rupees.	VII of 1913
(*b*) if not so accompanied	Eighty rupees.	
Exemptions		
Memorandum of any Association not formed for profit and registered under section 26 of the Indian Companies Act, 1913.		VII of 1913
40. MORTGAGE-DEED, not being an Agreement relating to deposit of Title-deeds, Pawn or Pledge (no. 6), Bottomry Bond (no. 16), Mortgage of a crop (no.		

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
41), Respondentia Bond (no. 56) or Security Bond (no. 57)—	
(*a*) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;	The same duty as a Conveyance (no. 23) for a consideration equal to the amount secured by such deed.
(*b*) when possession is not given or agreed to be given as aforesaid;	The same duty as a Bond (no. 15) for the amount secured by such deed.
Explanation.—A mortgagor who gives to the mortgagee a power-of-attorney to collect rents or a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this article.	
(*c*) when a collateral or auxilliary or additional or substituted security, or by way of further assurance for the abovementioned purpose were the principal or primary security is duly stamped—	
for every sum secured not exceeding Rs.1,000.	Twelve annas.
and for every Rs.1,000 or part thereof secured in excess of Rs. 1,000.	Twelve annas.
Exemptions	
XIX of 1883 XII of 1884 (1) Instruments executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists Loans Act, 1884, or by their sureties as securities for the payment of such advances.	
(2) Letter of hypothecation accompanying a bill of exchange.	
* * * * * *	
42. NOTARIAL ACT, that is to say, any instrument, endorsement, note, attestation, certificate, or entry not being a Protest (no. 50) made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public.	Two rupees.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
See also Protest of Bill or Note (no. 50).	
43. NOTE OR MEMORANDUM sent by a broker or Agent to his principal intimating the purchase or sale on account of such principal—	
(*a*) of any goods exceeding in value twenty rupees.	Three annas.
(*b*) of any stock or marketable security exceeding in value twenty rupees.	Subject to a maximum of fifteen rupees two annas for every Rs.10,000 or part thereof of the value of the stock or security.
44. NOTE OF PROTEST by the Master of a ship.	One rupee.
See also Protest by the Master of a ship (no. 51).	
* * * * * *	
45. PARTITION. Instrument of—as defined by section 2(15).	The same duty as a Bond (no. 5) for the amount of the value of the separated share or shares of the property. *N.B.*—The largest share remaining after the property is partitioned (or if there are two or more shares of equal value and not smaller than any of the other shares) then one of such equal shares shall be deemed to be that from which the other shares are separated. Provided always that— (*a*) when an instrument of partition containing an agreement to divide property in severality is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
	paid in respect of the first instrument, but shall not be less than twelve annas. (*b*) where land is held on Revenue Settlement for a period not exceeding thirty years and paying the full assessment the value for the purpose of duty shall be calculated at not more than five times the annual revenue. (*c*) where a final order for effecting a partition passed by any Revenue Authority or any Civil Court, or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument or partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed twelve annas.
46. PARTNERSHIP—	
A.—Instrument of—	
(*a*) where the capital of the partnership does not exceed Rs. 500.	Three rupees twelve annas.
(*b*) where the capital exceeds Rs. 500 but does not exceed Rs. 2,000.	Seven rupees eight annas.
(*c*) in any other case	Fifteen rupees.
B.—Dissolution of—	Ten rupees.
PAWN OR PLEDGE. *See* Agreement relating to deposit of Title-deeds, Pawn or Pledge (no. 6).	
* * * * * *	
50. PROTEST OF BILL OR NOTE, that is to say, any declaration in writing made by a Notary Public; or other person lawfully acting as such, attesting the dis-	Two rupees.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
honour of a Bill of Exchange or Promissory Note.	
51. PROTEST BY THE MASTER OF A SHIP, that is to say, any declaration of the particulars of her voyage drawn up by him with a view to the adjustment of losses or the calculation of averages, and every declaration in writing made by him against the characters or the consignees for not loading or unloading the ship, when such declaration is attested or certified by a Notary Public or other person lawfully acting as such. *See* also Note of Protest by the Master of a ship (no. 44).	Two rupees.
* * * * *	
54. RECONVEYANCE OF MORTGAGED PROPERTY—	
(*a*) if the consideration for which the property was mortgaged does not exceed Rs.1,000;	The same duty as a Conveyance (no. 23) for the amount of such consideration as set forth in the reconveyance.
(*b*) in any other case	Fifteen rupees.
55. RELEASE, that is to say, any instrument (not being such a release as is provided for by section 23-A), whereby a person renounces a claim upon another person or against any specified property—	
(*a*) if the amount or value of the claim does not exceed Rs.1,000;	The same duty as a Bond (no. 15) for such amount or value as set forth in the release.
(*b*) in any other case	Seven rupees eight annas.
56. RESPONDENTIA BOND, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination.	The same duty as a Bond (no. 15) for the amount of the loan secured.
REVOCATION OF ANY TRUST OR SETTLEMENT. *See* Settlement (no. 58); Trust (no. 64).	
57. SECURITY BOND OR MORTGAGE-DEED, executed by way security for the due execution of an office, or to account	

	Description of instrument	Proper stamp duty
	for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract—	
	(*a*) when the amount secured does not exceed Rs.1,000	The same duty as a Bond (no. 15) for the amount secured.
	(*b*) in any other case .	Seven rupees eight annas
	Exemptions	
	Bond or other instrument when executed—	
Ben. Act III of 1876	(*a*) by headman nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act;	
	(*b*) by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital, or any other object of public utility, shall be not less than a specified sum per mensem;	
Bom. Act VII of 1879	(*c*) under no. 3-A of the rules made by the Governor of Bombay in Council under section 70 of the Bombay Irrigation Act, 1879;	
XIX of 1883 XII of 1884	(*d*) executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists Loans Act, 1884, or by their sureties, as security for the repayment of such advances;	
	(*e*) executed by officers of Government or their sureties to secure the due execution of an office, or the due accounting for money or other property received by virtue thereof.	
	58. SETTLEMENT—	

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty	
A.—Instrument of (including a deed of dower)—	The same duty as a Bond (no. 15) for a sum equal to the amount or value of the property settled as set forth in such settlement: Provided, that where an agreement to settle is stamped with the stamp required for an instrument of settlement and an instrument of settlement in pursuance of such agreement is subsequently executed, the duty on such instrument shall not exceed twelve annas.	
Exemptions (*a*) Deed of dower executed on the occasion of a marriage between Muhammadans. (*b*) Hludassa, that is to say, any settlement of immovable property executed by a Buddhist in Burma for a religious purpose in which no value has been specified and on which a duty of Rs.10 has been paid.		
B.—Revocation of—	The same duty as a Bond (no. 15) for a sum equal to the amount or value of the property concerned, as set forth in the instrument of Revocation, but not exceeding fifteen rupees.	
See also Trust (no. 64).		
59. SHARE WARRANTS to bearer issued under the Indian Companies Act, 1913.	The same duty as a Debenture transferable by delivery [no. 27(b)] for a face amount equal to the nominal amount of the shares specified in the warrant.	VII of 1913

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
Exemptions Share warrant when issued by a company in pursuance of the Indian Companies Act, 1913, section 43, to have effect only upon payment, as composition for that duty, to the Collector of Stamp Revenue of— (*a*) one and a half per centum of the whole subscribed capital of the Company; or (*b*) If any company which has paid the said duty or composition in full, subsequently issues an addition to its subscribed capital, one and a half per centum of the additional capital so issued.	
* * * * * *	
61. SURRENDER OF LEASE—	
(*a*) when the duty with which the lease is chargeable does not exceed seven rupees eight annas;	The duty with which such lease is chargeable.
(*b*) in any other case .	Seven rupees eight annas.
Exemption Surrender of lease, when such lease is exempted from duty.	
62. TRANSFER (whether with or without consideration)— (*a*) of shares in an incorporated Company or other body corporate; or (*b*) of debentures, being marketable securities, whether the debenture is liable to duty or not except debentures provided for by section 8;	
When the value of the share or the face amount of the debenture does not exceed Rs.100.	Twelve annas.
where it exceeds Rs.100 but does not exceed . .. Rs. 200	One rupee eight annas.
where it exceeds Rs.200 but does not exceed 300	Two rupees four annas.

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty	
where it exceeds Rs.300 but does not exceed 400	Three rupees.	
where it exceeds Rs.400 but does not exceed 500	Three rupees twelve annas.	
where it exceeds Rs.500 but does not exceed 600	Four rupees eight annas.	
where it exceeds Rs.600 but does not exceed 700	Five rupees four annas.	
where it exceeds Rs.700 but does not exceed 800	Six rupees.	
where it exceeds Rs.800 but does not exceed 900	Six rupees twelve annas.	
where it exceeds Rs.900 but does not exceed 1,000	Seven rupees eight annas.	
and for every Rs.500 or part thereof in excess of 1,000	Three rupees twelve annas.	
(*c*) of any interest secured by a bond, mortgage-deed or policy of insurance—		
(i) if the duty on such bond, mortgage-deed or policy does not exceed five rupees;	The duty with which such Bond, Mortgage deed or Policy of Insurance is chargeable.	
(ii) in any other case	Seven rupees eight annas.	
(*d*) of any property under the Administrator-General's Act, 1913, section 25;	Fifteen rupees.	III of 1913
(*e*) of any trust property without consideration from one trustee to another trustee, or from a trustee to a beneficiary.	Seven rupees eight annas or such smaller amount as may be chargeable under clauses (*a*) to (*c*) of this article.	
Exemptions		
Transfers by endorsement—		
(*a*) of a bill of Exchange, Cheque or Promissory note;		
(*b*) of a Bill of Lading, Delivery Order, warrant for goods, or other mercantile document of title to goods;		
(*c*) of a Policy of Insurance;		
(*d*) of securities of the Government of India or the local Government.		
See also section 8.		

Stamp duty on certain instruments under the United Provinces Stamp (Amendment) Act, 1932—(continued).

Description of instrument	Proper stamp duty
63. TRANSFER OF LEASE by way of assignment and not by way of underlease.	The same duty as a Conveyance (no. 23) for a consideration equal to the amount of the consideration for the transfer.
Exemption Transfer of any lease exempt from duty.	
64. TRUST.—	
A.—DECLARATION OF—of, or concerning, any property when made by any writing not being a will.	The same duty as a Bond (no. 15) for a sum equal to the amount of value of the property concerned, as set forth in the instrument; but not exceeding twenty-two rupees eight annas.
B.—REVOCATION OF—of, or concerning, any property when made by any instrument other than a will.	The same duty as a Bond (no. 15) for a sum equal to the amount or value of the property concerned, as set forth in the instrument, but not exceeding fifteen rupees.
See also Settlement (no. 58).	
VALUATION. *See* Appraisement (no. 8).	
VAKIL. *See* Entry as a Vakil (no. 30).	
65. WARRANT FOR GOODS, that is to say, any instrument evidencing the title of any person therein named, or his assigns, or the holder thereof, the property in any goods lying in or upon any dock, warehouse or wharf, such instrument being signed or certified by or on behalf of the person in whose custody such goods may be.	Six annas.

U. P. COURT-FEES (AMENDMENT) ACT, 1932

(No. III OF 1932)*

[Received the assent of the Governor-General on April 25, 1932]

[PASSED BY THE LOCAL LEGISLATURE OF THE UNITED PROVINCES OF AGRA AND OUDH.]

An Act further to amend the Court-fees Act, 1870, in its application to the United Provinces.

Preamble.

VII of 1870

WHEREAS it is expedient further to amend the Court-fees Act, 1870, in its application to the United Provinces.

5 and 6, Geo. V, c. 61; 6 and 7 Geo. V, c, 37; 9 and 10, Geo. V c. 101

And whereas the previous sanction of the Governor-General has been obtained, under section 80-A, sub-section (3), of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called the United Provinces Court-fees (Amendment) Act, 1932.

(2) It extends to the territories for the time being administered by the Local Government of the United Provinces.

(3) It shall come into force on the first day of May, 1932, and shall remain in force up till March 31, 1934.

Amendment of section 6 of Act VII of 1870

2. To section 6 of the Court-fees Act, 1870 hereinafter referred to as "the said Act", the following proviso shall be added, namely,—

Provided that where such document relates to any suit, appeal or other proceeding under the Oudh Rent Act, 1886, the Agra Tenancy Act, 1926, or the United Provinces Land Revenue Act, 1901, the proper fee shall be three-quarters of the fee indicated in either of the said schedules except where the document is of any of the kinds specified as chargeable in the first schedule and the amount or value of the subject-matter of the suit appeal or proceeding to which it relates exceeds the value of Rs. 500:

Act XXII of 1886
U. P. Act III of 1926
U. P. Act III of 1901

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the commencement of this Act.

Amendment of paragraph (*v*) of section 7 of Act VII of 1870

3. In paragraph (*v*) of section 7 of the said Act the word "ten" in clause (*a*) shall be read as "twenty" and the word "five" in clause (*b*) shall be read as "six."

Amendment of paragraph (ix) of section 7 of Act VII of 1870

4. For paragraph (ix) of section 7 of the said Act the following clause shall be substituted, namely,—

(ix) In suits against a mortgagee for the recovery of the property mortgaged according to the principal money expressed to be secured by the instrument of mortgage.

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*Published in the Government Gazette, dated Allahabad, May 7, 1932

(ix) (*a*) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute, according to the total amount claimed by way of principal and interest.

Amendment of section 18 of Act VII of 1870

5. In section 18 of the said Act for the words "eight annas" the words "twelve annas" shall be substituted.

Amendment of Schedule I to Act VII of 1870

6. In Schedule I to the said Act the following amendments shall be made, namely,—

(i) In article 1 for the entries in the second and third columns the entries shown in the first and second columns of Schedule A to this Act shall be substituted.

(ii) In article 6 for the words "four," "eight" and "one rupee" in the third column the words "six," "twelve" and "one rupee eight annas," respectively, shall be substituted.

(iii) In article 7 for the words 'eight" and "one rupee" in the third column the words "twelve" and "one rupee eight annas", respectively, shall be substituted.

(iv) In article 8 for the word "eight" in the third column the word "twelve" shall be substituted.

(v) In article 11 for the entries above the proviso in the second and third columns the following shall be substituted:—

(1) When the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees;	Two per centum on such amount or value.
and	
(2) When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees;	Two and one-half per centum on such amount or value.
and	
(3) When such amount or value exceeds fifty thousand rupees, but does not exceed one lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees;	Three per centum on such amount or value.
and	
(4) When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees;	Four per centum on such amount or value.

(vi) In article 12 for the entries in the first and second columns and for the first paragraph in the third column the following shall be substituted:—

12. Certificate under the Indian Succession Act, 1925.	1. When the amount or value of any debt or security specified in the certificate under section 374 of the Act does not exceed twenty thousand rupees; and	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	2. When such amount or value exceeds twenty thousand rupees, but does not exceed fifty thousand rupees, for the portion of such amount or value which is in excess of twenty thousand rupees; and	Two and a half per centum on such amount or value and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	3. When such amount or value exceeds fifty thousand rupees, but does not exceed a lakh of rupees, for the portion of such amount or value which is in excess of fifty thousand rupees; and	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.
	4. When such amount or value exceeds a lakh of rupees, for the portion of such amount or value which is in excess of a lakh of rupees.	Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under section 376 of the Act.

(vii) For the table of *ad volorem* fees leviable on the institution of suits the table shown in Schedule B to this Act shall be substituted.

Amendment of Schedule II to Act VII of 1870

7. In Schedule II to the said Act the following amendments shall be made, namely:—

(i) In article 1 for the words “one anna,” “eight annas” and “one rupee” in the third column the words “two annas,’ “twelve annas” and “one rupee and eight annas”, respectively, shall be substituted; and the following clause shall be substituted for clause (*d*):—

(*d*) I.—When presented to the Board of Revenue for revision of a judgment or order,	Three rupees.
II.—When presented to a High Court—	
(1) Under the Indian Companies Act, 1913 (Act VII of 1913), for winding up a company.	Fifty rupees.
(2) Under section 115 of the Code of Civil Procedure, 1908 (Act V of 1908), for revision of an order—	Four rupees.
(3) In any other case	Three rupees.

(ii) In article 1-A for the words “twelve annas” in the third column the words “one rupee two annas” shall be substituted.

(iii) In articles 5, 6 and 7 for the word “eight” in the third column the word “twelve” shall be substituted.

(iv) In article 10 for the words “eight annas” “one rupee” and “two rupees” in the third column, the words “twelve annas”, “one rupee and eight annas” and “three rupees”, respectively, shall be substituted.

(v) For article 11, the following shall be substituted:—

11.	Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented.	(a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling Revenue Executive Authority:	Twelve annas.
		(b) to a Commissioner of the division:	Two rupees.
		(c) to a High Court or to a Chief Controlling Executive or Revenue Authority:	Three rupees.

(vi) The bracket opposite articles 12, 13 and 14 in the second column shall be omitted and for article 12 the following shall be substituted:—

12. Caveat	Where the amount or value of the property in respect of which the caveat is lodged—	
	(a) does not exceed five thousand rupees:	Five rupeees.
	(b) exceeds five thousand rupees.	Ten rupees.

(vii) For article 14 the following shall be substituted, namely,—

14. Petition in a suit under the Native Converts' Marriage Dissolution Act, 1866.		Seven rupees eight annas.

(viii) In article 17 for the words "Ten rupees" in the third column, the words "Fifteen rupees" shall be substituted, and the following proviso shall be added:—

Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees.

(ix) In articles 18 and 19 for the word "ten" in the third column the word "fifteen" shall be substituted.

(x) In articles 20 and 22 for the word "twenty" in the third column the word "thirty" shall be substituted.

SCHEDULE A.

When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, in excess of one hundred rupees up to two hundred rupees.	Twelve annas.
When such amount or value exceeds two hundred rupees, for every ten rupees, or part thereof, in excess of two hundred rupees up to five hundred rupees.	One rupee.

When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees, up to one thousand rupees.	One rupee four annas.
When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees four annas.
When such amount or value exceeds five thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twelve rupees eight annas.
When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Eighteen rupees twelve annas.
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty-five rupees.
When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Twenty-five rupees.
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty-one rupees four annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be four thousand five hundred rupees.

SCHEDULE B

Table of rates of ad valorem *fees leviable on the institution of suits*

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
	5	0	6
5	10	0	12
10	15	1	2
15	20	1	8
20	25	1	14
25	30	2	4
30	35	2	10
35	40	3	0
40	45	3	6
45	50	3	12
50	55	4	2
55	60	4	8
60	65	4	14
65	70	5	4
70	75	5	10
75	80	6	0
80	85	6	6
85	90	6	12
90	95	7	2
95	100	7	8
100	110	8	4
110	120	9	0
120	130	9	12
130	140	10	8
140	150	11	4
150	160	12	0
160	170	12	12
170	180	13	8
180	190	14	4
190	200	15	0
200	210	16	0
210	220	17	0
220	230	18	0
230	240	19	0
240	250	20	0
250	260	21	0
260	270	22	0
270	280	23	0
280	290	24	0
290	300	25	0
300	310	26	0

Table of rates of ad valorem *fees leviable on the institution of suits*—(continued)

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
310	320	27	0
320	330	28	0
330	340	29	0
340	350	30	0
350	360	31	0
360	370	32	0
370	380	33	0
380	390	34	0
390	400	35	0
400	410	36	0
410	420	37	0
420	430	38	0
430	440	39	0
440	450	40	0
450	460	41	0
460	470	42	0
470	480	43	0
480	490	44	0
490	500	45	0
500	510	46	4
510	520	47	8
520	530	48	12
530	540	50	0
540	550	51	4
550	560	52	8
560	570	53	12
570	580	55	0
580	590	56	4
590	600	57	8
600	610	58	12
610	620	60	0
620	630	61	4
630	640	62	8
640	650	63	12
650	660	65	0
660	670	66	4
670	680	67	8
680	690	68	12
690	700	70	0
700	710	71	4
710	720	72	8
720	730	73	12

Table of rates of ad valorem *fees leviable on the institution of suits*—(continued)

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
730	740	75	0
740	750	76	4
750	760	77	8
760	770	78	12
770	780	80	0
780	790	81	4
790	800	82	8
800	810	83	12
810	820	85	0
820	830	86	4
830	840	87	8
840	850	88	12
850	860	90	0
860	870	91	4
870	880	92	8
880	890	93	12
890	900	95	0
900	910	96	4
910	920	97	8
920	930	98	12
930	940	100	0
940	950	101	4
950	960	102	8
960	970	103	12
970	980	105	0
980	990	106	4
990	1,000	107	8
1,000	1,100	113	12
1,100	1,200	120	0
1,200	1,300	126	4
1,300	1,400	132	8
1,400	1,500	138	12
1,500	1,600	145	0
1,600	1,700	151	4
1,700	1,800	157	8
1,800	1,900	163	12
1,900	2,000	170	0
2,000	2,100	176	4
2,100	2,200	182	8
2,200	2,300	188	12
2,300	2,400	195	0
2,400	2,500	201	4

Table of rates of ad valorem *fees leviable on the institution of suits*—(continued)

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
2,500	2,600	207	8
2,600	2,700	213	12
2,700	2,800	220	0
2,800	2,900	226	4
2,900	3,000	232	8
3,000	3,100	238	12
3,100	3,200	245	0
3,200	3,300	251	4
3,300	3,400	257	8
3,400	3,500	263	12
3,500	3,600	270	0
3,600	3,700	276	4
3,700	3,800	282	8
3,800	3,900	288	12
3,900	4,000	295	0
4,000	4,100	301	4
4,100	4,200	307	8
4,200	4,300	313	12
4,300	4,400	320	6
4,400	4,500	326	4
4,500	4,600	332	8
4,600	4,700	338	12
4,700	4,800	345	0
4,800	4,900	351	4
4,900	5,000	357	8
5,000	5,250	370	0
5,250	5,500	382	8
5,500	5,750	395	0
5,750	6,000	407	8
6,000	6,250	420	0
6,250	6,500	432	8
6,500	6,750	445	0
6,750	7,000	457	8
7,000	7,250	470	0
7,250	7,500	482	8
7,500	7,750	495	0
7,750	8,000	507	8
8,000	8,250	520	0
8,250	8,500	532	8
8,500	8,750	545	0
8,750	9,000	557	8
9,000	9,250	570	0

Table of rates of ad valorem *fees leviable on the institution of suits*—(continued)

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
9,250	9,500	582	8
9,500	9,750	595	0
9,750	10,000	607	8
10,000	10,500	626	4
10,500	11,000	645	0
11,000	11,500	663	12
11,500	12,000	682	8
12,000	12,500	701	4
12,500	13,000	720	0
13,000	13,500	738	12
13,500	14,000	757	8
14,000	14,500	776	4
14,500	15,000	795	0
15,000	15,500	813	12
15,500	16,000	832	8
16,000	16,500	851	4
16,500	17,000	870	0
17,000	17,500	888	12
17,500	18,000	907	8
18,000	18,500	926	4
18,500	19,000	945	0
19,000	19,500	963	12
19,500	20,000	982	8
20,000	21,000	1,007	8
21,000	22,000	1,032	8
22,000	23,000	1,057	8
23,000	24,000	1,082	8
24,000	25,000	1,107	8
25,000	26,000	1,132	8
26,000	27,000	1,157	8
27,000	28,000	1,182	8
28,000	29,000	1,207	8
29,000	30,000	1,232	8
30,000	32,000	1,257	8
32,000	34,000	1,282	8
34,000	36,000	1,307	8
36,000	38,000	1,332	8
38,000	40,000	1,357	8
40,000	42,000	1,382	8
42,000	44,000	1,407	8
44,000	46,000	1,432	8
46,000	48,000	1,457	8

Table of rates of ad valorem *fees leviable on the institution of suits*—(concluded)

When the amount or value of the subject-matter exceeds—	But does not exceed—	Proper fee	
Rs.	Rs.	Rs.	a.
48,000	50,000	1,482	8
50,000	55,000	1,513	12
55,000	60,000	1,545	0
60,000	65,000	1,576	4
65,000	70,000	1,607	8
70,000	75,000	1,638	12
75,000	80,000	1,670	0
80,000	85,000	1,701	4
85,000	90,000	1,732	8
90,000	95,000	1,763	12
95,000	1,00,000	1,795	0

And the fee increases at the rate of thirty-one rupees four annas for every five thousand rupees, or part thereof, for example—

Rs.	Rs.	a.
2,00,000	2,420	0
3,00,000	3,045	0
4,00,000	3,670	0
5,00,000	4,295	0
5,35,000	4,500	0

SPECIAL POWERS ORDINANCE, 1932

(ORDINANCE NO. X OF 1932)*

AN

ORDINANCE

TO

Confer special powers on Government and its officers for the purpose of maintaining law and order.

WHEREAS an emergency has arisen which makes it necessary to confer special powers upon Government and its officers for the purpose of maintaining law and order;

NOW THEREFORE in exercise of the power conferred by section 72 of the Government of India Act, the Governor-General is pleased to make and promulgate the following Ordinance:—

CHAPTER I

PRELIMINARY

Short title, and extent and commencement.

1. (*1*) This Ordinance may be called the Special Powers Ordinance, 1932.

(*2*) This chapter and Sections 64, 74, 75, 76, 77, 78, 79 and 80 extend to the whole of British India, including British Baluchistan and the Sonthal Parganas, and the Governor-General in Council may, by notification in the *Gazette of India,* extend any or all of the remaining sections to the said area or to any province or part of a province specified in the notification.

(*3*) This Chapter and Sections 64, 74, 75, 76, 77, 78, 79, and 80 shall come into force at once, and the Local Government may, by notification in the local official Gazette, direct that any or all of the remaining provisions shall come into force in any area to which they have been extended, on such date as may be appointed in the notification.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(*1*) "the Code" means the Code of Criminal Procedure, 1898; and V of 1898

(*2*) "District Magistrate" means in the case of a Presidency-town or the town of Rangoon, the Commissioner of Police, except in Chapters IV and VI where, in the case of a Presidency-town it means the Chief Presidency Magistrate.

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*Published in the Government Gazette, dated Allahabad, July 9, 1932

CHAPTER II

EMERGENCY POWERS

Power to arrest and detain suspected persons.

3. (*1*) Any officer of Government authorized in this behalf by general or special order of the Local Government may, if satisfied that there are reasonable grounds for believing that any person has acted, is acting or is about to act, in a manner prejudicial to the public safety or peace, himself arrest such person without warrant, or may direct the arrest without warrant of such person, and in making such arrest any means that may be necessary may be used.

(*2*) An arrest made by or on the direction of any officer under this section shall be reported forthwith to the Local Government by the officer so making or so directing the arrest as the case may be, and such officer may, by order in writing, commit any person so arrested to such custody as the Local Government may, by general or special order, specify in this behalf:

Provided that no person shall, unless the Local Government by special order otherwise directs, be so detained in custody for a period exceeding fifteen days:

Provided further that no person shall be so detained in custody for a period exceeding two months.

Power to control suspected persons.

4. (*1*) The Local Government, if satisfied that there are reasonable grounds for believing that any person has acted, is acting, or is about to act, in a manner prejudicial to the public safety or peace or in furtherance of a movement prejudicial to the public safety or peace, may, by order in writing, give any one or more of the following directions, namely, that such person—

(*a*) shall not enter, reside or remain in any area specified in the order;

(*b*) shall reside or remain in any area specified in the order;

(*c*) shall remove himself from, and shall not return to, any area specified in the order;

(*d*) shall conduct himself in such manner, abstain from such acts, or take such order with any property in his possession or under his control, as may be specified in the order.

(*2*) An order made under Sub-section (1) shall not, unless the Local Government by special order otherwise directs, remain in force for more than one month from the making thereof.

(*3*) An order made under Sub-section (1) shall be served on the person to whom it relates in the manner provided in the Code for service of a summons.

Power to take possession of buildings.

5. (*1*) If, in the opinion of the Local Government, any land or building can be utilized as quarters or offices for public servants, or for the accommodation of troops or police, the Local

Government may, by order in writing, require the occupier or other person in charge of the land or building to place it at the disposal of Government at such time as may be specified in the order, together with the whole, or any part specified in the order, of any fixtures, fittings, furniture or other things for the time being in the building; and the Local Government may dispose of or use such land, building, fixtures, fittings, furniture or other things in such manner as it may consider expedient.

(2) In this section "building" includes any portion or portions of a building whether separately occupied or not.

Power to prohibit or limit access to certain places.

6. The District Magistrate may, by order in writing, prohibit or limit, in such way as he may think necessary for the public advantage, access to any building or place in the possession or under the control of Government or of any railway administration or local authority, or to any building or place in the occupation, whether permanent or otherwise, of His Majesty's Naval, Military or Air Forces or of any police force, or to any place in the vicinity of any such building or place.

Power to prohibit or regulate traffic.

7. The District Magistrate may, by order in writing, prohibit or regulate, in such way as he may think necessary for the public advantage, traffic over any road, pathway, bridge, waterway or ferry.

Power to regulate means of transport.

8. (*1*) The District Magistrate may, by order in writing, require any person to make, in such form and within such time and to such authority as may be specified in the order, a return of any vehicles or means of transport owned by him or in his possession or under his control.

(2) The District Magistrate, if, in his opinion, it is necessary for the public advantage, may, by order in writing, require any person owning or having in his possession or under his control any vehicle or means of transport to take such order therewith for such period as may be specified in the order.

Powers regarding arms, ammunition, etc.

9. (*1*) The District Magistrate may, by order in writing published in such manner as he thinks best adopted for informing the persons concerned,—

(*a*) prohibit, either absolutely or subject to such exception as may be specified in the order, the purchase, sale or delivery of, or other dealing in, any arms, parts of arms, ammunition or explosive substances; or

(*b*) direct that any person owning or having in his possession or under his control any arms, parts of arms, ammunition or explosive substances, shall keep the same in a secure place approved by the District Magistrate or remove them to any place specified in the order.

(2) The District Magistrate may take possession of—

(*a*) any arms, ammunition or explosives, or

(*b*) any tools, machinery, implements or other material of any kind, likely, in his opinion, to be utilized, whether by the owner or by any other person, for the purpose of causing unlawful hurt or damage to any person or to any property of Government or of any railway administration or of any local authority,

and may make such orders as he may think fit for the custody and disposal thereof.

Power to require the assistance of certain persons.

10. Any officer of Government authorised in this behalf by general or special order of the Local Government may, within any area specified in such order, require any landholder, village headman, lambardar, inamdar or jagirdar, or any officer or servant of any local authority, or any teacher in any school, college or other educational institution to assist in the restoration and maintenance of law and order and in the protection of property in the possession or under the control of Government or of any railway administration or local authority in such manner and within such limits as the officer so authorised may specify.

Power to control posts and telegraphs.

11. The District Magistrate, if, in his opinion, it is necessary for the public advantage may, in consultation with the chief postal authority in the district, control the operation of any post, telegraph, telephone or wireless office or station, and, in particular, may intercept any postal article or telegraphic, telephonic or wireless message in the course of transmission, may, ascertain its contents and may prohibit its further transmission.

Power to regulate the use of railways and vessels.

12. The District Magistrate may—

(*a*) require accommodation to be provided on any railway train or any vessel for any passengers or goods, and, for this purpose, exclude from such train or vessel any passengers or goods which it is already carrying or about to carry;

(*b*) require that any specified persons or classes of persons or persons proposing to travel to specified destinations, or any specified goods or classes of goods or goods consigned to specified destinations, shall not be carried on any railway or vessel;

(*c*) exclude or eject any passenger from any train or vessel;

(*d*) stop, or prohibit the stopping of trains or vessels at any station; or

(*e*) in consultation with the local railway authorities require special trains to be provided for the conveyance of troops, police or other persons.

13. The District Magistrate may, by order in writing, depute one or more police officers not below the rank of head constable, or other persons, to attend any public meeting for the purpose of causing a report to be made of the proceedings, and may, by such order, authorise the persons so deputed to take with them an escort of police officers.

Power to secure reports of public meetings.

Explanation—For the purposes of this section a public meeting is any meeting which is open to the public or to any class or portion of the public, and a meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto is restricted by ticket or otherwise.

14. The power to issue search-warrants conferred by Section 98 of the Code shall be deemed to include a power to issue warrants authorising—

Power to issue search-warrants.

(*a*) the search of any place in which any Magistrate mentioned in that section has reason to believe that any offence under this Ordinance or any act prejudicial to the public safety or peace has been, is being or is about to be committed, or that preparation for the commission of any such offence or act is being made;

(*b*) the seizure in or on any place searched under Clause (*a*) of anything which the officer executing the warrant has reason to believe is being used, or is intended to be used, for any purpose mentioned in that clause;

and the provisions of the Code shall, so far as may be, apply to searches made under the authority of any warrant issued, and to the disposal of any property seized, under this section.

15. Any authority on which any power is conferred by or under this Chapter may, by general or special order authorise any person to enter and search any place the search of which such authority has reason to believe to be necessary for the purpose of—

General power of search.

(*a*) ascertaining whether it is necessary or expedient to exercise such power; or

(*b*) ascertaining whether any order given, direction made, or condition prescribed in the exercise of such power has been duly complied with; or

(*c*) generally, giving effect to such power or securing compliance with, or giving effect to, any order given, direction made, or condition prescribed in the exercise of such power.

16. If any person disobeys or neglects to comply with an order made, direction given, or condition prescribed in accordance with the provisions of this Chapter, the authority which made the order, gave the direction or prescribed the condition may take

Power to give effect to orders if disobeyed.

or cause to be taken such action as it thinks necessary to give effect thereto.

Penalty for disobeying order under section 4.

17. Whoever disobeys or neglects to comply with any order made or direction given in accordance with the provisions of Section 4 shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Penalty for disobeying other orders under this Chapter.

18. Subject to the provisions of Section 17, whoever disobeys, or neglects to comply with any order made, direction given, or condition prescribed in accordance with the provisions of this Chapter or impedes the lawful exercise of any power referred to in this Chapter, shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

Claims for compensation.

19. (*1*) Any person who has suffered any direct loss or damage by reason of action taken under Section 5 or Sub-section (2) of Section 9 may, within two months from the date on which the action was taken, lodge a claim for compensation with the Local Government, or with such officer as the Local Government may appoint in this behalf.

(2) No claim for compensation may be lodged for loss or damage caused in any case where action has been taken under Section 16.

(3) Any claim lodged under Sub-section (1) may be investigated by such officer as the Local Government may appoint in this behalf, and any amount which may be agreed upon, between the Local Government and the claimant shall be paid to him. If the amount is not agreed upon, the claim shall be decided by an Arbitration Tribunal, in the manner hereinafter provided.

Constitution for Arbitration Tribunals.

20. (*1*) The Local Government may constitute an Arbitration Tribunal for the trial of any particular claim or claims, or of claims of a specified kind or of claims arising within specified area for which provision is not otherwise made.

(2) An Arbitration Tribunal shall consist of three persons, who are—

(*a*) Commissioners; or

(*b*) persons who have presided in a Civil Court of any grade for not less than five years; or

(*c*) persons who are qualified under Sub-section (3) of Section 101 of the Government of India Act for appointment as Judges of a High Court; or

(*d*) persons who have exercised the powers of a Magistrate of the first class for not less than five years; or

(*e*) persons having special knowledge of matters such as those which may be in dispute.

(3) The Local Government shall appoint one of the members to be President of the Tribunal.

(4) If for any reason any member of an Arbitration Tribunal is unable to discharge his duties, the Local Government shall appoint another member in his place, and on any such change occurring it shall not be incumbent on the Tribunal to re-call or re-hear any witness who has already given evidence in regard to any claim before it, and the Tribunal may act on any evidence already recorded by or produced before it.

Procedure of Arbitration Tribunals.

21. (1) Arbitration Tribunals may take evidence on oath (which such Tribunals are hereby empowered to administer) and shall have such powers to enforce the attendance of witnesses and the production of evidence as a Civil Court has under the Code of Civil Procedure, 1908. V of 1908

(2) In the event of any difference of opinion among the members of an Arbitration Tribunal, the opinion of the majority shall prevail.

(3) Subject to any rules which the Local Government may make in this behalf, the President of an Arbitration Tribunal may make orders consistent with this Chapter to provide for the place and conduct of a trial and all other ancillary matters which he may think necessary for carrying into effect the provisions of this Chapter.

Delegation of powers.

22. (1) The Local Government may invest the District Magistrate with powers of the Local Government under Sub-section (1) of Section 4, and may invest the District Magistrate or any Sub-divisional Magistrate, or any police officer not below the rank of Deputy Superintendent, with any of the powers of the Local Government under Section 5.

(2) The Local Government may invest any Sub-divisional Magistrate, or any police officer not below the rank of Deputy Superintendent, with any of the powers of a District Magistrate under this Chapter.

(3) The District Magistrate may, by order in writing, authorise any officer to exercise any of the powers of the District Magistrate under this Chapter in a specified area or in connexion with a specified emergency.

Reserve power to Governor-General in Council.

23. The Governor-General in Council may exercise any of the powers of a local Government under this Chapter.

CHAPTER III

OFFENCES AND PENALTIES

Tampering with public servants.

24. Whoever induces or attempts to induce any public servant or any servant of a local authority or any railway servant to disregard or fail in his duty as such servant shall be punish-

able with imprisonment which may extend to one year, or with fine, or with both.

Dissuation from enlistment.

25. Whoever dissuades or attempts to dissuade any person from entering the military or police service of His Majesty shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

Dissemination of false rumours.

26. Whoever by words, whether spoken or written, or by signs or by visible or audible representations or otherwise publishes any statement, rumour or report which is false and which he has no reasonable ground to believe to be true, with intent to cause or which is likely to cause fear or alarm to the public or to any section of the public, or hatred or contempt towards any public servant, or any class of His Majesty's subjects, shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

Imposition of collective fine on inhabitants of turbulent areas.

27. (*1*) Where it appears to the Local Government that the inhabitants of any area are concerned in the commission of such offences or acts, the Local Government may, by notification in the local official Gazette, impose a collective fine on the inhabitants of that area.

(*2*) The Local Government may exempt any person or class or section of such inhabitants from liability to pay any portion of such fine.

(*3*) The District Magistrate, after such inquiry as he may deem necessary, shall apportion such fine among the inhabitants who are liable collectively to pay it, and such apportionment shall be made according to the District Magistrate's judgment of the respective means of such inhabitants.

(*4*) The portion of such fine payable by any person may be recovered from him as a fine or as arrears of land revenue.

(*5*) The Local Government may award compensation out of the proceeds of a fine realised under this section to any preson who, in the opinion of the Local Government, has suffered injury to person or property by the unlawful acts of the inhabitants of the area.

Explanation.—For the purposes of this section, the "inhabitants" of an area includes persons who themselves or by their agents or servants occupy or hold land or other immovable property within such area, and landlords who themselves or by their agents or servants collect rents from holders or occupiers of land in such area, notwithstanding that they do not actually reside therein.

Dissemination of contents of proscribed documents.

28. Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any other law for the time being in force, shall be punishable with im-

prisonment which may extend to six months, or with fine, or with both.

29. (*1*) Where any young person under the age of sixteen years is convicted by any Court of an offence under this Ordinance or of an offence which in the opinion of the Court has been committed in furtherance of a movement prejudicial to the public safety or peace, and such young person is sentenced to fine, the Court may order that the fine shall be paid by the parent or guardian of such young person as if it had been a fine imposed upon the parent or guardian:

Power to direct payment by parent or guardian of fine imposed on a young person.

Provided that no such order shall be made unless the parent or guardian has had an opportunity to appear before the Court and be heard.

(*2*) In any such case the Court may direct by its order that in default of payment of the fine by the parent or guardian, the parent or guardian shall suffer imprisonment as if the parent or guardian had himself been convicted of the offence for which the young person is convicted.

CHAPTER IV

SPECIAL CRIMINAL COURTS

30. Courts of criminal jurisdiction may be constituted under this Ordinance of the following classes, namely:—

Special Courts.

(*i*) Special Judges;
(*ii*) Special Magistrates;
(*iii*) Summary Courts.

31. The Local Government may appoint to be a Special Judge for such area as it may think fit any officer who has acted for a period of not less than two years in the exercise of the powers of a Sessions Judge under the Code.

Special Judges.

32. Subject to the provisions of Section 48, a Special Judge shall try such offences as the Local Government, or an officer empowered by the Local Government in this behalf, may, by general or special order in writing, direct.

Jurisdiction of Special Judges.

33. (*1*) A Special Judge may take cognizance of offences without the accused being committed to his Court for trial, and, in trying accused persons, shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates:

Procedure of Special Judges.

Provided that a Special Judge may make a memorandum only of the substance of the evidence of each witness examined, and shall not be bound to adjourn any trial for any purpose unless such adjournment is, in his opinion, necessary in the interests of justice.

(*2*) In matters not coming within the scope of Subsection (1), the provisions of the Code, so far as they are not inconsistent with this Ordinance, shall apply to the proceedings of a Special Judge; and for the purposes of the said provisions, the Court, of the Special Judge shall be deemed to be a Court of Session.

Sentences by Special Judges.

34. A Special Judge may pass any sentence authorised by law.

Appeals and confirmation.

35. (*1*) An appeal shall lie in the case of any sentence passed by a Special Judge of death or of transportation or imprisonment for a term of two years or more, and the provisions of the Code and of the Indian Limitation Act, 1908, shall apply in respect of such appeal as if it were an appeal under the Code from a sentence passed by a Court of Session exercising jurisdiction in the area in which the offence was committed.

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(2) A sentence of death passed by a Special Judge shall be subject to confirmation in the manner provided in the Code for the confirmation of a sentence of death passed by a Court of Session.

Special Magistrates.

36. Any Presidency Magistrate or Magistrate of the first class who has exercised powers as such for a period of not less than two years may be invested by the Local Government with the powers of a Special Magistrate under this Ordinance.

Jurisdiction of Special Magistrates.

37. Subject to the provisions of Section 48, a Special Magistrate shall try such offences, other than offences punishable with death, as the Local Government or an officer empowered by the Local Government in this behalf may, by general or special order in writing, direct.

Procedure of Special Magistrates.

38. (*1*) In the trial of any case, a Special Magistrate shall follow the procedure laid down in Subsection (1) of Section 33 for the trial of cases by a Special Judge.

(2) In matters not coming within the scope of Subsection (1), the provisions of the Code, so far as they are not inconsistent with this Ordinance, shall apply to the proceedings of a Special Magistrate; and for the purposes of the said provision the Special Magistrate shall be deemed to be a Magistrate of the first class.

Sentences by Special Magistrates.

39. A Special Magistrate may pass any sentence authorised by law, except a sentence of death or of transportation or imprisonment exceeding seven years.

Appeals.

40. (*1*) Where a Special Magistrate passes a sentence of transportation or imprisonment for a term exceeding one year, or of fine exceeding one thousand rupees, an appeal shall lie, where the case was tried in a Presidency-town to the High Court, and where the case was tried outside the Presidency-town to the Court

of Session, unless the Special Magistrate passes a sentence of transportation exceeding one year or a sentence of imprisonment exceeding four years, in which case the appeal shall lie to the High Court.

(2) An appeal under Sub-section (1) shall be presented within seven days from the date of the sentence.

Distribution of cases.

41. If any question arises whether, under any order made under Section 32 or Section 37, an offence is triable by a Special Judge or a Special Magistrate, the question shall be referred for decision to the Local Government, and its decision shall be final.

Summary Courts.

42. The Local Government may, by general or special order in writing, empower any Magistrate appointed under the provisions of the Code to exercise the powers of a Summary Court in any area specified in the order.

Jurisdiction of Summary Courts.

43. (*1*) Subject to the provisions of Section 48, a Summary Court shall have power to try such offences as the District Magistrate may, by general or special order, direct:

Provided that no person shall be tried by a Summary Court for an offence not specified in Sub-section (1) of Section 260 of the Code which is punishable with imprisonment for a term exceeding two years.

(2) The District Magistrate may, by general or special order, give directions as to the distribution among the Summary Courts in his district of cases triable by them under Sub-section (1).

Procedure of Summary Courts.

44. In the trial of any case a Summary Court shall, as far as possible, follow the procedure laid down in the Code for the trial of warrant cases, and shall have all the powers conferred by the Code on a Magistrate:

Provided that the Court shall not be required to record more than a memorandum of the evidence or to frame a formal charge:

Provided further that, in the trial of any offence punishable with imprisonment for a term not exceeding one year, the Court may follow the procedure for the summary trial of cases in which an appeal lies laid down in Chapter XXII of the Code.

Sentences by Summary Courts.

45. Summary Courts may pass any sentence which may be passed by a Magistrate of the first class.

Appeals.

46. (*1*) If a Summary Court in a case tried according to the procedure for the trial of warrant cases passes a sentence of imprisonment for a term exceeding three months or a fine exceeding two hundred rupees, or in a case tried by summary procedure passes a sentence of imprisonment for a term exceeding one month or a fine exceeding fifty rupees, an appeal shall lie to the Special Judge appointed for the area in which the offence was committed, or, if no Special Judge has been so appointed, to the High

Court or to the Court of Sessions according as the offence was tried in a Presidency-town or was tried outside the Presidency-towns.

(*2*) An appeal under Sub-section (1) shall be presented within seven days from the date of the sentence.

(*3*) In disposing of an appeal under this section, a Special Judge shall follow the same procedure and have the same powers as an Appellate Court follows and has under the Code.

Procedure when Summary Court considers case triable by another Court.

47. (*1*) If a Summary Court is of opinion that the offence disclosed is one which it is not empowered to try, it shall send the case for trial to the Special Judge or Special Magistrate empowered to try the case under this Ordinance or, if no such Court has been so empowered, to an ordinary criminal court having jurisdiction.

(*2*) If a Summary Court is of opinion that an offence which it is empowered to try should be tried by a Court of superior jurisdiction, or that it requires a punishment in excess of that which the Summary Court is empowered to inflict, it shall stay proceedings and report the case to the District Magistrate who may—

(*a*) direct that the case shall be tried by a Summary Court, or

(*b*) send it to a Court constituted under this Ordinance having jurisdiction, or to an ordinary criminal court having jurisdiction, or

(*c*) report it for the orders of the Local Government.

Limitation of Jurisdiction of Special Courts.

48. (*1*) No Court constituted under this Ordinance shall try any offence unless it is an offence punishable under this Ordinance or was committed in furtherance of a movement prejudicial to the public safety or peace.

(*2*) The question whether or not an offence tried by a Court constituted under this Ordinance is of the nature described in Sub-section (1) shall not be raised in any Court other than the Court trying the offence, and where such question is so raised then, if the Court is that of a Special Judge, the question shall be referred to the Local Government, and if the Court is that of a Special Magistrate or is a Summary Court the question shall be referred to the District Magistrate, and the decision of the Local Government or District Magistrate shall be final.

Powers of Special Courts to deal with refractory accused.

49. (*1*) Where any accused, in a trial before a Court constituted under this Ordinance has, by his voluntary act, rendered himself incapable of appearing before the Court, or resists his production before it, or behaves before it in a persistently disorderly manner, the Court may, at any stage of the trial, by order in writing made after such inquiry as it may think fit, dispense with the attendance of such accused for such period as it may think fit, and proceed with the trial in his absence.

(*2*) Where a plea is required in answer to a charge from an accused whose attendance has been dispensed with under Sub-section (1) such accused shall be deemed not to plead guilty.

(3) An order under Sub-section (1) dispensing with the attendance of an accused shall not affect his right of being represented by a pleader at any stage of the trial, or of being present in person if he has become capable of appearing, or appears in Court and undertakes to behave in an orderly manner.

(4) Notwithstanding anything contained in the Code, no finding, sentence or order passed in a trial before a Court constituted under this Ordinance shall be held to be illegal by reason of any omission or irregularity whatsoever arising from the absence of any or all of the accused whose attendance has been dispensed with under Sub-section (1).

Special rule of evidence.

50. Notwithstanding anything contained in the Indian Evidence Act, 1872, when the statement of any person has been recorded by any Magistrate, such statement may be admitted in evidence in any trial before a Court constituted under this Ordinance if such person is dead or cannot be found or is incapable of giving evidence, and the Court is of opinion that such death, disappearance or incapacity has been caused in the interests of the accused.

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Legal practitioners.

51. A Court constituted under this Ordinance shall not be required to grant an adjournment for the purpose of securing the attendance of a legal practitioner if, in the opinion of the Court, such adjournment would cause unreasonable delay in the disposal of the case.

Exclusion of interference of other Courts.

52. Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided by this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance and, save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under Section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court.

Application of ordinary law.

53. The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special criminal courts constituted under this Ordinance.

CHAPTER V

SPECIAL PROVISIONS AGAINST INSTIGATION TO THE ILLEGAL REFUSAL OF THE PAYMENT OF CERTAIN LIABILITIES.

Power to declare notified areas and notified liabilities.

54. (*1*) The Local Government may, by notification in the local official Gazette, declare that any part of the province or the whole province shall be a notified area for the purposes of this Chapter.

(*2*) Such Local Government may further, by the same or by subsequent notification, declare that in such notified area land revenue or any sum recoverable as arrears of land revenue, or any tax, rate, cess or other due or amount payable to Government or to any local authority, or rent of agricultural land, or anything recoverable as arrears of or along with such rent, shall be a notified liability.

Punishment for unlawful instigation to the non-payment of notified liability.

55. Whoever, by words either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any notified liability.

and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever.

shall be punishable with imprisonment which may extend to six months, or with fine or with both.

Special rule of procedure.

56. No Court shall take cognizance of any offence punishable under this Chapter except upon a report in writing of facts which constitute such offence made by a police officer not below the rank of sub-inspector.

Power to collect an arrear of a notified liability as an arrear of land revenue.

57. (*1*) Any person to whom an arrear of a notified liability is due may apply in writing to the Collector to realise it, and the Collector may, after satisfying himself that the amount claimed is due, proceed to recover it as an arrear of land revenue in accordance with the law applicable to the recovery of arrears of land revenue in the area concerned.

(*2*) Nothing in this section shall prevent any person to whom an arrear of a notified liability is due from recovering it in accordance with the law applicable to the recovery of such arrear.

(*3*) Any person from whom an amount has been recovered under this section in excess of the amount due from him may recover such excess in accordance with law from the person on whose behalf the Collector has realised it.

CHAPTER VI

SPECIAL PROVISIONS AGAINST ASSOCIATIONS DANGEROUS TO THE PUBLIC PEACE.

58. In this Chapter, unless there is anything repugnant in the subject or context,—

Definitions.

(*a*) "notified place" means a place notified under Sub-section (1) of Section 59;

(*b*) "place" includes also a house, building tent and vessel; and

(*c*) "unlawful association" means an unlawful association within the meaning of Section 15 of the Indian Criminal Law Amendment Act, 1908, and includes an association which has been declared to be unlawful by the Governor-General in Council under the powers conferred by Section 64.

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59. (*1*) The Local Government may, by notification in the local official Gazette, notify any place which in its opinion is used for the purposes of an unlawful association.

Power to notify and take possession of places used for the purposes of an unlawful association.

(2) The District Magistrate, or any officer authorised in this behalf in writing by the District Magistrate, may thereupon take possession of the notified place and evict therefrom any person found therein, and shall forthwith make a report of the taking of possession to the Local Government.

(3) A notified place whereof possession is taken under Sub-section (2) shall be deemed to remain in the possession of Government so long as the notification under Sub-section (1) in respect thereof remains in force.

60. (*1*) The District Magistrate or officer taking possession of a notified place shall also take possession of all movable property found therein, and shall make a list thereof and submit it, with a report of the taking of possession of such movable property, to the Local Government.

Movable property found in a notified place.

(2) If, in the opinion of the Local Government, any articles specified in the list are or may be used for the purposes of the unlawful association, the Local Government may, by order in writing declare such articles to be forfeited to His Majesty, and may give such directions for the disposal thereof as it may think fit.

(3) Any articles specified in the list which are not so forfeited may be delivered by the District Magistrate to any person whom he considers to be entitled to possession thereof, or may be tained in the possession of Government and used in such manner the District Magistrate may direct.

Any person who enters or remains upon a notified place without the permission of the District Magistrate, or of an officer authorised by him in this behalf, shall be deemed to com-

upon . notified

mit criminal trespass, and, notwithstanding anything contained in the Code, any such offence of criminal trespass shall be cognizable and non-bailable.

The relinquishment of property.

62. Before this Ordinance ceases to have effect, or before a notification under Sub-section (1) of Section 59 is cancelled, the Local Government shall give such general or special directions as it may deem requisite regulating the relinquishment by Government of possession of notified places and of movable property found thereon whereof possession has been retained under Sub-section (3) of Section 60.

Power to forfeit funds of an unlawful association.

63. (*1*) Where the Local Government is satisfied, after such inquiry as it may think fit that any monies, securities or credits are being used or are intended to be used for the purposes of an unlawful association, the Local Government may, by order in writing, declare such monies, securities or credits to be forfeited to His Majesty.

(*2*) A copy of an order under Sub-section (1) may be served on the person having custody of the monies, securities or credits, and on the service of such copy such person shall pay or deliver the monies, securities or credits to the order of the Local Government:

Provided that, in the case of monies or securities, a copy of the order may be endorsed for execution to such officer as the Local Government may select, and such officer shall have power to enter upon and search for such monies and securities in any premises where they may reasonably be suspected to be, and to seize the same.

(*3*) Where the Local Government has reason to believe that any person has custody of any monies, securities or credits which are being used or are intended to be used for the purposes of an unlawful association, the Local Government may by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing in any manner whatsoever with the same, save in accordance with the written orders of the Local Government. A copy of such order shall be served upon the person to whom it is directed.

(*4*) The Local Government may endorse a copy of an order under Sub-section (3) for investigation to any officer it may select, and such copy shall be warrant whereunder such officer may enter upon any premises of the person to whom the order is directed, examine the books of such person, search for monies and securitie and make inquiries from such person, or any officer, agent or serv of such person, touching the origin of and dealings in any mo securities or credits which the investigating officer may suspe being used or are intended to be used for the purposes of lawful association.

(5) A copy of an order under this section may be served in the manner provided in the Code for the service of a summons, or, where the person to be served is a corporation, company, bank or association of persons, it may be served on any secretary, director or other officer or person concerned with the management thereof, or by leaving it or sending it by post addressed to the corporation, company, bank or association at its registered office, or where there is no registered office, at the place where it carries on business.

(6) Where an order of forfeiture is made under Sub-section (1) in respect of any monies, securities or credits in respect of which a prohibitory order has been made under Sub-section (3), such order of forfeiture shall have effect from the date of the prohibitory order, and the person to whom the prohibitory order was directed shall pay or deliver the whole of the monies, securities, or credits forfeited, to the order of the Local Government.

(7) Where any person liable under this section to pay or deliver any monies, securities, or credits to the order of the Local Government refuses or fails to comply with any direction of the Local Government in this behalf, the Local Government may recover from such person, as arrears of land revenue or as a fine, the amount of such monies or credits or the market value of such securities.

(8) In this section, "security" means a document whereby any person acknowledges that he is under a legal liability to pay money, or whereunder any person obtains a legal right to the payment of money; and the market value of any security means the value as fixed by any officer or person deputed by the Local Government in this behalf.

Power of Governor-General in Council to declare associations to be unlawful.

64. (1) If the Governor-General in Council is of opinion that any association interferes with the administration of law and order, or that it constitutes a danger to the public peace, he may, by notification in the *Gazette of India*, declare such association to be unlawful.

(2) An association in respect of which such declaration has been made shall be an unlawful association for the purposes of the Indian Criminal Law Amendment Act, 1908, throughout the whole of British India. XIV of 1908

Effect of reports and declarations.

65. Every report of the taking possession of property and declaration of forfeiture made or purporting to be made under this Chapter, shall, as against all persons, be conclusive proof that the property specified therein has been taken possession of by Government or has been forfeited, as the case may be.

CHAPTER VII

SPECIAL PROVISIONS AGAINST CERTAIN FORMS OF INTIMIDATION

Definition of "molestation."

66. For the purposes of this Chapter, a person is said to molest another person who,—

(*a*) with a view to cause such other person to abstain from doing or to do any act which such other person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such other person or anyone in whom such person is interested, or loiters at or near a house where such person or anyone in whom such person is interested resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof, or

(*b*) loiters at or near the place where such other person carries on business, in such a way or with intent that any person may thereby be deterred from entering or approaching or dealing at such place, or does any other act at or near such place which may have a like effect.

Punishment for molestation.

67. Whoever molests or abets the molestation of any person shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

Special rule of procedure.

68. No Court shall take cognizance of any offence punishable under Section 67 except upon a report in writing of facts which constitute such offence made by a police officer.

Definition of "boycotting."

69. For the purposes of this Chapter,—

(*a*) a person is said to "boycott" another person who refuses to deal or do business with, or to supply goods to, or to let a house or land to, or to render any customary service to such person or any person in whom such person is interested, or refuses to do so on the terms on which such things would be done in the ordinary course, or abstains from such professional or business relations as he would ordinarily maintain with such person; and

Definition of "public servant".

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(*b*) a "public servant" includes a public servant as defined in Section 21 of the Indian Penal Code, and a servant of a local authority, and a person belonging to any class of persons which the Local Government may, by notification in the local official Gazette, declare to be public servants for the purposes of this Chapter.

Punishment for boycotting of a public servant.

70. Whoever boycotts or abets the boycotting of a public servant, or threatens a public servant with boycotting, shall be punishable with imprisonment which may extend to six months, or with fine, or with both:

Provided that no person shall be convicted under this section if the Court is satisfied that his acts were not intended to prejudice the public servant boycotted, or proposed or threatened to be boycotted, in the discharge of the duties of his office or to cause such public servant to terminate or withhold his services in the discharge of such duties, or to commit a breach of discipline.

Special rules of procedure.

71. (*1*) An offence punishable under Section 70 shall be non-cognizable and bailable, and notwithstanding anything contained in the Second Schedule to the Code, a case relating to such an offence, shall, for the purposes of Section 204 of the Code, be deemed to be one in which a warrant should issue in the first instance.

(*2*) Where information is given to the officer in charge of a police station of the commission within the limits of such station of an offence punishable under Section 70, he shall deal with it in the manner provided in Section 154 of the Code, and he shall investigate the case as if he had received an order to that effect from a competent Magistrate.

Punishment for participating in a mock funeral ceremony.

72. Whoever with intent to annoy any person, or with the knowledge that annoyance is likely to be caused to any person, performs or takes part in or abets the performance of any mock ceremony resembling any ceremony associated with or consequent upon death shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

Jurisdiction.

73. No Court other than a Court of a Presidency Magistrate or Magistrate of the first class or of a Special Judge or Special Magistrate constituted under this Ordinance shall take cognizance of or try any offence under this Chapter.

CHAPTER VIII

SUPPLEMENTAL

Offences under the Ordinance to be cognizable and non-bailable.

74. Notwithstanding anything contained in the Code, any offence punishable under this Ordinance shall, save as otherwise specially provided in this Ordinance, be cognizable and non-bailable.

All offences under Act XIV of 1908 to be cognizable and non-bailable.

75. Notwithstanding anything contained in the Code, all offences punishable under Sub-section (1) of Section 17 of the Indian Criminal Law Amendment Act, 1908, shall be cognizable and non-bailable.

XIV of 1908

Certain other offences to be cognizable and non-bailable.

76. (*1*) The Local Government may, by notification in the local official Gazette, declare that any offence punishable under Sections 160, 186, 187, 188, 189, 190, 227, 228, 295A, 298, 506, 507 or 508 of the Indian Penal Code, when committed in rea specified in the notification, shall, notwithstanding any-contained in the Code, be cognizable and non-bailable, and pon the Code shall while such notification remains in force,

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be deemed to be amended accordingly.

(2) Notwithstanding anything contained in Section 195 or Section 196 of the Code, in any area in which a notification under Sub-section (1) in respect of Section 186, 187, 188, 228, 295A or 505 of the Indian Penal Code is in force, any Court otherwise competent to take cognizance of such offence may take cognizance of such offence upon a report in writing of facts constituting such offence made by any police officer, but shall not proceed with the trial unless it has received a complaint in respect of such offence under Section 195 or Section 196 as the case may be, and the absence of such complaint shall be reasonable cause, within the meaning of Section 344 of the Code, for postponing the commencement of the trial and for remanding the accused.

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Temporary amendment of section 4, Act XXIII of 1931.

XXIII of 1931

77. So long as this Ordinance remains in force in Sub-section (1) of Section 4 of the Indian Press (Emergency Powers) Act, 1931 after Clause (*b*), the following words and clauses shall be deemed to be inserted, namely:—

"or which tend, directly or indirectly,—

(*c*) to seduce any officer, soldier, sailor or airman in the military, naval or air forces of His Majesty or any police officer from his allegiance or his duty, or

(*d*) to bring into hatred or contempt His Majesty or the Government established by law in British India or

the administration of justice in British India or any Indian Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief, or

(*e*) to put any person in fear or to cause annoyance to him and thereby induce him to deliver to any person any property or valuable security, or to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, or

(*f*) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence, or to refuse or defer payment of any land revenue, tax, rate, cess or other due or amount payable to Government or to any local authority, or any rent of agricultural land or anything recoverable as arrears of or along with such rent, or

(*g*) to induce a public servant or a servant of a local authority to do any act or to forbear or delay to do any connected with the exercise of his public fun or to resign his office, or

(*h*) to promote feelings of enmity or hatred between rent classes of His Majesty's subjects, or

(*i*) to prejudice the recruiting of persons to serve in any of His Majesty's forces, or in any police force, or to prejudice the training, discipline or administration of any such force,"

and the provisions of that Act shall apply accordingly.

Jurisdiction barred.

78. Except as provided in this Ordinance, no proceeding or order purporting to be taken or made under this Ordinance shall be called in question by any Court, and no civil or criminal proceeding shall be instituted against any person for anything done or in good faith intended to be done under this Ordinance or against any person for any loss or damage caused to or in respect of any property whereof possession has been taken under this Ordinance.

Operation of other penal laws not barred.

79. Nothing contained in this Ordinance shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence punishable under this Ordinance.

Savings in respect of certain Ordinances.

II of 1932
III of 1932
IV of 1932
V of 1932

80. (*1*) Anything done in pursuance of any provision of the Emergency Powers Ordinance, 1932, the Unlawful Instigation Ordinance, 1932, the Unlawful Association Ordinance, 1932, or the Prevention of Molestation and Boycotting Ordinance, 1932, shall, where the corresponding provision of this Ordinance has come into force before July 4, 1932, be deemed on the expiry of the said Ordinances to have been done in pursuance of the corresponding provision of this Ordinance, and shall have effect, and the provisions of this Ordinance shall have effect, accordingly.

(*2*) Without prejudice to the generality of the foregoing provision it is hereby expressly provided that—

(*a*) this Ordinance shall operate to confer a right of appeal in all cases where an appeal would have lain under any provision of any of the Ordinances specified in Sub-section (1), and every appeal pending at the time of the expiry of the said Ordinances, and subject to the provisions of this Ordinance relating to the presentation of appeals, every appeal made in pursuance of this Sub-section shall be heard and decided in accordance with the provisions of this Ordinance;

this Ordinance shall operate to confer a power to prosecute any person for any offence committed against any provision of any of the Ordinances specified in Sub-section (1) and such offence shall be deemed to be an offence committed against the corresponding provision of this Ordinance;

(*c*) this Ordinance shall operate to confer a power to continue and complete any trial or proceeding under any provision of any of the Ordinances specified in Subsection (1) which was pending at the time of the expiry of the said Ordinances as if such trial or proceeding were a trial or proceeding begun under the corresponding provision of this Ordinance.

U. P. DISTRICT BOARDS (SECOND AMENDMENT) ACT

(No. X OF 1932)*

[Received the assent of the Governor-General on Sep. 2, 1932]
[PASSED BY THE LOCAL LEGISLATURE OF THE UNITED PROVINCES OF AGRA AND OUDH]

An Act to amend the United Provinces District Boards Act, 1922, in order to remove certain doubts and difficulties which have arisen in the operation of the Act.

THE UNITED PROVINCES DISTRICT BOARDS (SECOND AMENDMENT) ACT, 1922

WHEREAS it is expedient to amend the United Provinces District Boards Act, 1922, in order to remove certain doubts and difficulties which have arisen in the operation of the Act: It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the United Provinces District Boards (Second Amendment) Act, 1932.

(2) It shall come into force on such date as the Local Government may by notification in the gazette appoint in this behalf.

Definition.

2. In this Act the expression "the principal Act" shall mean the United Provinces District Boards Act, 1922.

Amendment of Section 6 of the principal Act.

3. In section 6 of the principal Act the words and figures "sub-section (2) of section 35 or sub-section (3) of section 35-B" shall be substituted for the words and figures "sub-section (3) of section 35."

Amendment of Section 33 of the principal Act.

4. In section 33 of the principal Act after the words "member of the board" the words "or of the education committee" shall be inserted and the following sentence shall be added at the end of the section, namely, "A grant-in-aid given to a school in contravention of rules made under this Act is for the purposes of this section a misapplication of money belonging to the board".

Amendment of Sub-section (1) of Section 34 of the principal Act.

5. In sub-section (1) of section 34 of the principal Act after the words "member of the board" the words "or of the education committee" shall be inserted.

Amendment of Sub-sections (5) and (6) of Section 35-A of the principal Act.

6. In sub-sections (5) and (6) of section 35-A of the principal Act, the words and figures "sub-section (4)" and "Sub-section (5)" shall be substituted for the words and figures "sub-section (5)" and "sub-section (6)" respectively.

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*Published in the Government Gazette, dated Allahabad, September 10, 1932

7. For sub-section (2) of section 37 of the principal Act the following sub-section shall be substituted:—

Amendment of Sub-section (2) of Section 37 of the principal Act.

"(2) The term of office of a chairman, who at the date of his election or nomination is not a member of the board, shall expire on the same date as that of members of the board".

8. For sub-sections (2), (3) and (4) of section 63-A of the principal Act the following sub-sections shall be substituted:—

Amendment of Sub-sections (2), (3) and (4) of Section 63-A of the principal Act.

"(2) The board shall appoint an education committee which shall consist of twelve members. Of these, eight shall be members and four shall not be members of the board. Of those who are not members of the board not exceeding two may be Government servants in the Education department other than members of the inspecting staff of that department.

(3) A newly elected board shall, within fifteen days of the appointment or election of its chairman, meet under his chairmanship to elect, in accordance with sub-sections (2) and (5) of this section, members of the education committee from amongst its own members and to appoint to be members of the education committee the persons who are not members of the board.

(4) The Local Government shall make rules for the appointment of persons to the education committee who are not members of the board. If, in the opinion of the Local Government any appointment for any vacancy on the committee has not been made in accordance with such rules, Government shall require the board to make a further appointment for that vacancy. If Government consider that such further appointment has not been made in accordance with the rules Government shall then appoint to the vacancy such person as they think fit."

9. In sub-section (6) of section 63-A of the principal Act for the words "the appointment of any person to be a member of the education committee has been made in accordance with the provisions of sub-section (4) or (5) of this section as the case may be" shall be substituted the words "the appointment of election, or nomination for election or appointment of any person to be a member of the education committee or the election of the chairman or vice-chairman of the education committee has been made in accordance with the provisions of this Act".

Amendment of Sub-section (6) of Section 63-A of the principal Act.

10. (1) Sub-section (9) of section 63-A of the principal Act shall be re-numbered as sub-section (9) (*a*).

Amendment of Sub-section (9) of Section 63-A of the principal Act.

(2) The following sub-clauses shall be added to sub-section (9) (*a*):—

"(*b*) The secretary of the education committee shall convene a meeting of the members of the committee within fifteen days of its constitution or a vacancy occurring in the office of chairman for the purpose of electing a chairman of the committee. The chairman of the board shall preside over this meeting and shall have a casting vote in the event of a tie. If within 30 days of the constitution of the education committee its chairman has not been elected, Government shall appoint a chairman from amongst the members of the committee:

Provided that no salaried officer of the Government shall be appointed as chairman of the education committee".

"(*c*) The education committee at its first meeting after the election of its chairman or at its first meeting after the United Provinces District Boards (Second Amendment) Act of 1932 comes into force shall elect a vice-chairman whose term of office shall be one year only. In the absence of the chairman the vice-chairman shall preside over the meetings of the committee. In the absence of both the chairman and the vice-chairman the members present shall elect a chairman of the meeting and he shall perform all the duties and exercise all the powers of the chairman of an education committee when presiding at that meeting. The education committee shall elect its vice-chairman annually. The vice-chairman of the education committee shall also exercise such powers and perform such duties as are delegated to him by the chairman of the education committee.

During a vacancy in the office of chairman of the education committee, or in the case of urgent necessity during the temporary absence or incapacity of the chairman of the education committee, the vice-chairman of the education committee shall perform any duty and exercise any power of the chairman of the education committee."

"(*d*) Notwithstanding any other provisions of this Act a chairman, vice-chairman or member of the education committee shall continue in office, unless he dies or is removed by Government or by the board or unless he resigns or unless the education committee is dissolved under Sub-section (20) of this section until his successor is duly elected or appointed."

"(*e*) A chairman or vice-chairman of the education committee may resign by submitting his resignation to the chairman of the board. A member of the education committee may resign by submitting his resignation to the chairman of the education committee."

"(*f*) If a member of the education committee dies or is removed or resigns, the board shall fill the vacancy by special resolution in the case of a member of the board. In the case of a member of the education committee who is not a member of the board, the board shall appoint a person to the vacant seat in accordance with the provisions of Section 63-A (3) and (4). If the vacant seat was held by a Muslim the vacancy shall be filled by the appointment of a Muslim: if it was held by a non-Muslim the vacancy shall be filled by the appointment of a non-Muslim."

Amendment of Sub-section (11) of Section 63-A of the principal Act.

11. For Sub-section (11) of Section 63-A of the principal Act shall be substituted the following:—

"(*a*) The deputy inspector of schools shall be the secretary of the education committee.

"(*b*) If an education committee at any time passes a resolution by a majority of the total number of members constituting the committee that the deputy inspector of schools be transferred from the district the department of education shall transfer him."

Amendment of Sub-section (13) of Section 63-A of the principal Act.

12. Sub-section (13) of Section 63-A of the principal Act shall be numbered (13) (*a*) and the following clause shall be added:—

"(*b*) If the chairman of the education committee is not a member of the board he shall be entitled to attend any meeting of the board and to address the board on any matter relating to educational questions in the district."

Addition of Sub-section (14) to Section 63-A of the principal Act.

13. To Section 63-A of the principal Act shall be added the following new Sub-section (14):—

"(14). The education committee shall meet for the transaction of business at least once in every month except in the districts of Naini Tal, Almora and Garhwal where the committee shall meet at least once in every quarter: ten days' notice shall be given for an ordinary meeting of the committee and four days for an emergent meeting."

Addition of Sub-section (15) to Section 63-A of the principal Act.

14. To Section 63-A of the principal Act shall be added the following new Sub-section (15):—

"(15) Government may remove from the education committee any member who is not a member of the board for any of the reasons justifying removal of a member from the board under Sub-section (1) of Section 31, the word "committee" being read for this purpose for the word "board" wherever it occurs in that sub-section."

Addition of Sub-section (16) to Section 63-A of the principal Act.

15. To Section 63-A of the principal Act shall be added the following new Sub-section (16):—

"(16) (*a*) The Local Government may remove from the board a member of the education committee or chairman of the education committee being a member of the board, who in the opinion of the Local Government has so flagrantly abused in any manner his position as a member of the committee or as chairman of the committee as to render his continuance as a member detrimental to the public interest and the Local Government may in like circumstances remove from the education committee a member or chairman of the education committee who is not a member of the board. A member or chairman of the committee removed from the board will thereupon cease to be a member or chairman of the committee."

"(*b*) The Local Government may also remove from his office a chairman of the education committee who in the opinion of the Local Government has habitually failed to perform his duty; provided that if he is a member of the board such removal will not involve his removal therefrom."

"(*c*) A member of the education committee or chairman of the education committee removed under this sub-section shall not be eligible for election or appointment to the education committee as member or chairman as the case may be, until after the next general election of the board."

Addition of Sub-section (17) to Section 63-A of the principal Act.

16. To Section 63-A of the principal Act shall be added the following new Sub-section (17):—

"(17) Provided that when the Local Government proposes to take action under Sub-section (15) or (16) of this section an opportunity of explanation shall be given to the member or chairman concerned and when such action is taken the reasons therefor shall be placed on record."

Addition of Sub-section (18) to Section 63-A of the principal Act.

17. To Section 63-A of the principal Act shall be added the following Sub-section (18):—

"(18) The provisions of Section 32 shall be applicable to a member or chairman of an education committee removed under Sub-section (15)."

Addition of Sub-section (19) to Section 63-A of the principal Act.

18. To Section 63-A of the principal Act shall be added the following new Sub-section (19):—

"(19) The board may, subject to the approval of Government, remove the chairman of the education committee or a member or members of the education committee from the committee by a special resolution supported by a majority of the total number of the members of the board. Save as provided by this sub-section the board shall not have power to remove a member of the education committee."

Amendment of Sub-section (20) to Section 63-A of the principal Act.

19. To Section 63-A of the principal Act shall be added the following new Sub-section (20):—

"(20) (*a*) If at any time it appears to the board that the education committee persists in making default in the performance of any duty or duties imposed on it by or under this or any other enactment, or in exceeding or abusing its powers, the board may, after calling for an explanation from the committee and considering any objection made by it to action being taken under this sub-section, dissolve the committee and proceed to appoint another. The resolution of the board by which the education committee is dissolved under this sub-section shall be a special resolution passed by a majority consisting of not less than two-thirds of the total number of members of the board for the time being. The resolution shall be subject to the approval of Government and shall not take effect until it is so approved.

(*b*) When an education committee is dissolved by an order under this sub-section—

(*i*) all members of the education committee shall on a date to be specified by Government vacate their offices as such members but without prejudice to their eligibility for election or nomination under clause (*ii*),

(*ii*) the election and appointment of members of the new education committee shall be made in accordance with Sub-section (3) of this section on a date to be fixed by Government,

(*iii*) the provisions of Sub-sections (4), (5), (9) (*b*) and (9) (*c*) shall apply as if the education committee were being constituted after a general election."

Amendment of Sub-section (2) of Section 65-A of the principal Act.

20. For Sub-section (2) of Section 65-A of the principal Act the following sub-section shall be substituted:—

"(*a*) The education committee shall have power to sanction all contracts for educational purposes up to a maximum of Rs.5,000 provided budget provision exists and provided further that contracts for new educational buildings or for special repairs to existing educational buildings shall be sanctioned by the board.

(*b*) The location, site, plans, specifications and estimates of new educational buildings shall be approved by the education committee before the sanction of the board is given to projects or contracts for such buildings."

Delegation of Sub-section (3) of Section 65-A of the principal Act.

21. Sub-section (3) of Section 65-A of the principal Act shall be deleted.

Amendment of Sub-section (4) of Section 65-A of the principal Act.

22. For Sub-section (3) of Section 65-A of the principal Act shall be substituted:—.

"(3) Contracts for educational purposes sanctioned by the education committee under Sub-section (2) (*a*) of the section shall be signed by the secretary of the education committee."

Addition to Sub-section (1) (*b*) of Section 68 of the principal Act.

23. In Sub-section (1) (*b*) of Section 68 of the principal Act the word and figures "or 82" shall be added after the word and figures "Section 41," the comma after these word and figures being placed after the word and figures "or 82."

24. In Sub-section (1) (*c*) of Section 68 of the principal Act the word and figures "or 82" shall be added after the word and figures "Section 74," the comma after these word and figures placed after the word and figures "or 82."

Addition to Sub-section (1) (*c*) of Section 68 of the principal Act.

25. To Sub-section 2 (*b*) of Section 161 of the principal Act shall be added the following clauses:—

Addition of clauses to Sub-section 2 (*b*) of Section 161 of the principal Act.

"(*iv*) any expenditure proposed in the budget, or

(*v*) the continuance in future years of any recurring expenditure proposed in the budget."

26. In Sub-section 1 (*a*) of Section 164 of the principal Act after the words "occupied by a board" the words "or education committee" shall be inserted.

Amendment of Sub-section 1 (*a*) of Section 164 of the principal Act.

27. In Sub-section (3) of Section 166 of the principal Act after the word "board" shall be inserted the words "or committee of the board, or a joint committee, or any officer or servant of a board or of a committee of a board or of a joint committee."

Amendment of Sub-section (3) of Section 166 of the principal Act.

28. In Sub-section (1) of Section 167 of the principal Act after the word "board" where it first occurs shall be inserted the words "or education committee or joint committee or other committee of the board."

Amendment of Sub-section (1) of Section 167 of the principal Act.

29. In Sub-section (1) of Section 168 of the principal Act after the word "board" shall be added the words "or education committee or joint committee or other committee of the board."

Amendment of Sub-section (1) of Section 168 of the principal Act.

30. (1) In Schedule I of the principal Act the following additional items shall be inserted in the first and second columns, namely:—

Additions to and amendments of Schedule I of the principal Act.

(*a*) after the item against Section 63:

"63-A (2) To appoint an education committee."

"63-A (5) To elect members of the board to be members of the education committee."

"63-A (12) To remit for reconsideration any resolution of the education committee."

(*b*) after the item against Section 65 (2) (*b*):

"65-A (2) (*a*) To sanction contracts for new educational buildings or for special repairs to existing educational buildings."

(2) The entry in the third column against Section 82 shall be deleted and for the entry in the second column the following words shall be substituted, namely:—

"To appoint and dismiss the engineer and the tax-officer of the board."

Addition to Schedule II of the principal Act.

31. In Schedule II of the principal Act the following additional item shall be inserted in the first and second columns before the item against section 86 (1), namely:—

"82. Power to appoint, grant leave of absence to, punish, dismiss, transfer and control servants of the board on a monthly salary of Rs.25 or less."

U. P. COURT-FEES (SECOND AMENDMENT) ACT, 1932

(No. VII of 1932)*

[Received the assent of the Governor-General on July 18, 1932]

[Passed by the Local Legislature of the United Provinces of Agra and Oudh.]

An Act to amend the United Provinces Court-Fees (Amendment) Act, 1932

THE UNITED PROVINCES COURT-FEES (SECOND AMENDMENT) ACT, 1932.

U. P. Act III of 1932

Whereas it is expedient to amend the United Provinces Court-Fees (Amendment) Act, 1932, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the United Provinces Court-Fees (Second Amendment) Act, 1932.

Amendment of clause (*x*) of Section 7 of U. P. Act III of 1932.

2. In Section 7, clause (*x*) of the United Provinces Court-Fees (Amendment) Act, 1932, the figure "21" shall be substituted for the figure "22."

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INDIAN EMIGRATION (AMENDMENT) ACT, 1932

(No. XVI of 1932)*

[Received the assent of the Governor-General on September 30, 1932]

An Act further to amend the Indian Emigration Act, 1922, for certain purposes.

VII of 1922

Whereas it is expedient further to amend the Indian Emigration Act, 1922, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Emigration (Amendment) Act, 1932.

Amendment of Section 24, Act VII of 1922.

VII of 1922

2. For clause (*b*) of Sub-section (2) of Section 24 of the Indian Emigration Act, 1922, (hereinafter referred to as the said Act), the following shall be substituted, namely:—

"(*b*) the licensing, supervision and control of persons in British India engaged in causing or assisting persons to emigrate and in the conveyance and accommodation of emigrants, and the prohibition of unlicensed persons from being so engaged."

3. In Section 25 of the said Act—

Amendment of Section 25, Act VII of 1922.

(*a*) in clause (*b*) of Sub-section (2), for the words "induces, or attempts to induce" the words "causes or assists or attempts to cause or assist" shall be substituted; and

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*Published in the Government Gazette, Dated Allahabad, October 1[illegible] 1932.

(*b*) Sub-section (3) shall be renumbered as Sub-section (4), and the following sub-section shall be inserted as Sub-section (3), namely:—

"(3) When in the course of any proceedings in connection with emigration in which a person licensed in accordance with rules framed under clause (*b*) of Sub-section (2) of Section 24 is concerned, a breach of the provision of this Act or of the rules made under this Act is committed, such persons shall be liable to the punishment provided by Sub-section (2), unless he shows that he was not responsible for and could not have prevented the commission of the breach."

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Amendment of Section 30, Act VII of 1922.

4. In Sub-section (8) of Section 30 of the said Act, for the words "induces, or attempts to induce" the words "causes or assists or attempts to cause or assist" shall be substituted.

TRADE DISPUTES ACT, 1929

(No. XIX OF 1932)*

[Received the assent of the Governor-General on September 30, 1932]

An Act to amend the Trade Disputes Act, 1929, for certain purposes.

VII of 1929 WHEREAS it is expedient to amend the Trade Disputes Act, 1929, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Trade Disputes (Amendment) Act, 1932.

Amendment of Section 13, Act VII of 1929.

VII of 1929 2. In Section 13 of the Trade Disputes Act, 1929.

(*a*) in Sub-section (1),—

(*i*) for the words "except with the consent in writing of the Secretary of the Trade Union or of the person, firm or company in question" the words "if the Trade Union, person, firm or company in question has preferred a request to the Court or Board that such information shall be treated as confidential" shall be substituted, and

(*ii*) for the words "without such consent" the words "without the consent in writing of the Secretary of the Trade Union or the person, firm or company in question, as the case may be" shall be substituted;

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(*b*) in Sub-section (2), after the words "before a Court or Board" the word "wilfully" shall be inserted; and

(*c*) after Sub-section (2) the following sub-sections shall be inserted, namely:—

"(3) No Criminal Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

(4) No Criminal Court shall take cognizance of any offence under this section except with the previous sanction of the authority appointing such Court or Board; and no Civil Court shall without the like sanction entertain any suit against a member of a Court or Board, or any person present at or concerned in the proceedings before a Court or Board for any matter arising out of such proceedings."

CODE OF CRIMINAL PROCEDURE, 1898

(No. XXI OF 1932)*

[Received the assent of the Governor-General on October 1, 1932]

An Act further to amend the Code of Criminal Procedure, 1898, for a certain purpose.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing; It is hereby enacted as follows:— V of 1898

Short title.

1. This Act may be called the Code of Criminal Procedure (Amendment) Act, 1932.

Amendment of Section 526, Act V of 1898.

2. In Section 526 of the Code of Criminal Procedure. 1898,— V of 1898

(*a*) in Sub-section (5), for the words "has power under this section to award by way of costs" the words "may under this section award by way of compensation" shall be substituted;

(*b*) in Sub-section (6A), for the word "costs" the word "compensation" shall be substituted, and for the words "any expenses reasonably incurred by such person in consequence of the application" the words "such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case" shall be substituted;

(*c*) for Sub-section (8) the following sub-section shall be substituted, namely:—

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*Published in the Government Gazette, Dated Allahabad, October 15, 1932.

"(8) If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon:

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused";

(*d*) to Sub-section (9) the following Explanation shall be added, namely:—

"*Explanation.*—Nothing contained in Sub-section (8) or Sub-section (9) restricts the powers of a Court under Section 344"; and

(*e*) after Sub-section (9) as so amended the following sub-section shall be added, namely:—

"(10) If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal, admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon."

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U. P. LAND REVENUE (SECOND AMENDMENT) ACT

(No. XII OF 1932)*

[Received the assent of the Governor-General on December 1, 1932]

[PASSED BY THE LOCAL LEGISLATURE OF THE UNITED PROVINCES OF AGRA AND OUDH]

An Act to amend the United Provinces Land Revenue (Amendment) Act of 1932 (U. P. Act II of 1932).

U. P. Act II 1932

WHEREAS it is expedient to amend the United Provinces Land Revenue (Amendment) Act, 1932, for the purposes hereinafter appearing: It is hereby enacted as follows:—

Short title

1. This Act may be called the United Provinces Land Revenue (Second Amendment) Act, 1932.

Amendment Section 14 of U. P. Act II 1932

2. In Section 14 of the United Provinces Land Revenue (Amendment) Act, 1932, for the words and figures "In Sub-section (2) of Section 72" the words and figures "in Section 74 (*a*) and (*b*) in Sub-section (2) of Section 76" shall be substituted.

Amendment Section 17 of U. P. Act II 1932

3. In Section 17 of the United Provinces Land Revenue (Amendment) Act, 1932, for the figures and letter "212A" the figures and letter "212 (*a*)" shall be substituted.

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*Published in Govt Gazette, dated Allahabad, December 10, 1932